



REPUBLIC OF KENYA



KENYA LAW
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Abere v Ondieki (Civil Appeal 09 of 2019)
[2022] KEELC 14600 (KLR) (3 November 2022) (Judgment)

Neutral citation: [2022] KEELC 14600 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
CIVIL APPEAL 09 OF 2019
JM ONYANGO, J
NOVEMBER 3, 2022

BETWEEN

ROBERT ABERE APPELLANT

AND

ZABLON MOKAYA ONDIEKI RESPONDENT

*(Being an Appeal from the Judgment Hon. P. K. Mutai (SRM)
delivered on 11th April, 2021 in Kisii CM ELC Case No 84 of 2019)*

JUDGMENT

Introduction

1. This appeal arises from the judgment of Hon. P. K. Mutai(SRM) delivered on 26th May, 2021 in Kisii CM ELC Case No. 84 of 2019 (hereinafter referred to as ‘the Appeal’).
2. According to the Memorandum of Appeal dated 20th April, 2022, the Appeal is premised on the following grounds:
 - a. The learned trial magistrate erred in law and fact by finding that the plaintiff had not proved his case on a balance of probability.
 - b. The learned trial magistrate erred in law and fact by ignoring the [Land Control Act](#) on consent.
 - c. The learned trial magistrate erred by rewriting the parties’ agreement.
 - d. The learned trial magistrate erred in law and fact by trying to implement’s voidable agreement.
 - e. The learned trial magistrate erred in law and fact by finding that by instructing the Land Control Board to contrary to the law.



- f. The learned trial magistrate erred in law by not considering the documentary evidence of the Appellant.
3. Premised on the above grounds the Appellant prayed that the judgment of the learned trial Magistrate be set aside and the same be substituted with an order allowing the Appellant's claim in the lower court with costs.

Brief background of the case

4. The Appellant filed suit on 19th June 2019 seeking an eviction order against the Defendants from a parcel of land known as Nyaribari Chache/BB/Boburia/ 13090 (hereinafter referred to as the suit property). He also sought general damages together with costs of the suit.
5. In his plaint the Appellant alleged that he was at all material times the registered owner of the suit property. He alleged that despite being the absolute registered owner of the suit property, on 19th January, 2019 the defendant in the company of a group of goons entered the suit property, fenced a portion of it and dug a pit latrine thereon. He further alleged that the Respondents had stopped him from farming on the suit property.
6. In response to the Plaintiff's claim the Respondent filed a statement of Defence denying the allegations raised against him by the Appellant. The Respondent further raised a counterclaim seeking a mandatory injunction compelling the Appellant who had sold him a portion of the suit property measuring 50ft by 100ft vide a sale agreement dated 13th October, 2018 to execute the transfer documents in respect of the aforementioned portion within 60 days failing which the necessary transfer documents should be executed by the Executive Officer of the court.
7. Having considered the evidence of the parties and the witness, the trial magistrate delivered his judgment on 26th May, 2021 in which he held that;

“having carefully analyzed the evidence, I find that the plaintiff's claim is without basis. The plaintiff's case is dismissed with costs to the defendant. There is however merit in the counterclaim by the Defendant. Judgment is entered in favor of the defendant as follows;

- i. The balance owed to the plaintiff be cleared with the next 60 days
 - ii. The plaintiff to execute and hand over transfer documents to the defendant for the purchased property measuring 50ft by 100ft in land parcel Nyaribari Chache/BB/Boburia13090 within 60 days from the date of this judgment. In default the court Administrator is directed to execute the documents.
 - iii. The defendant is granted costs of the counterclaim.”
8. It is against the said decision by the trial court that the Appellant has lodged this Appeal.
 9. On 28th July, 2022, the Court directed that the Appeal be disposed of by way of written submissions and ordered the parties to file their written submissions within 30 days and both parties have complied with the court's directions.

Issues for Determination

10. Having considered the background of this case as set out in the pleadings, the testimonies of all the witness, the documentary evidence produced before the lower court, the submissions of the parties in



the lower court, the judgment of the trial magistrate, the grounds outlined in the Memorandum of Appeal and the submissions of the parties with respect to the Appeal, the issues for determination are:

- a. Whether the learned trial magistrate erred in law and fact by finding that the plaintiff had not proved his case on a balance of probabilities.
- b. whether the Learned Trial Magistrate erred in law and fact by ignoring the provisions of the [*Land Control Act*](#) on consent.

Analysis and Determination

Whether the learned trial magistrate erred in law and fact by finding that the plaintiff had not proved his case on a balance of probabilities.

11. Learned counsel for the Appellant submitted that the Appellant had during the hearing of his case demonstrated through production of documents that he had been tricked into entering into an agreement which he eventually refused to honour. Counsel submitted that the Appellant entered the agreement for the sale of a portion of the suit property through duress after he was forcefully handcuffed and taken to a chief's camp. It was counsel's submission that the Applicant had clearly painted a picture before the trial court that the parties had not agreed to the completion of the agreement which picture the trial magistrate ignored in its determination.
12. In response to the above submissions, learned counsel for the Respondent while referring the court to the Record of Appeal at Page 18, submitted that the Appellant had during cross-examination admitted that he had sold off a portion of the suit property to the Respondent at a total sum of Kshs. 430,000/= which was paid in two installments. Counsel vehemently denied that the Appellant had been tricked into signing a sale agreement. He contended that the Appellant who is professional teacher admitted in his witness statement dated 26th February, 2020 that he entered into an agreement with the Respondent.
13. Counsel further contended that the Appellant did not mention anything to do with him being tricked in his Plea nor did he state so in his witness statement that he adopted as his evidence before the trial court. It was his view that the Plaintiff's cause of action was based on trespass as he alleged that the respondent had encroached on his property. He submitted that the question of him being tricked into signing a sale agreement with the Respondent was a total departure from the claim he had presented before the court. He urged the court to consider the principle established in the case of [*Dakianga Distributors \(K\) LTD VS Seed Company LTD*](#) (2015) eKLR that parties are bound by their pleadings and should not lead the court to aspects of evidence that is completely at variance with their own pleadings.
14. Before outlining my findings on the above submissions by the parties it is important to state that the applicable law as to the burden of proof is found in Section 107, 108 and 109 of the [*Evidence Act*](#). The duty of proving averments contained in the plea lay squarely on the Appellant. In [*Karugi & Another V. Kabiya & 3 Others*](#) [1987] KLR 347 the Court of Appeal stated that:

“The burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof... The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim.” (Emphasis added).



15. It is not in dispute that the Appellant's cause of action is trespass. At paragraphs 4 to 7 of the Plaintiff the Appellant averred as follows;
- “ 4. Despite being the registered owner of the said parcel of land known as Nyaribari Chache/BB/Boburia/13090, on 18/1/2019, the defendant and a group of goons entered the plaintiff's and fenced off part of it and started digging a latrine
 5. the plaintiff reported the matter in Kisii Police station OB/84/21/1/2019.
 6. the Plaintiff has on numerous occasions protested to the defendant against occupation but the defendant has refused, neglected, ignored and or refused to do so necessitating the filing of this suit.
 7. The defendant's actions have made the plaintiff not to use his land causing him damages.”
16. As correctly pointed out by counsel for the Respondent, the Appellant did not raise the issue of entering into a land sale agreement in his pleadings. Even after being served by the Defendant's Counterclaim claiming a purchaser's interest in the suit property, the Appellant did not bother to file a response to it. It was only during cross-examination by the counsel for the Respondent that he raised claims of him being coerced and/or tricked into signing a sale agreement with the Respondent. However, when push came to shove, he admitted that he in deed entered into an agreement for the sale of the suit property in the presence of his wife and son wherein he was paid a total sum of Kshs. 430,000/=.
17. It is therefore clear that the Appellant failed to prove his claim that Appellant had trespassed into the suit property. It is also very clear that Appellant failed to discount the Respondent claim that, he (the Appellant) had willingly entered into a land sale agreement and allowed respondent to have an immediate entry into a portion of a suit property measuring 50ft by 100ft. Furthermore from his own testimony, it is clear that he acknowledged receipt of part of purchase price totally to Kshs. 430,000.
18. Having failed to prove his own case which was based on trespass, he could not expect the trial court to infer or consider extraneous allegations that he had been tricked into signing an agreement. During cross-examination he confirmed that he had accepted part payment of the purchase price from the Respondent thus lending credence to counsel's submission that his allegations of being coerced into signing the sale agreement were farfetched. If he expected the trial court to take his claim seriously, he ought to have raised the issue of coercion in his reply to the Counterclaim. As correctly submitted by counsel for the Respondent, the Appellant is bound by his pleadings and I cannot fault the trial magistrate for failing to consider the Appellant's evidence that was at variance with his pleadings.

Whether the learned trial Magistrate erred in law and fact by ignoring the provisions of the Land Control Act on consent.

19. Learned counsel for the Appellant argued that the trial Magistrate erred by failing to find that the transaction forming the subject matter of the case at hand was null and void for want of Land Control Board consent. He argued that despite the issue forming the basis of the case, the trial Magistrate never made any attempt to make a determination that Land Control Board consent was never obtained. He argued that given that the Respondent was only entitled to a refund of the purchase price, the trial court failed to make such an observation.



20. On the other hand, counsel for the Respondent submitted that the Respondent had during the hearing of his case, given reasons as to why consent of the Land Control Board was not obtained. He argued that the main reason was that the Appellant in total breach of the agreement refused to sign the application for consent of the Land Control Board despite receiving part of the purchase price. Counsel relied on the case of *Macharia Mwangi Maina & 87 others Vs Davidson Mwangi Karigi* (2014) eKLR where the Court of Appeal held that the court has to look at the reason why Land Control Board consent was not obtained within 6 months in declaring that the transaction was not enforceable. Where there exists a good reason why the consent was not obtained within the statutory period and the vendor has retained the purchase price, the transaction/sale agreement will not be null and void.
21. Section 6 of the *Land Control Act* provides as follows:
- 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) ...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.
22. Under section 7 of the *Land Control Act*, consideration paid for a transaction which becomes void is recoverable as a debt subject to section 22 of *the Act*. An application for consent is made under section 8 (1), which requires that the application for consent should be made in the prescribed form within six months of the making of the agreement. The proviso thereto gives the High Court (currently the ELC) power to extend the period if it considers that there are sufficient reasons to do so upon such conditions, if any, as it may think fit.
23. Section 9 (2) stipulates that where an application for the consent of 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; or
- (b) where an appeal is entered under section 11 and dismissed, on the expiry of the time limited for appeal under section 13; or
- (c) where a further appeal is entered under section 13 and dismissed, on that dismissal.
24. In so far as the above provisions make it mandatory for the consent of the Land Control Board to be obtained within six months for transactions involving sale of agricultural land like in this case, the Court of Appeal has in a number of cases, expressed the view that failure to obtain Land Control Board consent does not invalidate such transactions. The Court of Appeal has emphasized in a number of cases that the equitable doctrines of constructive trust or proprietary estoppel should be applied to controlled land transactions.
25. For instance, in the case of *Willy Kimutai Kitilit v Michael Kibet* [2018] eKLR, the Court of Appeal held that:
- ‘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.....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.’

26. Furthermore, in the case of Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri [2014] eKLR the Court of Appeal observed that:

‘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 on 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 by the facts of the case. The respondent all along acted on the basis and represented 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’

27. Similarly, in the case of William Kipsoi Sigei v Kipkoech Arusei & another [2019] eKLR, the Court of Appeal held as follows:’

“Taking into account the Macharia Mwangi Maina decision and the Willy Kimutai Kitilit decision alongside the circumstances of this case, we are of the view that the fact that the appellant herein, received the full purchase price for the property, allowed the 1st respondent to take possession, and for a period of at least fourteen years, let him remain on the property undisturbed, a constructive trust had been created. We agree with the English decision Yaxley v Gotts & Another, (2000) Ch 162, where it was held that an oral agreement for sale of property, created 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. This was also the approach taken in Macharia Mwangi Maina decision where the court observed that the appellant had put the respondent into possession of the suit property with the intention that he was to transfer the properties purchased to them and as such, a constructive trust had been created and the appellant could not renege. We come to the conclusion that the in the circumstances of this case the equitable doctrines of constructive trust and proprietary estoppel were applicable and enforceable in regard to land subject to the Land Control Act. We therefore agree with the learned judge of the Environment and Land Court that despite the lack of consent of the Land Control Board, the doctrine of constructive trust applied to the agreement between the appellant and the



1st respondent. In the circumstances, we find that the first appellate court, made the correct decision, and we have no justification to interfere with that decision.”

28. Based on my analysis above while relying on the three Court of Appeal decisions, since the Appellant received part of the purchase price totaling to Kshs. 430,000 from the Respondent after entering into a sale agreement dated 13th October, 2018 which clearly stipulated that the appellant was to allow the respondent to take possession of the purchased portion of the suit property immediately upon the execution of the agreement, it is my view that even though there was no consent of the Land Control Board, an element of trust was created when the Respondent received part of the purchase price and signed an agreement that allowed the respondent to immediately take possession of the suit property. Further, the said trust became an overriding interest over the said portion of the suit property and the Appellant is merely holding the said portion in trust for Respondent.
29. Notwithstanding the fact that the Respondent failed to obtain the necessary Consent from the Land Control Board within the requisite period of six (6) months to enable him acquire title to the disputed portion of the suit property in his name; I find that the transaction is not void but is enforceable by virtue of the doctrine of constructive trust. Consequently, the Respondent is entitled to have the disputed portion registered in his name. In the circumstances, I find that the trial Magistrate was right in allowing the Appellant’s counterclaim and ordering for the portion of the suit property to be transferred to him. I further find that the trial Magistrate did not err by upholding the terms of the sale agreement in respect to the suit land given that the same was not contested.
30. From the foregoing therefore, I find that the appeal is not merited and the same is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 3RD DAY OF NOVEMBER 2022.

J.M ONYANGO

JUDGE

