



Tebere Concrete Company Limited v Gichuhi & another (Environment & Land Case 70 of 2017) [2022] KEELC 3021 (KLR) (3 June 2022) (Judgment)

Neutral citation: [2022] KEELC 3021 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT & LAND CASE 70 OF 2017
EC CHERONO, J
JUNE 3, 2022
FORMERLY EMBU E.L C. NO. 14 OF 2016**

BETWEEN

TEBERE CONCRETE COMPANY LIMITED PLAINTIFF

AND

DICKSON MACHARIA GICHUHI 1ST DEFENDANT

MOSES NDUNGU MUNGAI 2ND DEFENDANT

JUDGMENT

- 1 The plaintiff, vide a plaint dated 7th march, 2016 and filed in court the same date seeks the following orders-;
 - a. A declaration that the plaintiff is the owner of P/NO. 1617 Wachoro.
 - b. An order requiring the defendant to remove the perimeter fence on the plaintiff's property.
 - c. Alternatively to (b)
An order that the plaintiff do remove the said perimeter fence at the defendant's expense.
 - d. An injunction against the defendant by himself, his agents and servants from entering, remaining in or interfering with the plaintiff's quiet possession and title to P/No. 1617 Wachoro.
 - e. General damages for trespass.
- 2 The first defendant filed an Amended defence and counter-claim where he seeks by way of counter-claim mesne profits of Kshs. 200,000/= per month for 54 months from 1st April, 2011 plus interest thereof.



- 3 The 1st defendant is also seeking costs of the main suit and the counter-claim. On his part, the 2nd defendant also filed defence and counter-claim to the plaintiff's claim on 29th June, 2020.
- 4 After pre-trial directions were taken, this Honourable court certified the case as ripe for hearing and by consent, the parties fixed the matter for hearing on 9/2/2021.

Plaintiff's Summary of Facts

- 5 The first witness called by the plaintiff was its Director, one Rajesh Shah. In his testimony, the said Rajesh Shah was referred to his witness statement dated 9/11/2020 which he adopted as his testimony. He was also referred to his list of documents dated 7/3/2016 containing 22 items which he also produced as P-Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, & 22 respectively.
- 6 The second witness was Kavid Shah who works for the plaintiff company as a manager. He was also referred to his witness statement dated 9/11/2020 which he sought to be adopted by the court in his testimony. He was also shown his Replying affidavit to the 2nd defendant's Notice of Motion dated 17/7/2020 which he asked the Court to adopt in his testimony as well.

1st Defendant's Summary of Facts

- 7 The 1st defendant testified alone and adopted his witness statement dated 2/9/2020. He was referred to his list of documents containing 15 items which he produced as P-Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, & 15 respectively. According to the 2nd defendant, he went to his land and found someone operating a crusher which was in operation. He also found office blocks and staff quarters as well as a dumping site on his land. He approached the office block where he found one person who introduced himself as Rajesh Shah. He introduced himself as the owner of the land. The said Rajesh Shah told him that the land they were occupying belonged to the County Government. He went to the Adjudication offices situated at Kiritiri where he obtained a current letter confirming his ownership of the suit land dated 26/4/2011.
- 8 He stated that one year later while still using the land, the plaintiff approached him claiming that they would buy his land. They entered into a sale Agreement dated 25/2/2012 which they both executed. He evacuated squatters who had occupied a portion of the suit land and bought them an alternative land to settle. After resettling the squatters, he approached the plaintiff company for the balance of Kshs. 3,500,000/=. However, the plaintiff denied/refused to pay the balance due and only paid Kshs. 400,000 on 16/5/2014 and refused to pay the balance despite visiting their offices. The 1st defendant contends that the plaintiff's failure /refusal to clear the balance amounted to a breach of contract hence making the Agreement rescinded and impossible to perform. By a letter dated 27/2/2015, he notified the plaintiff herein that the sale Agreement had been terminated as a result of their breach but he decided to repay them their monies that he had received plus 30% interest making a total of Kshs. 2,470,000/=.
- 9 He stated that as a result of the plaintiff's breach and broken relations, he found another buyer who is the 2nd defendant herein and sold him the suit land on 7/10/2015. After complying with all statutory requirements, the title deed was issued in his favour on 25/1/2019.

2nd Defendant's Summary of Facts

- 10 The 2nd defendant was also referred to his witness statement dated 29/6/2020 which he asked the court to adopt in his testimony. He was also shown a list of documents containing 14 items dated the same



day which he also produced as exhibits in this case except item No. 6. He said that he bought the suit land from Dickson Macharia Gichuhi, the 1st defendant herein. He further stated that the suit land is being utilized by the plaintiff whom he found using the same. He admitted that he has never used the land.

Legal Analysis and Decision

11 I have considered the testimony of the parties and/or their witnesses. I have also considered the rival submissions and the applicable law. Before I analyse and evaluate the evidence adduced, the following facts are not in dispute-;

1. The plaintiff and the 1st defendant entered into a sale Agreement for the suit land on 25/2/2012
2. The purchase price was agreed at Kshs. 5,000,000/= and the plaintiff made a down payment of Ksh. 1,500,000/= upon execution of the said Agreement
3. The balance of Ksh. 3,500,000/= was to be paid on the completion of the transfer
4. The plaintiff made a further payment of Kshs. 400,000/= on 16/5/2014
5. Upon execution of the said Sale Agreement on 25/2/2012, the plaintiff was put into possession and occupation of the suit property for purposes of its business
6. It was a term of the said agreement that the 1st defendant was to take necessary steps to evict squatters that were in occupation of part of suit property at the time
7. There was no completion date specified in the agreement.

12 From the pleadings and the documents adduced in evidence, the following are the probable issues for determination-;

1. Whether the Sale Agreement between the 1st defendant and the plaintiff dated 25th February, 2012 was legally and validly rescinded?
2. Whether the Plaintiff's suit is proper and sustainable?
3. Whether the 1st defendant is entitled to the prayers sought in the counterclaim?
4. Whether the 2nd defendant is entitled to the prayers sought in the counterclaim?
5. Who will bear the costs of this suit?

Whether the Sale Agreement between the 1st Defendant and the Plaintiff dated 25th February, 2012 with respect to the suit property was legally and validly rescinded?

13 It is not in dispute that the plaintiff and the 1st defendant entered into a Sale Agreement of the suit property P/NO. 1617 Wachoro Adjudication Section comprising 18.5 Acres or thereabouts on 25/2/2012. The Sale Agreement was produced by the plaintiff as P-Exhibit No.2. From a cursory look at the said Sale Agreement, it is clear that the suit property at the time of sale was under Adjudication process. It is my view that since the interest that was being sold/disposed of was under Adjudication, it was incumbent upon the 1st defendant to present the Sale Agreement together with the documents of transfer to the Adjudication Officer for purposes of effecting the same in the Adjudication Register. The process of registration of an interest on land under Adjudication is by way of presenting a sale Agreement duly executed by the seller and the purchaser in accordance with the *law of Contract Act*, CAP 23.



- 14 It was one of the terms of the said Sale Agreement that the seller who is the 1st defendant herein was to take the necessary action to evict the persons who were in possession of a section of the subject property. It was also a term of the said Agreement that parties were to do all that was necessary to facilitate the completion of the sale transaction and transfer in favour of the plaintiff. The plaintiff was also put in possession of the subject property for purposes of its business.
- 15 In paragraph 20 of his defence and counterclaim, the 1st defendant admitted entering into the Sale Agreement with the plaintiff and evicting squatters who had occupied a portion of the suit property as indicated in one of the terms of the said Agreement. The 1st defendant at paragraph 22 of his counterclaim averred that after removing the squatters and resettling them on an alternative land, he approached the plaintiff for the balance of the purchase price of Kshs. 3,500,000/ but the plaintiff refused to pay the same thereby amounting to a breach of the contract.
- 16 At paragraph 25 of the counterclaim, the 1st defendant admitted payment of Kshs. 400,000/ on 16/5/2014 as part of the balance of the purchase price.
- 17 In paragraph 26 of his counterclaim, the 1st defendant averred that by a letter dated 27/2/2015, he notified the plaintiff on cancellation of the sale Agreement between them dated 25/2/2012.
- 18 It is trite that the law on rescission of a contract for sale of land is to the effect that if the contract contains a condition entitling the vendor to rescind on the happening of certain events, and those events happen, then the vendor may rescind. In the absence of such a condition, the vendor may rescind only if the purchaser's conduct is such as to amount to a repudiation of the contract, and the parties can be restored to their former position.
- 19 I have looked at the sale Agreement between the plaintiff and the 1st defendant dated 25/2/2012 and find no completion date provided. Paragraph 5 of the terms of the sale Agreement provides as follows-;
5. In the event the purchaser is unable to pay the balance of the purchase price as agreed, then the vendor shall be entitled to rescind this Agreement and to claim 30% of the unpaid purchase price as liquidated damages.”
- 20 As I have already stated, the parties did not specify the completion period in the Sale Agreement. Where completion period is not specified, the Law Society Conditions of Sale (1989 Edition) apply. Condition 11 of the said Law provides as follows-;

‘Rescission

- 1). Where a purchaser makes an objection or a requisition under condition 10 with which the vendor is unable to comply or with which he is unwilling to comply on reasonable grounds of difficulty, delay or unreasonable expense, the vendor may give to the purchaser written notice referring to this conditions, specifying his grounds and requesting withdrawal of the objection or requisition within a specified period not less than seven (7) days.
- 2) If the purchaser fails to withdraw the objection or requisition within the period specified by the notice, the vendor may by notice in writing to the purchaser rescind the contract.
- 3) On rescission the vendor shall repay to the purchaser his deposit and any payment of the purchase price without interest and the purchaser shall return to the vendor all papers belonging to the vendor.



- 4) The purchaser has no claim against the vendor for costs, compensation or otherwise.
- 5) Where the contract becomes void under any law the provisions of sub-condition (3) and (4) apply.”

21 Since the contract for the sale of the suit property by the 1st defendant to the plaintiff dated 25/2/2012 did not provide a completion date, the parties should have entered an Addendum to specify the completion date. In the alternative, the vendor should have given the purchaser notice to complete the payment of the purchase price within a specified period failing which he could rescind the contract as provided for under the Law Society Conditions of Sale.

22 At paragraph 7, 8 and 9 of his witness statement filed in court on 29/9/2020, the 1st defendant stated as follows-;

“7) That the plaintiff denied/refused to pay the balance due and only paid 400,000/= on 16/5/2014 and completely refused to pay the balance despite visiting their offices constantly and the advocate M/S Morris Njage & Co Advocates who had acted for both of us in drafting the sale agreement.

8) The plaintiff’s refusal to clear the balance amounted to a breach of contract hence making the agreement rescinded and impossible to perform as a result of their breach.

9) That by a letter dated 27/2/2015, I notified the plaintiff herein that the agreement had been terminated as a result of their breach but decided to repay them their monies that I had acknowledged plus the 30% interest as follows-;

Cheque No.241873 KSHS. 950,000/=

Cheque No. 241874 KSHS. 950,000/=

Cheque No.241875 KHS. 570,000/=

Total KSH.-----2,470,000/=”

23 From the above admission, it is clear that despite there being no completion date provided in the sale agreement dated 25/2/2012, the 1st defendant decided to rescind the contract with the plaintiff unilaterally without notifying the plaintiff as required under the law society conditions of sale. The 1st defendant’s action to rescind the contract without regard to the plaintiff in my view is a nullity and of no legal effect. The 1st defendant has not proved that the plaintiff refused and/or denied to pay him the balance of the purchase price as there was no express date for completion of the Agreement. The 1st defendant’s allegation that he visited the plaintiff’s offices or their hitherto firm of M/S Morris Njage & Co. Advocates for payment of the purchase price is not supported by any evidence. Those averments in my respective view are mere allegations without substance considering that M/S Morris Njage & Co. Advocates have not been shown that they were retained by the plaintiffs to continue acting for them beyond drawing of the Sale Agreement dated 25/2/2012

2. Whether the Plaintiff’s suit is proper and sustainable

24 The plaintiff in this suit is seeking five orders. The first order is a declaration that she is the owner of P/NO. 1617 Wachoro Adjudication Section. As I have stated herein above, the suit property was under Adjudication section at the time the plaintiff and the defendant entered into the sale agreement



- on 25/2/2012 as can be seen in the body of the sale Agreement and the letter by the District Land Adjudication and Settlement Officer, Mbeere South District dated 26/4/2011 and produced by the 1st defendant as D-Exhibit NO. 1. Unlike land transactions under the Land Registration Act No. 3 of 2012, transfer of interest in land situated in an area declared as an Adjudication Section does not require consent before transfer.
- 25 The parties are only required to appear before the Adjudication officer with a duly signed agreement who, upon verifying that the name of the seller is recorded in the register as owner and paying the requisite fees may record the buyer as the new owner.
- 26 The Adjudication and Settlement officer vide the said letter dated 26/4/2011 confirmed that indeed the suit property P/NO. 1617 Wachoro Adjudication Section was recorded in the name of the 1st defendant and that the title deeds for the section were not yet out as the process of Adjudication was still in progress. The Officer further stated that immediately the title deeds were out, Dickson Macharia Gichuhi, the 1st defendant herein will be issued with one in respect to the suit property P/NO. Wachoro Adjudication Section.
- 27 When the 1st defendant entered into a Sale Agreement with the plaintiff on 25/2/2012, he did not present the sale agreement to the Adjudication and Settlement officer in order to change the record to reflect her as the owner. The 1st defendant did not even produce documents of transfer of the suit property to the 2nd defendant which confirms that the transfer of the suit land to the 2nd defendant did not require consent of the land control Board.
- 28 From the Sale Agreement produced by the 2nd defendant dated 7th October 2015, the subject matter for sale was still described as Plot Number 1617, Wachoro Adjudication Section. The implication is that the 1st defendant was also free to present the Sale agreement to the Adjudication and settlement officer, Wachoro Adjudication Section, Mbeere South District for substituting his name in the Adjudication Register with that of the 1st defendant as the owner. Again, the 2nd defendant need not apply and obtain a consent of the land control board under CAP. 302 Law of Kenya to effect the changes in the Adjudication Register.
- 29 The defendants in their defence stated that the Agreement between the plaintiff and the 1st defendant became void for lack of consent under section 6 of the Land Control Act. My take on that is that, since the suit property at the time of Sale on 25/2/2012 had not been registered under any Statute requiring consent under the land control Act, but was still under Adjudication process, the land control Board consent was not applicable. The argument by the defence therefore falls by the wayside.
- 30 The truth of the matter is that when the plaintiff and the 1st defendant entered into the Sale Agreement on 25/2/2012, the 1st defendant gave the plaintiff possession, occupation and control over the suit property for purposes of its business. The plaintiff then constructed office blocks, staff quarters and invested in machinery worth more than 90 million. He cannot be allowed to rescind the agreement unilaterally without involving the plaintiff who acted on the agreement to invest heavily.
- 31 In the case Macharia Mwangi Maina & 87 Others Vs Davidson Mwangi Kagiri (2014) e KLR, the Court of Appeal held as follows-;

“-----In is our considered view that the respondent created an implied or constructive trust in favour of those persons who had paid the purchase price pending the sale of all the 240 plots. In Mwangi & Another v Mwangi (1986) KLR 328, it was held that the rights of a person in possession or occupation of land are equitable rights which are binding on the land and the land is subject to those rights; the absence of any reference to the existence



of a trust in the title documents does not affect the enforceability of the trust since the reference to a trustee under section 126 (1) of the Registered Land Act is merely permissive and not mandatory. In *Mutsonga v Nyati* (1984) KLR 425 and *Kanyi-v-Muthiora* (1984) KLR 712, it was held that the equitable doctrines of implied, constructive and resulting trusts are applicable to registered Land by virtue of Section 163 of the Registered Land Act which provides for the application of common law of England as modified by equity. In *Yaxley v Gotts & Another*, (2000) Ch 162, it was held that an oral agreement for sale of property an interest in the property even though void and unenforceable as a contract but the oral agreement was still enforceable on the basis of a constructive trust or proprietary estoppel. In this case, it was the respondent who put the appellants in possession of the suit property not as licensees but with the intention that he was to transfer individual plots purchased by them. The respondent went ahead and received the purchase price. We are of the considered view that the doctrines of proprietary estoppel and constructive trust are applicable and the respondent cannot renege. As Lord Bridge observed in *Lloyds Bank Plc v Rosset*, (1991) 1 AC 107, 132, a constructive trust is based on “common intention” which is an agreement, arrangement or understanding actually reached between the parties and relied on and acted by the claimant. In the instant case, there was a 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.

- 32 From the facts of this case, the respondent all along acted on the basis and representation that the appellants were to obtain proprietary interest in the suit property. Constructive trust is an equitable concept which acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner by defeating the common intention. As was stated by Lord Reid in *Steadman v Steadman* (1976) AC 536, 540,

“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”.

- 33 As regards the consent of the Land control Board, the court in the case of *Mwangi & Another v Mwangi*, (1986) KLR 328, held that the creation of a trust over agricultural land situated in a land control area, does not constitute any “other disposal or dealing” with the land within the meaning of Section 6 (1) (a) of the Land Control Act and therefore the consent of the local Land Control Board is not required. This position had earlier been applied in the case of *Gatimu Kinguru v Muya Gathangi* (1976) KLR, 253 where it was stated-;

“The creation of a trust over agricultural land in a Land Control area does not constitute an “other disposal of or dealing” for the purpose of section 6(1) of the Land Control Act and, therefore, does not require the consent of the local land control Board.”

- 34 Having found that the 1st defendant entered a sale agreement and after receiving a deposit of the purchase price putting the plaintiff in possession for purposes of doing business who started constructing office blocks, staff quarters and investing in stone crushing machines running into millions of shillings created a constructive trust in favour of the plaintiff.



.Whether the 1st defendant is entitled to the prayers sought in his counterclaim

35 The 1st defendant in his Amended defence and counterclaim dated 8th October, 2020 is seeking mesne profits of Kshs. 200,000/ per month plus interest from 1st April 2015 to 7th October, 2015. The 1st defendant is also seeking costs of the suit and counterclaim.

36 Section 2 of the *Civil Procedure Act* defines Mesne profits as follows-;

“In relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession---”

37 In my evaluation on whether the plaintiff’s claim is proper and sustainable, I find that from the sale agreement dated 25/2/2012, the 1st defendant gave the plaintiff possession and occupation of the suit property with a promise which she reasonably relied upon thereby creating constructive trust in his favour. The claim by the 1st defendant against the plaintiff is therefore unmerited and untenable.

4.Whether the 2nd defendant is entitled to the prayers sought in his counterclaim

38 The 2nd defendant on his part is seeking three orders namely eviction, permanent injunction and mesne profits. He is also asking for costs. Having found that the plaintiff has acquired the suit property through constructive trust, the 2nd defendant’s counterclaim also fails.

39 Suffice to add that when the 2nd defendant entered into a Sale Agreement with the 1st defendant on 7th October 2015, he failed to conduct due diligence on whether the property was vacant. By so doing, the 2nd defendant took a high risk since the property was not available as the plaintiff who had entered into an earlier sale agreement was still in possession and occupation of the suit property. The 2nd defendant’s acquisition of title to the suit property is not therefore protected in law as the same is shrouded with illegality, corrupt scheme and unprocedural irregularities. A certificate of title acquired through such process is liable for cancellation under Section 26 of the *Land Registration Act* No. 3 of 2012 which provides as follows-;

26 (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except-

- a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

40 At the time the 1st and 2nd defendants entered a sale Agreement on 7th October, 2015 the plaintiff and the 1st defendant had an existing valid and binding agreement over the same property. The subsequent sale agreement between the 1st and 2nd defendant and the title deed issued on 18th April, 2017 was entered into and acquired illegally, unprocedurally or through a corrupt scheme.



41 In the case of *Elijah Makeri Nyangwara v Stephen Mungai Njuguna & Another*, Eldoret ELC Case No. 609 'B' of 2012, Munyao J held as follows-;

– It needs to be appreciated that for Section 26(1) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26(1) (b) is to remove protection from an innocent purchaser or innocent title holder.”

I agree with the above decision by the learned Judge.

Decision And Final Orders

42 Having carefully evaluated and analysed the evidence, the rival submission and the applicable law, I find and hold that the plaintiff has proved its case against the defendants on the required standard. On the other hand, I find that the 1st and 2nd defendants have failed to prove their counterclaim to the required standard. In the upshot, I enter judgment for the plaintiff in the following terms-;

- (1) A declaration that the Plaintiff is the owner of P/No. 1617/wachoro.
- (2) An order be and is hereby issued requiring the 1st Defendant to remove the perimeter fence on the Plaintiff's property.
- (3) In the alternative to paragraph (2) above, the plaintiff to remove the perimeter fence at the 1st Defendant's expense.
- (4) A permanent injunction against the Defendants by themselves, their agents and servants from entering, remaining in or interfering with the Plaintiff's quiet possession and title to P/ No.1617 Wachoro.
- (5) The Plaintiff to pay the balance of the purchase price to the 1st Defendant in the sum of Ksh. 3,100,000/= within 30 days.
- (6) The 1st and 2nd Defendants counterclaim is hereby dismissed.
- (7) Each party to bear their own costs.

JUDGMENT READ, DELIVERED AND SIGNED IN THE OPEN COURT AT KERUGOYA THIS 3RD JUNE, 2022.

.....

HON. E.C. CHERONO

ELC JUDGE

In the presence of-;

Mr Mwamuye for Plaintiff

Mr Okwaro for the 2nd Defendant

Mr Mugo H/B for Muriithi for 1st Defendant

Kabuta - C/A.

