Orina v Apiemi (Environment and Land Appeal 6 of 2021)
[2023] KEELC 17776 (KLR) (7 June 2023) (Judgment)

Neutral citation: [2023] KEELC 17776 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA

ENVIRONMENT AND LAND APPEAL 6 OF 2021

JM KAMAU, J

JUNE 7, 2023

BETWEEN

NAFTAL BOSIRE ORINA ..... APPELLANT

AND

ANDREW ONGAGA APIEMI ..... RESPONDENT

(Being an Appeal from the Judgment of the Hon. B.M. Kimtai, Principal Magistrate delivered in Kisii on 24th day of December, 2019 in Keroka ELC Case No. 4 of 2018)

JUDGMENT

Judgment:

1. The Respondent filed a suit on 23/02/2016 against the Appellant, the latter being the registered proprietor of the parcel of land known as Title Number Ekerubo Settlement Scheme/50. He averred that he purchased an aggregate 2 Acres out of the said suit property vide Sale Agreement dated 14/08/2014. He did pay a substantial amount of the purchase price and he avers that he was all along willing, ready and able to complete his part of the transaction. However, the Appellant refused, failed and/or neglected to excise the 2 Acres out of the suit property and release the completion documents to enable him transfer the 2 Acres to him. This in spite of the numerous requests culminating with a Notice of completion dated 08/10/2015. He therefore prays for an order of:

    a. Specific Performance for the Defendant to transfer to the Plaintiff 2 Acres out of Title Number Ekerubo Settlement Scheme/50.

    b. A permanent injunction restraining the Defendant from alienating, sub-dividing, transferring, leaking, changing, dealing in, transacting on or in any manner disposing of Title Number Ekerubo Settlement Scheme/50.

    c. The costs of this suit.

2. Upon being served, the Appellant filed a Statement of Defence dated 25/05/2016 denying the claims in the Plaint but admitting that he is the registered owner of the parcel of land Title No. Ekerubo Settlement Scheme/50 but that he never entered into any agreement of sale with the Respondent over any part of the land. He further claimed that this suit touched on the subject matter in Keroka Principal Magistrate's Court Civil Suit No. 39 of 2015 and that the entire suit should be struck out with costs.

3. From the records in court it is clear that Principal Magistrate's Court Civil Case No. 39 of 2015 was withdrawn on 24/06/2016. On 18/06/2018 the Respondent, through his Advocates Nyamweya Mamboleo Advocates, wrote to the Environment and Land Court Kisii where this matter had been filed asking the court to transfer the same to Keroka Principal Magistrate's Court due to its monetary value of less than Kshs. 5,000,000/= and on 18/06/2018 the Honorable Mr. Justice John Mutungi acceded to the request and ordered that the matter be so transferred to Keroka Magistrate's Court for Hearing and determination and the said orders were effected. The matter was given Serial Number ELC 4 OF 2018. The same then went for full Hearing with both parties taking to the Witness Box.

4. The Respondent testified that he bought 2 Acres out of the suit property at Kshs. 1,200,000/= vide Agreement of Sale dated 17/12/2014. He paid the money and took possession of the land. He paid the money in 3 instalments of Kshs. 550,000/= on 23/12/2015, Kshs, 355,000/= on 11/02/2015 and Kshs. 353,000/= on 03/02/2015, the last one being a Banker's Cheque to the Appellant's son, Thomas Nyauncho Bosire at the Appellant's request. He produced the following documents as further proof of his testimony.

    1. A copy of the certificate of search in respect to Ekerubo Settlement Scheme/50.

    2. A copy of Agreement of Sale dated 14/08/2014 between the Respondent and the Appellant.

    3. The Appellant's payment Records – copies of acknowledgements of payments for the receipt of purchase price.

5. On cross-examination, the Respondent said that he bought the land on behalf of his son, One Thomas Mong'are who is in the U.S.A. But he did not possess a power of Attorney. He also said that he did not attend the Land Control Board for consent and in re-examination he said that it was the Appellant who had to apply for consent for sub-division.

6. The Appellant on his part testified that he did not sell any land to the Respondent. He did not receive any monies from the Respondent but that he did sign the Agreement for sale with his thumbprint as his signature. On cross-examination he owned up to his thumbprint on the sale agreement dated 17/12/2014 endorsed on 25/05/2015 but denied that any money was paid to him. When asked by the court, he said he did not know how much was paid. He also admitted that the thumbprints on the acknowledgment notes were his.

7. After hearing the evidence above, the court retired to write the Judgment that is the subject of this Appeal. The court held that the sum of Kshs. 905,000/= had been paid to the Appellant out of the total consideration of Kshs. 1,200,000/= and the balance of Kshs. 353,000/= to his son – Thomas for the 2 Acres out of Ekerubo Settlement Scheme/50 measuring 18.5 Hectares and that the Respondent is in physical possession of the 2 Acres. The Appellant allowed the Respondent to take physical possession of the suit property with the intention that he would later transfer the same to the Respondent.

8. These are the facts of the case and the same are well summed up by the Trial Court. And as a general rule, the Court will not interfere with the findings and conclusions of the Trial Court unless it is satisfied that they are based on no evidence or on a misapprehension of the evidence or that the Trial Court is demonstrably shown to have acted on wrong principles of law in reaching the findings it did.

9. The Learned Trial Magistrate then summarized his Judgment as follows: -

10. It is therefore very clear that the court is called upon to dispense submissive justice and therefore the question is, would conscience of humanity allow an individual to receive purchase price and later plead that the agreement is void. It is equitable remedy by which the court can enable an aggrieved party to obtain restriction. The court is a court of law and a court of equity. Equity shall suffer no wrong without a remedy and equally deters unjust enrichment.

11. Therefore, with Article 15(a) of the *Constitution* in mind, this court shall administer justice without undue regard to procedural technicalities. The evidence presented herein shows that indeed the Appellant herein has received the entire purchase price from the Respondent and therefore complied with the reason that the Respondent is in the physical possession of the land. I will enter Judgment for the Respondent as follows: -

    a. An order of specific performance for the Defendant herein to transfer to the Plaintiff two (2) Acres out of the suit property title Number Ekerubo Settlement Scheme/50.

    b. Cost of this suit be borne by the Plaintiff.

12. It is against this Judgment that the Appellant appeals to this Honorable Court on the following Grounds: -

    1. The Learned Trial Magistrate erred in law in failing to appreciate and find that the relief of specific performance could not issue in view of the peremptory Provisions of Section 6 and 8 of the *Land Control Act* Cap 302 Laws of Kenya.

    2. The Learned Trial Magistrate erred in law and fact in finding that the Respondent had proved his case on a balance of probability thereby making an erroneous declaration for specific performance against the weight of the evidence on record and issues of law raised in the Defence.

    3. The Learned Trial Magistrate erred in Law and fact in failing to find that the Respondent lacked capacity to seek the remedy of specific performance for lack of a legal power of attorney donated to the Respondent by the person he was acting for.

    4. The Decree of the Learned Trial Magistrate cannot be implemented as it will violate the preemptory provisions of Section 8 of the *Land Control Act* Cap 302 Laws of Kenya.

    And prays for the following orders: -

        a. The Appeal herein be allowed and the Judgment and Decree of the Trial Court dated and delivered on the 24th day of December 2019 in Keroka PM ELC No. 4 of 2018 be set aside, reviewed, varied and/or quashed.

        b. The Court be pleased to substitute the Judgment thereof with an order dismissing the suit in the subordinate Court being suit No. Keroka PM ELC No. 4 of 2018 – Andrew Ongaga Apiemi v Naftal Bosire Orina.

        c. Costs of this Appeal and the costs of the suit in the Lower Court be awarded to the Appellant and be borne by the Respondent.

13. I invited both parties to file written Submissions but only the Appellant did so which I did consider as I retired to write this Judgment.

14. Once again, the ghost in the *Land Control Act* is ogling at us.

15. It is the Appellant's case that the Trial Magistrate did not appreciate the relief of Specific Performance could not issue in view of the "peremptory" provisions of Sections 6 and 8 of the *Land Control Act*, CAP 302 Laws of Kenya i.e.

Section 6: Transactions affecting agricultural land;

1. Each of the following transactions that is to say: -

a. the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;

b. the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of [Rev. 2012] CAP. 302 Land Control 7 [Issue 1] less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 (L.N. 516/1961) for the time being apply;

c. Deleted by Act No. 22 of 1987, Sch. is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.

Section 8: Application for consent;

1. An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto: Provided that the High Court may, notwithstanding that the period of six months may have expired, extend that period where it considers that there is sufficient reason so to do, upon such conditions, if any, as it may think fit.

2. The land control board shall either give or refuse its consent to the controlled transaction and, subject to any right of appeal conferred by this Act, its decision shall be final and conclusive and shall not be questioned in any court.

3. For the purposes of subsection (1), an application shall be deemed to be made when it is delivered to the authority prescribed in the manner prescribed.

4. An application under subsection (1) shall be valid notwithstanding that the agreement for the controlled transaction is reduced to writing, or drawn up in the form of a legal document, only after the application has been made.

16. The effect of Section 6 is that apart from transactions by transmissions by virtue of will or intestacy where the transmission will leave the land as it is without any sub-division or a transaction where the Government or the Settlement Fund Trustees or a County Council (I believe a County Government now) is a party, for every Agricultural Land, consent of the Land control board must be sought for any sale, transfer, lease, mortgage, exchange, partition or other disposal within a Land Control Area. Otherwise the same shall be void for all purposes. Section 8 provides by who, how and when the Application for such consent shall be made. It shall be made in the prescribed form within 6 months of the making of the agreement for the controlled transaction. The Appellant argues that no Application for such consent was made within the prescribed 6 months nor was extension of the period sought from the High Court. And the Appellant happily says that the Respondent's recourse is Section 7 which provides for the recovery of the consideration as a civil debt. On this argument, I wish to observe as follows: -

17. Either party can apply for the consent and the Appellant, having received almost the entire consideration, failed to initiate the process of Application for consent and now wants to use failure of the application to his advantage. As to Ground Number 4 of the Memorandum of Appeal, after the expiry of the 6 months, the Appellant did not apply to have the same extended nor has he ever refunded the monies received which he submits that Section 7 of the Act makes that consideration a civil debt. I would interpret this Section to mean that the consideration does not become a civil debt until and unless the transaction becomes void. When does the transaction become void? Under Section 9 (2) of the *Land Control Act*, it is only when the consent has been refused that the transaction becomes void:

> " ...where an Application for the consent of a Land Control Board has been refused, then the agreement for a controlled transaction shall become void
>
> a. on the expiry of the time limited for appeal under section 11;
>
> b. where an appeal is made to the Provincial Land Control Appeals Board and dismissed, on the expiry of the time limited for appeal to the Central Land Control Appeals Board or;
>
> c. where a further appeal is preferred to the Central Land Control Appeals Board and dismissed."

18. Unless an Application has therefore been made for consent and the same refused and the time for the various appeal(s) preferred dismissed or time for such respective appeals has expired, one cannot talk of the transaction as being void. If no one has applied for consent, then such consent has not been 'refused' within the meaning of section 9(2) of the Act. The scenario herein is that of failure by the parties to apply for the consent and not for the transaction being void. What was envisaged by the Legislature was not a situation where there would be unwillingness to apply for the consent of the Land Control Board but the refusal by the latter to grant the consent. A distinction must be made between situations in which the Land Control Board in a particular area refuses to give consent for good public policy reasons, and those situations where parties fail or refuse to apply for such consent. It was not foreseen that any party would be unwilling to apply for the requisite consent.

19. This leads me to Ground Number 4 of the Memorandum of Appeal that the Decree of the Learned Trial Magistrate cannot be implemented as it will violate the preemptory provisions of Section 8 of the *Land Control Act* Cap 302 Laws of Kenya.

20. There is a common belief that both parties to a controlled transaction must apply for the consent of the Land Control Board. This is a misconception. Perhaps it is because of the way the forms for such Application are designed, making it mandatory for both parties to sign the forms. But the Act is very clear under Section 8 (1).

> " An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto.....

21. Under Section 25 of the Act, it is the Minister who designs the forms for Application for Consent:

    1. The Minister may make regulations for prescribing anything which may be prescribed under this Act, and generally for carrying into effect the purposes and provisions of this Act.

    2. Without prejudice to the generality of subsection (1) of this section, regulations may prescribe —

a. the forms to be used and the fees to be paid for things to be done under this Act;

b. the procedure for the making of applications and appeals under this Act, and the particulars and material to be furnished;

22. When discharging his duty under Section 25 of the *Land Control Act*, CAP 302 Laws of Kenya, the Minister designed the forms for Application for Consent of the Land Control Board, Form 1 in the Schedule to the Land Control Regulations, 1967 contrary to Section 8 (1) of the Act by making it obligatory for both the Vendor and Purchaser to jointly apply for the Consent. A glance at the Application form, Form 1 in the Schedule to the Land Control Regulations, 1967 is startling. The commencement of the same is worded in first person singular:

I Hereby apply to the.....Land Control Board for its consent to the transaction described below, and give the following information:....."

23. In any case, most of the information called for has to do with the Purchaser, lessee, mortgagee or chargee. The same then ends in plurality as follows:

> "We hereby declare that the above information is true to the best of our knowledge and belief....."

24. There is then provision for the Purchaser, lessee, mortgagee, chargee or authorised agent or agents on one hand and owner, lessor, mortgagor, chargor, or authorised agent or agents on the other to verify the information given by one person by signing the form. This is very inattentive and irresponsible draftsmanship which many scoundrels have taken advantage of. It is unfortunate that the Ministry has allowed this anomaly to go on uncured for decades. The forms are supposed to be in conformity with the *Land Control Act*. As observed above, Section 8 (1) of the Act provides that either party can apply for consent and it is the high time that the forms for Application for consent of the Land Control Board were redesigned to conform to this section so that either party can apply for consent as provided for by the parent Act. The requirement in the Application form in its current design that makes it mandatory that both the Vendor and Purchaser must jointly apply for the Consent should be removed. And where only one of the parties applies, it would suffice that there is proof of a genuine transaction with sufficient consideration and that the other party has been given proper and adequate Notice to appear at the Board before the Application is considered.

25. In the instant case, the Respondent should not have sat back when the Appellant refused to co-operate in the making of the Application. He should have risen to the occasion and singularly applied for the Consent which would have been perfectly within the law. There is no law that requires both parties to apply for the consent. And even now the Respondent is still within his rights to apply to the Court, I believe the Environment and Land Court, for extension of time. Such Application for extension has no time limit though it has to be made like any other Application for extension of time, without unreasonable delay.

26. As to the issue of locus standi, the agreement was made between the Respondent and the Appellant and the latter received all the monies either directly from the Respondent or through the said Respondent. Even the Sale Agreement was signed by the 2 parties. The defense of locus standi is therefore unsustainable. The Appellant is estopped from raising this plea having benefitted from the same.

27. As to the issue of Breach of Contract by the Respondent on the ground that there was some balance to be paid to the Appellant, I do not find any. In fact the Appellant seems to have been overpaid in the sum of Kshs. 58,000/=. The Respondent having paid the entire sum of the consideration to the

Appellant who failed to transfer the parcel of land nor hive the 2 Acres out of the larger portion of land i.e. EKERUBO SETTLEMENT SCHEME/50 it is the Appellant who is in breach of contract and not the Respondent.

28. Coming now to the remedies available to the Respondent who the Trial Court found was aggrieved, the Respondent attained full ownership rights over the 2 Acres out of the parcel of land known as LR. NO. EKERUBO SETTLEMENT SCHEME/50 the moment he completed to pay the purchase price of Kshs. 1,200,000/=. Any continued registration of this parcel in the name of the Appellant was as a Trustee.

29. In *Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri* [2014] eKLR the Court of Appeal held that the Appellant's action of receiving the full purchase price and putting the Respondent in possession created a constructive trust in favour of the Respondent. The Court accordingly granted an order of Specific Performance in favour of the Respondent. In the case, the Appellant (Vendor) had sub-divided his land into 240 one-acre plots, and by an agreement of sale sold some of those plots to the Respondents and others (Purchasers). Upon paying the full purchase price and survey fees, he put each Purchaser in possession. Each of the Purchasers in the suit claimed to have developed their own portions by erecting permanent structures, built schools, churches and installed water and electricity. The Vendor did not make an application for consent of the Land Control Board for purposes of obtaining consent to transfer. Later, the Vendor filed a suit for injunction and eviction. The Purchasers filed a Defence and counter-claim seeking an order to compel the Vendor to transfer the land to them. The trial Judge entered judgment for the Vendor and dismissed the counter-claim on the basis that the suit land being agricultural land the consent of the Land Control Board was required and in the absence of the consent, the agreements of sale were not enforceable. On appeal, the Purchasers' counsel contended that the Purchasers were entitled to the land by constructive trust and that the *Land Control Act* should be interpreted in the light of the 2010 Constitution to ensure that the Purchasers received substantive justice. The Court sitting in Nyeri held, *inter alia*, that the possession of the land by Purchasers was an overriding interest in favour of the Purchasers and further that:

30. In the instant case, there was common intention between the appellants and the respondent in relation to the suit property. Nothing in the *Land Control Act* prevents the claimants from relying upon the doctrine of constructive trust created by the facts of the case."

31. The Court stated further at thus:

The transaction between the parties is to the effect that the respondent created a constructive trust in favour of all persons who paid the purchase price. We are of the considered view that a constructive trust relating to land subject to *Land Control Act* is enforceable."

32. In *Willy Kimutai Kitilit v Michael Kibet* [2018] eKLR the Court of Appeal at Eldoret Civil Appeal No. 51 of 2015 held as follows:

> " The *Land Control Act* does not, unlike Section 3 (3) of the *Law of Contract Act* and Section 38 (2) of the *Land Act* save the operation of the doctrines of constructive trust or proprietary estoppel nor expressly provide that they are not applicable to controlled land transactions. Although the purpose of the two statutes are apparently different, they both limit the freedom of contract by making the contract void and enforceable. 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 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..... 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....."

33. The Court of Appeal concluded as follows:

> "....the appellant created a constructive trust in favour of the respondent. It was not in dispute that the appellant sold a 2-acre portion of his land comprising of 2.440 Hectares to the respondent in 2008. He gave possession of the land to the respondent who fenced the land and developed a portion of half an acre by planting trees. The respondent paid the last instalment of the purchase price in 2010. However, the appellant did not transfer the 2 acres to the respondent and instead caused the whole land to be registered in his name on 4th December, 2012, and filed a suit for the eviction of the respondent thereafter. By the time the appellant caused himself to be registered as the proprietor of the whole piece of land he was a constructive trustee for the respondent and it would be unjust and inequitable to allow the appellant to retain the 2 acres that he had sold to the respondent in the circumstances of the case. As we have held in essence that, the lack of the consent of Land Control Board does not preclude the Court from giving effect to equitable principles, in particular the doctrine of constructive trust.....If one party to an agreement stands by and lets the other party incur expense or prejudice his position on the faith of the agreement being valid, he will not then be allowed to turn around and assert that the agreement is unenforceable."

34. The instant case resonates with the above findings by the Court of Appeal whose Decisions bind this Court and I do not find even a crack through which I can escape. It is on all fours with the present case. The Purchaser is entitled to the land by constructive trust and the *Land Control Act* should be interpreted in the light of the 2010 Constitution to ensure that the Purchaser receives substantive justice.

35. In the case of *Richard Joshua v Susan Nyangweso Okworo Nyamira* ELC Case No. E003 of 2022 I addressed this issue as follows: -

> "....an immoral culture has taken root in this country where people enter into a sale agreement particularly in land transactions, receive money from purchasers, use the money but when the purchasers demand for transfer, the former become difficult and introduce other family members who they say have raised objections to the transaction. The Vendor then uses this as an excuse for not completing the transaction. He refuses to attend the Land Control Board for consent to transfer, does not refund the purchase price and makes the entire process stall. As a consequence, the *Land Control Act* has been converted into a vehicle for soft loans and perpetuation of fraud. This was not the intention of parliament when passing the *Land Control Act*, CAP 301 of the Laws of Kenya. It is so immoral to receive purchase price from a person who may have used all his lifetime savings and with whom the Vendor enters into a willing seller willing buyer contract freely and voluntarily to buy a piece of land but later on the Vendor introduces another member of the family who says that he was not consulted and would not have sanctioned the sale. The

objector is used as an excuse not to complete the transaction. The latter even undertakes to refund the consideration when 'I get the money'. By then the Vendor's urgent needs have been sorted out, courtesy of the consideration received. There are also instances where family members differ over the sharing of the purchase price and a member decides to object to the transfer in order to push for a bigger piece of cake. Others, after spending the purchase money, want to go back to the Purchaser for renegotiation, claiming that they got a raw deal. The land may even have attracted a healthier buyer after the Vendor has signed the sale contract and received the consideration and he would now want to renegotiate the contract or pull out. Effectually, people have used this tool to "borrow" money as capital for their businesses, fees to educate their children, money to buy other parcels of land elsewhere or enrich themselves in any other way and then later on refuse to complete the transaction using the excuse of their families not having consented to the transaction or that the suit land is family or ancestral land and they have nowhere else to call home. Others even come with arguments that their so and so had left a curse in the family that no one should sell the land. It is not uncommon to hear the Vendor brag, "You cannot get far. Even if you go to Court it will take years before the matter is finalized and even if the Court gives judgment in your favour, we shall apply to court to be allowed to pay by monthly instalments and the Court will order the refund of the purchase price at a partly small interest and also allow the refund in peanut instalments. The money will then not benefit you". Should Courts allow this? Should Courts be used to preserve this practice? Courts should not abet this callous behavior. The Court cannot shut its eyes to this sharp practice and allow it to thrive. In our society where the doctrine of laissez faire is the order of the day it is inequitable to allow this wicked conduct to flourish. Contracts must be allowed to be performed as agreed upon....."

35. In the premises, I find that the Appeal is anything else but short of merit and I dismiss it with costs to the Respondent in addition to the costs awarded to the Respondent in the lower court.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 7TH DAY OF JUNE 2023.

MUGO KAMAU

JUDGE

In the Presence of:

Court Assistant: Sibota

Appellant: Mr. Begi

Respondent: N/A