



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 168 OF 2017 (CONSOLIDATED WITH

THIKA ELC CASE NO. 404 OF 2017)

VEELAND HOUSING COMPANY LIMITED.....1ST PLAINTIFF

FAJ CONSULTANTS LIMITED.....2ND PLAINTIFF

GLORIA NYAWIRA WAMBUGU.....3RD PLAINTIFF

VERSUS

DAVID WAWERU KAHINGA.....1ST DEFENDANT

KAMAU CHEGE.....2ND DEFENDANT

KAGUNYI NJUGUNA.....3RD DEFENDANT

LEE MUCHIRI KAMAU.....4TH DEFENDANT

PATRICK MACHARIA.....5TH DEFENDANT

CALVARY LEMALKAT.....6TH DEFENDANT

LONAH NYAKHAMA.....7TH DEFENDANT

GEORGE KIARIE ZIPPORAH.....8TH DEFENDANT

AILEEN KANJIRU JAPHER.....9TH DEFENDANT

JUDGMENT

1. The plaintiffs instituted this suit vide a plaint dated 22nd February 2017 seeking the following Orders;

(i) A permanent injunction to issue restraining the defendants their agents and representatives from in any way interfering with the quiet enjoyment and possession of the suit premises described as Plots Nos. 1, 2, 3, 4, 5, 6, 8, 12, 13, 14, 15, 16, 20, 21, 22, 23, 24, 25, 72, 73, 9, 74, 75, 88, 90, 93, 94, 95 subdivisions of L.R. No. 7969 Kiambu (the suit premises).

(ii) A declaration that the plaintiffs have proprietary interest in the suit premises under the doctrine of promissory estoppel/proprietary estoppel and there is a constructive trust on the 1st Defendant in favour of the plaintiffs.

(iii) The 1st Defendant be compelled by an order of specific performance to transfer the suit premises to the plaintiffs in default of which the Registrar of the Court to execute the necessary transfer documents in favour of the plaintiffs.

(iv) The 2nd and 3rd Defendants be cited and censured for professional misconduct.

(v) The defendants to pay for costs of the suit.

2. On 3.4.2017, another suit was filed by one CHRISTINE IMBOSA MBOGUA in **Thika ELC Case No. 404 of 2017** against the defendants who are the same as those in suit no 168 of 2017 save that the 5th defendant in the suit 404 of 2017 is one Sherwin Mbogo and not Patrick Macharia. The two suits were consolidated through directions issued on 3/7/2019 where file no. 168 of 2017 was to be the lead file.

3. An application for injunction was filed contemporaneously with the suit no. 168 of 2017 on 23.2.2017, where on the same date, the court issued a temporary injunction restraining the defendants from interfering with the suit parcels. A similar order was issued in file no. 404 of 2017 on 4.4.2017. The court delivered the substantive ruling in respect of the application dated 22.2.2017 in case 168 of 2017 on 2.3.2018 where the injunctive orders sought were confirmed. In essence, the defendants were restrained from selling, demolishing, harassing, and alienating or in any other way interfering with the plaintiff's quiet possession of the suit premises pending the hearing of the suit.

4. The defendants herein entered appearance, actively participated in the interlocutory proceedings but failed to file their defence despite proper service being effected. The matter hence proceeded for formal proof.

5. Two witnesses testified on behalf of the plaintiffs. **Pw1 Josephine Mwoi Wambugu** adopted her statement of 14.6.2019 as her evidence. It was her testimony that she is a director of the 1st and 2nd plaintiffs. That the 1st and 2nd plaintiffs bought the suit premises on diverse dates in the year 2015 & 2016 from the 1st Defendant & Christine Mbogua. They undertook their part of the contract by paying the purchase price and monies for subdivision. They also took possession of the suit properties.

6. Pw1 stated that the 1st Defendant with the aid of the 2nd and 3rd Defendants embarked on harassing the plaintiffs in their quiet possession of the suit premises by sending the 4th-9th defendants together with a gang of unknown people to demolish their properties with the sole aim of ejecting them from the suit properties and thereafter have the land sold to new buyers. That it only took the intervention of the Court orders to stop the harassment.

7. It was also her testimony that it was unconscionable and it is a professional misconduct for the 2nd and 3rd Defendants to have acted for the plaintiffs in the sale agreements and later on be in cohorts with the defendants. To this end, pw1 raised a formal complaint against the 2nd and 3rd defendants at the Law Society of Kenya.

8. Pw1 produced the 22 documents in their list filed on 14.6.2019 as their exhibits 1-22 respectively.

9. **Pw2 Gloria Nyawira Wambugu** also adopted the contents of her statement of 14.6.2019 as her evidence where she corroborated the testimony of Pw1. It was her testimony that she bought Plot No. 88 and 90 out of parcel LR. No. 7969 from the 1st Defendant and his co-owner Christine Imbosa Mbogua. She took possession of her plots which she has developed. She confirmed that the defendants were interfering with her quiet possession until when this Court issued the injunctive orders. She contends that the 1st defendant has failed to facilitate the transfer of the aforementioned plots and she therefore prays that her claim be allowed as per the plaint.

10. In **Thika ELC Case No. 404 of 2017 Christine Imbosa versus David Waweru Kahinga & 8 Others**, the plaintiff had sought for an order of a permanent injunction against the defendants from selling, disposing or in any way interfering with the plaintiffs enjoyment use and occupation of the suit premises herein. The plaintiff also sought an order for the defendants to be compelled to refund any Sale price deposits received by them related to the suit premises. Christine, the plaintiff in the aforementioned case no. 404 of 2017 had pleaded that she was the joint proprietor of LR No. 7969 Kiambu measuring approximately 10.21 acres, with David Waweru Kahinga, the 1st defendant. The two had subdivided the plot No. 7969 into various plots for sale but reserved some plots i.e. plots No.s 26, 35, 57, 58, 60, 64, 65, 66, 67, 68, 77, 81, 82, 84, 86, 91, 92, 96, 97, 98. They proceeded to sell various plots to M/s Veeland Housing Company Limited, M/s Vaj Consultants Limited who were property developers as well as individual buyers. That in January and February of year 2017, the plaintiff learnt that the 1st Defendant together with the 2nd to 9th Defendants had started to lay claim to the suit properties whereby, the 1st Defendant intended to resell the plots to other new buyers. That the 1st Defendant persisted in the aforesaid acts of reselling the suit properties leading to the filing of suit ELC Case No. 168 of 2017. This did not stop the 1st defendant from engaging in a selling spree necessitating the filing of the suit 404 of 2017 as Christine needed a court order to stop the fraudulent sale of the suit premises. Christine Imbosa however did not testify.

Analysis and Determination

11. From the evidence and submissions of the parties the following are the issues arising for the court's determination.

(i) Whether the plaintiffs have proprietary interest in the suit properties under the doctrine of promissory estoppel/proprietary estoppel and whether there is a constructive trust on the part of the 1st Defendant in favour of the plaintiffs.

(ii) Whether the 1st Defendant should be compelled by an order of specific performance to transfer the suit premises to the plaintiffs and in default, the Registrar of the Court to execute the necessary transfer documents in favour of the plaintiffs.

(iii) Whether the 2nd and 3rd Defendants should be cited and censured for professional misconduct.

(iv) Whether the orders sought in the suit ELC 404 OF 2017 should be granted.

(v) Who shall pay the costs of the suit?

Promissory estoppel/ Constructive Trust

12. Promissory estoppel is the legal principle that a promise is enforceable by law, even if made without formal consideration when a promisor has made a promise to a promisee who then relies on that promise to his subsequent detriment. Promissory estoppel is intended to stop the promisor from arguing that an underlying promise should not be legally upheld or enforced.

13. General estoppel is provided for under **Section 120 of the Evidence Act** as follows:

“When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.”

14. In **Titus Muiruri Doge v Kenya Cannery Ltd [1988] eKLR**, the Court held as follows;

“If a party is made so to believe in a certain state of facts and that party acts on those facts, to his detriment, and the other party stands by and does not stop him from so acting, that other party is estopped from changing his stand. If one says to A “go ahead, this is land, but you may build on it, spend money, we will go into formalities of transfer later” and A does all that, the representor is estopped from denying the right accrued to and acquired by A”.

15. In **Carol Construction Engineers Limited & another v National Bank of Kenya [2020] eKLR** the court stated as follows;

“From a scan of our decisional law, one must show the following five elements in order to establish estoppel by representation or promissory estoppel:

1. Representation: There must be a representation by the representor in words or by acts or conduct;

2. Reasonableness: The person relying must satisfy the Court that it was reasonable for them to rely on the representation;

3. Reliance: the victim must demonstrate that he was induced by the representation and in such reliance acted on it;

4. Detriment: the victim must show that in acting in reliance of the representation he suffered some detriment or changed his position; and

5. Unconscionability: the victim must demonstrate that it would be unconscionable to permit the representor to resile from the representation.

Where each of these elements is demonstrated, a party will be permitted to raise an estoppel to prevent the opposite side from going back on their word and establishing by evidence any averment which is substantially at variance with his former representation”.

16. The plaintiffs in the suit 168 of 2017 entered into Sale agreements with the 1st Defendant and Christine Imbosa Mbogua (Plaintiff in case 404 of 2017), where they were legally represented by the 2nd and 3rd Defendants. The plaintiffs paid the purchase price and took possession of the suit properties. It follows that the first three ingredients have been satisfied. In both suits, the parties have averred that the 1st defendant has sought to sell the suit premises to other parties. The heated prosecution of the injunction applications is a clear manifestation of the struggles the plaintiffs have encountered in the hands of the defendants. This satisfies the 4th and 5th ingredients.

17. In the Court of Appeal case of **Willy Kimutai Kitilit v Michael Kibet [2018] eKLR** where the Court was dealing with the question of applicability of constructive trust/ proprietary estoppel in relation to the Land Control Act and the Law of Contract Act, the court held that;

“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”.

18. In this case, the plaintiffs in suit 168 of 2017 are yet to acquire title to the suit properties as the actions of the Defendants have become a hindrance, yet the plaintiffs did all that was required of them in the sale transactions. They were also given possession of the suit land. Going by the Court of Appeal decision in **Willy Kimutai Kitilit (supra)**, and **Macharia Mwangi Maina & 87 Others vs. Davidson Mwangi Kagiri (2014) eKLR**, the doctrine of constructive trust/ proprietary estoppel is applicable herein in favour of the plaintiffs.

Specific performance

19. The next question is whether the plaintiffs are entitled to an order of specific performance. In **Reliable Electrical Engineers Ltd Vs Mantrac Kenya Limited (2006) eKLR, Justice Maraga** (as he then was) stated that:-

“Specific performance like any other equitable remedy is discretionary and the Court will only grant it on well settled principles.....

The Jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the

contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or enforceable. Even when a contract is valid and enforceable, specific performance will however not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even when damages are an adequate remedy, specific performance may still be refused on the ground of undue influence or where it will cause severe hardship to the defendant.”

20. In this case there is a valid contract between the parties. It was a term of the agreement (in the sale agreements) at **Paragraph 8 on Failure to Complete** that;

“... if the vendor fails to comply, the purchaser shall be entitled at his own discretion to either sue the vendor for specific performance or to demand an unconditional refund of the deposit...”.

21. In light of the above mentioned clause, and the plaintiff having taken possession as well as steps to develop the suit premises herein, I find that an award of damages shall not be an adequate alternative remedy. Given the circumstances of this case, I do find that an order of specific performance is an apt remedy for the plaintiffs in the suit 168 of 2017.

Professional misconduct

22. As to whether this Court should censure the 2nd and 3rd Defendants for professional misconduct, i make reference to the provisions of **Section 60** of the **Advocates Act** which provides as follows:

“(1) A complaint against an advocate of professional misconduct, which expression includes disgraceful or dishonourable conduct incompatible with the status of an advocate, may be made to the Tribunal by any person.”

23. I find that Pw1 has already indicated to the court that she has instituted a formal complaint against the two advocates to the Law Society of Kenya. I therefore find that the Law Society of Kenya is the proper body/institution to deal with the issues raised by the plaintiffs against the 2nd and 3rd defendants through the established mechanisms in the Disciplinary Tribunal.

The suit ELC 404 of 2017

24. The plaintiff in the suit no 404 of 2017 did not testify. However, i can safely conclude that the plaintiff’s claim raised in ELC suit no 404 of 2017 has been subsumed in the claim of the plaintiffs in ELC 168 of 2017 as the interests in both suits are more or less the same.

Costs

25. Costs follow events, see **Section 27 of the Civil Procedure Act**. Way back on 8.3.2017, a notice of appointment was filed by Fred Mwihia Advocates for the defendants in the suit 168 of 2017, and on the same date, the 1st defendant proceeded to swear an affidavit on behalf of the other defendants. However, the 5th defendant (Patrick Macharia) rescinded the contents therein vide his replying affidavit dated 19.5.2017. He (Patrick Macharia) even filed a notice of change of advocates taking on F.N. Njanja, the advocates for the plaintiff’s herein as his advocate. The defendants pursued the interlocutory proceedings with fervent endeavors, but they declined to defend the suits during the trial. I confidently say so because on 2.3.2018 when the court delivered its substantive ruling on the injunction application of 22.2.2017, the court specifically stated as follows; *“the defendants should file their defenses expeditiously and not later than 14 days”*. Thereafter, there were repeated reminders from the court for the defendants to comply with order 11 to no avail. It is however quite apparent that the 1st defendant is the master mind of the acrimony which gave rise to the current proceedings. This defendant was even filing an application (on 11.8.2020) for injunction just few days to the hearing of the suit. By then he had craftily gone solo with a new advocate, one S. Ogeto Ongoki & Co. Advocates. He is the one who should pay costs of the suit. As regards the case 404 Of 2017, the interests of the plaintiff therein have been taken care of in case no.168 of 2017.

Final orders

26. In the end I do find that the plaintiffs suit succeeds in the following respects;

(i) An order of permanent injunction be and is hereby issued restraining the defendants and/or their agents and representatives from in any way interfering with the quiet enjoyment and possession of the suit premises described as Plots Nos. 1, 2, 3, 4, 5, 6, 8, 12, 13, 14, 15, 16, 20, 21, 22, 23, 24, 25, 72, 73, 9, 74, 75, 88, 90, 93, 94, 95, (the suit plots) the same being subdivision of LR. No. 7969 Kiambu.

(ii) A declaration is hereby issued that the plaintiffs have proprietary interest in the suit properties under the doctrine of promissory estoppel/proprietary estoppel and there is a constructive trust on the 1st Defendant in favour of the plaintiffs.

(iii) The 1st Defendant is hereby compelled by an order of specific performance to transfer the suit premises (plots) to the plaintiffs within 45 days in default of which the Deputy Registrar of the Court is hereby authorized to execute the necessary transfer documents in favour of the plaintiffs.

(iv) The 1st defendant is hereby condemned to pay costs of the suit in case no. 168 of 2017.

(v) The suit ELC 404 of 2017 is hereby marked as spent as the prayers therein have been subsumed in the suit 168 of 2017.

DATED AND SIGNED AT MERU THIS 4TH DAY OF MARCH, 2021

HON. LUCY N. MBUGUA

ELC JUDGE - MERU

DELIVERED AT THIKA THIS 18TH DAY OF MARCH 2021

HON. LUCY GACHERU

ELC JUDGE - THIKA