



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC APPEAL NO. 33 OF 2018**

**SAMSON KARANJA NJUGUNA.....APPELLANT**

**VERSUS**

**KHAMIS ALI MOHAMED.....RESPONDENT**

***(Being an Appeal from the Judgment of Hon. T. W. Murigi, Chief***

***Magistrate Thika, delivered on 30<sup>th</sup> October 2018 in Thika CMCC No. 616 of 2009)***

**JUDGMENT**

The Appellant **Samson Karanja Njuguna** was the Defendant in **CMCC 616A of 2009**, while the Respondent **Khamis Ali Mohammed** was the Plaintiff in the said suit. By a Plaint dated **13<sup>th</sup> July 2009**, the Plaintiff (Respondent) sought for orders that;

***a) Judgment by this Court adjudging the Defendant to take the balance of the purchase price from the Plaintiff in final settlement in respect of land parcel No. Thika Municipality Block 21/1903 and the Defendant to transfer the suit land to the Plaintiff.***

***IN THE ALTERNATIVE , the Defendant does pay the Plaintiff the deposit of the purchase price paid to him by the Plaintiff in respect of land parcel No. Thika Municipality/Block 21/1903 and the full value of the development made on the suit land by the Plaintiff.***

***b) Costs of the suit and interest.***

In his statement of Claim, the Plaintiff (Respondent) averred that vide a Sale Agreement dated **29<sup>th</sup> August 2005**, the Defendant (Appellant) agreed to sell the suit property to the Plaintiff (Respondent) at an agreed sum of **Kshs. 125,000/=** . That it was the term of the said Agreement that the Plaintiff(Respondent) was to pay the sum of **Kshs. 25,000/=** to the Defendant(Appellant) upon the execution of the said agreement which the Plaintiff ( Respondent) did and the Defendant( Appellant) put the Plaintiff (Respondent) into vacant possession of the suit property from the date of the said agreement and handed over the Plaintiff ( Respondent) the ballot papers in respect of the suit property. That it was the agreement between the two parties that after the Execution of the agreement, the Defendant (Appellant) was to also hand over the original title deed to the suit property and the balance of the purchase price of **Kshs. 100,000/=** to be cleared by the Plaintiff (Respondent) on **31<sup>st</sup> August 2005**.

That on **29<sup>th</sup> August 2005**, the Plaintiff (Respondent) paid the Defendant (Appellant) **Kshs.8,000/=** to enable the Defendant (Appellant) clear the balance payment for the title deed to the suit property from **Gatunyaga Diary Farm Company Limited** and **Kshs. 1,600/=** as fare to enable the Defendant (Appellant) to attend the Land Control Board for Consent and the sum money was to be deducted from the purchase price.

That on **31<sup>st</sup> August 2005**, the Plaintiff (Respondent) called the Defendant (Applicant ) in a bid to conclude the transaction including payment of the balance of the purchase price and handing over of the requisite title documents, but the Defendant (Appellant) alleged that he had lost the title deed to the suit property and promised the Plaintiff (Respondent) to have it re issued through the relevant Land Registrar.

That in the meantime the Plaintiff (Respondent) extensively developed the suit land and built a permanent house and has put up amenities like water and electricity costing him **Kshs.1.3million** and he and his family have been residing there. That on **26<sup>th</sup> May 2009**, the Defendant (Appellant) informed the Plaintiff that he had been re issued with a title deed and showed it to him. That instead of concluding the sale, the Defendant (Appellant) purported to increase the purchase price from **Kshs.125,000/-** to **Kshs 200,000/=** and declined to take the balance of the purchase price. That the Plaintiff (Respondent's) claim against the Defendant (Appellant) was for a Judgment against the Defendant adjudging him to take **Kshs. 90,400/=** being the balance of the purchase price.

The Suit was contested and the Defendant (Appellant) filed a Defence and Counter Claim dated 7<sup>th</sup> September 2009. In his Defence the Defendant (Appellant) denied all the allegations made in the Plaintiff. He averred that the Plaintiff (Respondent) paid him Kshs.25,000/= and denied that there was a term in the agreement to the effect that the balance was to be paid upon hand over of the original title deed. He also averred that it was the Plaintiff (Respondent) who was in fundamental breach of the sale agreement. He particularized breach as; failing to pay the balance of the purchase price on or before 31<sup>st</sup> August 2005; failing to attend Land Control Board on 2<sup>nd</sup> September 2005; refusing to meet with the Defendant despite various requests; failing to pay even after being served with the requisite notice.

It was the Defendant's contention that the agreement is unenforceable as the Plaintiff (Respondent) is already in fundamental breach of the agreement and taking into account the statutory 90 days had lapsed since the execution of the sale agreement dated 29<sup>th</sup> August 2005.

In his Counter Claim, the Defendant (Appellant) sought for orders that;

*a) An eviction order from Land parcel No. Thika Municipality / Block 21/1903, together with mesne profits at Kshs.10,000/= per month from 29<sup>th</sup> August 2005 until the determination of the suit.*

*b) Costs of the suit and Interest and/ or any other relief the Honourable Court may deem just and fit to grant.*

#### **PLAINTIFF'S (RESPONDENT'S) CASE**

**PW1 Khamis Ali Mohamed** testified that on 29<sup>th</sup> August 2005, he entered into an agreement with **Samson Karanja** for the purchase of land No. **Thika Municipality Block 21/1903**. He produced the sale Agreement as exhibit 1. That they proceeded to the Land Control Board and agreed on **Kshs. 8000/=** for the title deed balance. He produced the receipt as Exhibit 2. That he paid **Kshs. 1600/** to facilitate the Defendant to go to the Board. He further produced it as exhibit 3. That the Defendant signed the transfer forms dated 29<sup>th</sup> August 2005. He produced the transfer forms as exhibit 4. That they agreed that he would take possession and he has built 6 rooms and a store and a bathroom with no fence. That he has installed electricity in it but the Defendant wrote a letter dated 20<sup>th</sup> April 2009, stating that he would not continue with the installation. That he went to an Advocate who wrote to **Samson**. He produced the letters as **Exhibit 5(a) and 5(b)**. That **Samson** told him he wanted to sell the plot to someone else. That he showed him the title deed when they were writing down the Sale Agreement. Further that **Samson** told him that the title deed was lost and he was given another one. He produced the Kenya Gazette as Exhibit 6 . He produced the copy of the title deed as Exhibit 7.

It was his further testimony that the Defendant refused to transfer the land to him and he went to a Valuer and as per his report dated 29<sup>th</sup> May 2012, the Valuer valued the land at **Kshs.4.8 million**. That he wanted the Defendant to transfer the land to him and the cash he had incurred and if not he should give him back what he spent to develop the land. That the agreed purchase price was **Kshs. 125,000/=** and at the execution of the sale agreement and he paid **Kshs. 20,000/=**. That in the sale agreement, they agreed that he would pay the balance on 31<sup>st</sup> August 2005, and he never saw the Defendant as he never went for the money. He denied that he lost the original title deed nor that he refused to pay the Defendant. That there is a default clause in the agreement. He testified that he had the money with him and it was not true that he was entitled to a refund of 20 %. That he did not pay because the Defendant did not fulfil his part. That he had developed the land with more than 20% of the refund price.

**PW2 Jane Wangari Muthuku** testified that she is an Advocate practicing in the name and style of **Wangari & Co Advocates**. That the parties went to her office on 29<sup>th</sup> August 2005 and she drafted an agreement in writing over **L.R Thika Municipality / Block 21/1903**, and both parties signed and she too signed. That the purchase price was **Kshs. 125,000/=** and the vendor acknowledged receipt of **Kshs. 25,000/=** and the balance was to be paid on or before 31<sup>st</sup> August 2005. That both parties did not comply with the terms of the agreement. That after sometime the Plaintiff went to her office and told her that the Defendant had refused to transfer the property as agreed and showed her a letter dated 20<sup>th</sup> April 2009, written by the Defendant and she wrote to the Defendant on 21<sup>st</sup> April 2009.

Further that the Defendant had indicated that he had misplaced the title deed and she told the Defendant to have the same gazetted so that he could be issued with another one. That after the Defendant was issued with another title deed, the Plaintiff called the Defendant but the Defendant demanded for an extra **Kshs. 220,000/-** over and above what he had received in her office. That she drew the Land Control Board Application forms and they both signed and the Defendant demanded fare to attend the Land Control Board. Further that the Plaintiff paid **Kshs. 8,000/=** which the Defendant owed to the County.

It was her evidence that the Defendant received **Kshs. 25,000/=** excluding other amounts. That the balance was not paid because the Defendant indicated that he had lost the title. That the title deed disappeared before they got to her office. That the Plaintiff and the Defendant were communicating and they had agreed that the transfer was to be done after he received the title deed. It was her evidence that the Plaintiff was not her client and they came with the Defendant to her office and the Plaintiff was given a copy of the title by the Defendant .

#### **DEFENDANT'S (APPELLANT'S) CASE**

**DW1 Samson Karanja Njuguna** testified that on 20<sup>th</sup> August 2005, he entered into a Sale Agreement with the Plaintiff . That he told the Plaintiff that the title deed was at **Gatunyaga Dairy Farmers** and he paid **Kshs. 8,000/=** and was given the title deed. That after they proceeded to Advocate **Wangari's** office and recorded an Agreement in writing and the Plaintiff promised to pay on 31<sup>st</sup> August 2005. That he paid **Kshs. 17,000/=** which was added to **Kshs. 8,000/=** bringing a total of **Kshs. 25,000/=**. That he gave the Plaintiff the original title deed and they were given a date for 2<sup>nd</sup> September 2005, to attend the Land Control Board. That on 2<sup>nd</sup> September 2005, he went to the Board with his wife and the Plaintiff did not turn up. Further that he passed by **Wangari's** office and informed her of what transpired. Further that on 31<sup>st</sup> August 2005, the Plaintiff was to pay **Kshs .100,000/=** and he never paid as he never saw him.

That the Plaintiff has put up houses on his plot. Further that on **10<sup>th</sup> March 2009**, he wrote to the Plaintiff demanding for his money and the Advocate demanded for the title deed so that the Plaintiff would make payment and he told **Wangari Advocates** that the title deed was lost. That he applied for a title deed dated **24<sup>th</sup> December 2008**. That there is someone who has been on his land for **Kshs. 10,000/=**. That the Plaintiff should vacate his land. Further that the Plaintiff did not have authority to get on his land. That in paragraph 3 of the Sale Agreement, the Plaintiff was to take possession of the land upon execution of the said agreement. That he showed the Advocate the original title deed at the lands office.

After the *viva voce* evidence, the parties filed their written submissions and on **30<sup>th</sup> October 2018**, the trial Court entered Judgment in favour of the Plaintiff(Respondent) plus costs and stated as follows;

***“I find that the Defendant frustrated the transaction. Plaintiff has proved his case on a balance of probability. The Defendant Counter Claim fails and it is dismissed on the basis of my findings.”***

The Appellant was aggrieved by the above determination of the Court and Decree thereon and he has sought to challenge the said Judgment through the **Memorandum of Appeal dated 19<sup>th</sup> November 2018** and filed on **26<sup>th</sup> November 2018**. The Appellant sought for orders that;

***1. That the Appeal be allowed and for the Subordinate Court’s Judgment to be set aside.***

***2. Any orders the Honourable Court may deem just to grant.***

The grounds upon which the Appellant sought to have the Appeal allowed are;

***1. That the Learned Magistrate erred in making a decision in favour of the Respondent against the weight of the evidence.***

***2. The learned Magistrate erred in Law in failing to appreciate the fact that the sale transaction was null and void for lack of Land Control Board Consent.***

***3. That the Learned magistrate erred in failing to hold that the Appellant was only to refund the sum of Kshs. 20,000/= being the deposit paid.***

***4. That the Learned Magistrate erred in Law in her manner of writing the Judgment.***

***5. That the Learned Magistrate erred in law and in fact in failing to find that the Respondent was the one in fundamental breach of the sale agreement for failing to pay the purchase price within the stipulated period.***

***6. That the Learned Magistrate erred in law in failing to take into account that the Contract between the Appellant and the Respondent was unenforceable at law.***

***7. That the Learned Magistrate erred in law and in fact in failing to appreciate the weight of evidence and documents adduced by the Appellant.***

***8. That the Learned Magistrate erred in law in making an ambiguous award based on the Complaint yet the Respondent had already filed an Amended Complaint .***

The Appeal was canvassed by way of written submissions and the Appellant through the Law firm of **Nganga Ngigi & Co Advocates** filed his written submissions dated **26<sup>th</sup> August 2020**, and submitted that the Sale Agreement dated **20<sup>th</sup> August 2005**, upon which the Respondent based his claim on, was unreceivable in evidence as there was no evidence that the stamp duty was paid for as required by **Section 19** of the Stamp Duty Act. Further that even if the Sale Agreement was receivable in Court, the Respondent was in fundamental breach of the same as he failed to pay for the balance of **Kshs. 100,000/=** as per his own admission, he never deposited the said balance. He relied on the case of **Danson Muriuki Kihara.....Vs.... Johnson Kabungo (2017) eklr** while citing the case of **National bank of Kenya Ltd...Vs... Pipeplastic Samkolit(K) Limited** where the Court held that;

***“A Court of law cannot rewrite a Contract between the parties. The parties are bound by the terms of their Contract unless coercion, fraud or undue influence are pleaded and proved.”***

It was further submitted that the Judgment fails to elaborate the facts that the trial Court took into consideration when arriving at her decision. It was the Appellant’s submission that the trial court erred in failing to take into account that the Contract between the Appellant and the Respondent was unenforceable in law. He relied on the case of David **Sironga Ole Tukai...Vs... Francis Arap Muge & 2 others (2014) eklr** where the Court held that;

***“the following five fundamental conclusions in view are self evident and flow directly from the above express provisions of the Land Control Act; (i) All transactions involving agricultural land situate in a land control area are void for all purposes unless the Control Board within that land Control area has sanctioned them.”***

It was further submitted that the Respondent had filed an Amended Complaint vide an Application dated **14<sup>th</sup> December 2017**, which the Court allowed and in her Judgment the trial court awarded prayers in the Complaint and not as per the Amended Complaint. He urged the Court to allow the

Appeal.

The Respondent through the Law Firm of **M/S Wambui Ngugi & Co Advocates** filed his written submissions dated **11<sup>th</sup> August 2020**, and submitted that the Learned Magistrate decision in his favour was well considered. That at the time of the agreement there was awareness and intention of the parties to fulfill the transaction into completion as the Appellant had put the Respondent in possession. That the Appellant's conduct of putting the Respondent into actual possession of the suit land created a **constructive trust** and the wrong suffered by the Respondent at the hands of the appellant could only be cured by the equitable remedy. He Relied on the on the case of **Willy Kimutai Kitilit....Vs....Michael Kibet (2018) eKLR** where the court held;

***“Thus, since the current Constitution has by virtue of Article 10(2) (b) elevated equity as a principle of justice to a constitutional principle and requires the courts in exercising judicial authority to protect and promote that principle, amongst others, it follows that the equitable doctrines of constructive trust and proprietary estoppel are applicable to and supersede the Land Control Act where a transaction relating to an interest in land is void and enforceable for lack of consent of the Land Control Board.***

It was further submitted that the Appeal is not merited as the decision was based on evidence adduced. The Court was urged to dismiss the Appeal.

This Court has carefully read and considered the Appeal herein the findings of the trial court, the submissions by the Counsels and the evidence adduced.

As this is a first appeal, it is the Court's duty to analyze and re-assess the evidence on record and reach its own independent decision in the matter as provided by **Section 78** of the **Civil Procedure Act**. See the case of **Selle ....Vs... Associated Motor Boat Co. [1968] EA 123** where the Court held that;

***“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan(1955), 22 E. A. C. A. 270).***

The Court will take it takes into account that it will only interfere with the discretion of the trial Court where it is shown that the said discretion was exercised contrary to the law or that the trial Magistrate misapprehended the applicable law and failed to take into account a relevant factor or took into account an irrelevant factor or that on the facts and law as known, the decision is plainly wrong. See the case of **Ocean Freight Shipping Co. Ltd....Vs.. Oakdale Commodities Ltd(1997)eKLR, Civil App.No.198 of 1995**, where the Court held that:-

***“This is of course not an appeal to us from the decision of the single Judge. The discretion given by Rule 4 is exercised on behalf of the court by a single Judge and for a full bench to interfere with the exercise of the discretion, it must be shown that the discretion was exercised contrary to law, i.e. that the single Judge misapprehended the applicable law, or that he failed to take into account a relevant factor, or took into account an irrelevant one or that on the facts and the law as they are known, the decision is plainly wrong.”***

The Appellant has filed the instant Appeal claiming that the trial magistrate erred in law in failing to appreciate that the Sale Agreement, subject of the suit was null and void for lack of the **Land Control Board Consent**. Further that the sale agreement was invalid for lack of being stamped as stipulated by the **Stamp Duty Act** and that the Court ignored the evidence adduced before it.

It is not in doubt that the suit was based on the agreement of sale dated **20<sup>th</sup> August 2005**. It is the Appellant's submissions that the sale agreement was unreceivable as there was no evidence of stamp duty payment.

The guiding provisions of law with regards to Contracts for the sale of land is to be found in **Section 3(3)** of the **Contract Act** provides:-

***“No suit shall be brought upon a contract for the disposition of an interest in land unless—***

***(a) the contract upon which the suit is founded—***

***(i) is in writing;***

***(ii) is signed by all the parties thereto; and***

***(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party.”***

The Court has seen the Contract of Sale dated **20<sup>th</sup> August 2005**, by the parties and the Contract is in writing , it is signed by all the parties and it has been attested to by PW2, who was the Advocate and she was present. Therefore, it follows that the parties entered into a valid sale agreement, and the Court finds and holds that the trial Court did not err in finding that there was a valid sale agreement.

The Appellant has further appealed on the ground that the trial Court erred in failing to find that the Respondent was the one who was in fundamental breach of the sale agreement and that the Appellant was only to refund **Kshs. 20,000/=**. It is not in doubt that the parties entered into the sale agreement and upon the execution of the same, the Respondent paid **Kshs. 25,000/-** as per the sale agreement. The balance of the purchase price was to be cleared on **31<sup>st</sup> August 2005**.

According to PW2, the parties had agreed that the balance of the purchase price would be paid upon the Appellant delivering to the Respondent the title deed. However, the Appellant did not deliver the title deed and instead sought to change the terms of the Contract by requiring the Respondent to add more money, which was not as per their sale agreement. The evidence of PW2 has been corroborated by the evidence of PW1. Further PW2 confirmed that the Respondent was always ready and willing to pay the balance of the amount and he even visited her office and she did a letter. The Court finds that the actions of the Appellant of failing to avail the title deed for purposes of completion compromised the completion. While it might not have been express term, the Court finds that it was an implied term of the contract that the title deed ought to have been availed. This Court would agree with the trial Court that the actions of the Appellant of refusing to avail the title deed and further of changing the terms of the Contract by requiring the Respondent to pay more money than what had been agreed upon indeed frustrated the Contract.

The Appellant has also faulted the trial Court for failing to find that the sale transaction was null and void for lack of Land Control Board Consent. In the case of **Willy Kimutai Kitilit....Vs....Michael Kibet (supra)** the Court held that;

***“A contract for the sale of land to which the Land Control Act applies is not void from inception nor is it an illegal contract. It becomes void when no application for consent of the Land Control Board is made or if made, it is refused and the appeal from the refusal, if any, has been dismissed (see Section 9 (2)). The Land Control Act prescribes the time within which the application for consent should be made to the Land Control Board but does not prescribe the time within which the Land Control Board should reach a decision or the time within which any appeal should be determined.”***

In the instant case, it is not in doubt that there was intention for the parties to attend the land Control Board to seek for the consent to transfer the land on **2<sup>nd</sup> September 2005** and the forms had equally been signed. It therefore means that the sale agreement was not illegal at inception. It is however not in doubt that as per the agreement, the Respondent was to take possession upon the execution of the agreement which he did and he developed the land.

As per the letter dated **22<sup>nd</sup> September 2008**, **Wangari Advocate** wrote to the Appellant informing him that he was to avail the original title and upon them obtaining the Consent to transfer land from the Land Control Board, he was then to receive the balance of the purchase price and the letter does confirm that the Appellant had not availed the necessary documentation to be able to receive the balance.

The Appellant is the one that put the Respondent in possession of the suit property and though the consent of the Land Control Board was never given, the actions of the Appellant who was to ensure that the same had been done frustrated the contract. At all material times as per the evidence adduced, the Respondent was ready and willing to finalize the contract. Upon being put in possession, the Respondent developed the suit property and in the Court's considered view, there was constructive trust that was created on behalf of the Respondent.

It is the Appellant who frustrated the Contract and has now sought to sell the suit property to another party. The Court is required under the new Constitution to apply the doctrines of equity in making its determination and exercising its discretion. The Appellant can not be allowed to benefit from his actions of frustrating the contract. See the case of **Willy Kimutai Kitilit....Vs....Michael Kibet (supra)** where the Court held that ;

***“Since the doctrines of constructive trust and proprietary estoppel apply to oral contracts which are void and enforceable, in our view, and by analogy, they equally apply to contracts which are void and enforceable for lack of consent of the Land Control Board especially where the parties in breach of the Land Control Act have unreasonably delayed in performing the contract. However, whether the court will apply the doctrines of constructive trust and proprietary estoppel to a contract rendered void by lack of the consent of Land Control Board will largely depend on the circumstances of each particular case.”***

This Court finds and holds that there was a constructive trust created by the parties and therefore the agreement was enforceable

The Appellant being the one in breach of the Contract by frustrating the same could not be allowed to refund the amounts to the Respondent. In the case of **Willy Kimutai Kitilit Vs Michael Kibet CA NO. 20 of 2015** the Court agreeing with the decision in **Macharia Mwangi Maina & 87 Others v. Davidson Mwangi Kagiri [2014] eKLR** held that;

***“that the equitable doctrines of constructive trust and proprietary estoppel are applicable and enforceable to land subject to the Land Control Act, though this is subject to the circumstances of the particular case. Upon the application of the equitable doctrines, the Court in its discretion may award damages and where damages are an inadequate remedy grant the equitable remedy of specific performance.”***

Having now carefully re-evaluated and re-assessed the available evidence before the trial court and the Memorandum of Appeal together with the written submissions, the Court finds that the trial Magistrate arrived at a proper determination and this Court finds no reason to upset the said determination. The Court notes that the Appellant faulted the trial Court for failing to consider an Amended Plaintiff. However, as per the Record of Appeal dated **11<sup>th</sup> October 2019**, filed by the Appellant, there is no Amended Plaintiff attached but only an intended Amended Plaintiff with no indication of whether the same was allowed or not.

The upshot of the foregoing is that the Appellant's Appeal is found **not merited** and consequently the instant Appeal is **disallowed** entirely and the **Judgment** and **Decree** of the trial court are upheld with costs to the Respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT THIKA THIS 18<sup>TH</sup> DAY OF MARCH, 2021**

**L. GACHERU**

**JUDGE**

**18/3/2021**

**Lucy - Court Assistant**

**ORDER**

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic and in light of the directions issued by the Lordship, the Chief Justice on **15<sup>th</sup> March 2020**, this **Judgment** has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

**With Consent of and virtual appearance via video conference – Microsoft Teams Platform**

**M/s Kilonzo holding brief for Mr. Ngige for the Appellant**

**M/s Wangare holding brief for M/s Wambui for the Respondent**

**L. GACHERU**

**JUDGE**

**18/3/2021**