



Malinda v Mbaka (Being sued as the legal representative and administrator of the estate of Jane Muthoni Mbaka (deceased)) (Environment & Land Case 475 of 2017) [2022] KEELC 14708 (KLR) (7 November 2022) (Judgment)

Neutral citation: [2022] KEELC 14708 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 475 OF 2017
CA OCHIENG, J
NOVEMBER 7, 2022
(FORMERLY MAKUENI ELC. NO. 370 OF 2017
AND MACHAKOS CMCC NO. 1053 OF 2013)

BETWEEN

CAROLINE MUMBUA MALINDA PLAINTIFF

AND

ANN MWIKALI MBAKA DEFENDANT

BEING SUED AS THE LEGAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF JANE MUTHONI MBAKA (DECEASED)

JUDGMENT

1. By a Plaint dated the December 21, 2011 which was amended on March 7, 2016, the Plaintiff prays for Judgment against the Defendant for:
 1. An order of specific performance of the said agreement directing the Defendant to specifically execute and transfer title number Nzaiu/Nziu/940 measuring Eight (8) acres to the Plaintiff within a period of Fourteen (14) days, failure whereof, the transfer be executed by the Executive Officer.
 2. A declaration that the period of Ninety (90) days contemplated under Clause D within which to effect the transfer has not expired.
 3. An order directing the parties to appear before the relevant Land Control Board to seek for consent to transfer Title Number Nzaiu/Nziu/940 in favour of the Plaintiff within 90 days and the balance of the purchase price be paid upon delivery of the completion documents including the consent of the Land Control Board and a signed Transfer in respect to the suit property.



4. In the alternative general damages for breach of contract and a refund to be ascertained by a valuer to cover the current market value, improvements and developments made thereon to the Plaintiff.
 5. That the parties be at liberty to apply.
 6. Costs of the suit and interest.
 7. Any other relief that this Honourable Court may deem fit and just to grant.
2. The Defendant filed a Defence including Counter-claim where she insisted that the Plaintiff breached the Sale Agreement and was not entitled to the orders sought. She prayed for the suit against her to be dismissed with costs and Judgment entered in her favour as per the Counter-claim for:
- a. A declaration that the Sale Agreement dated November 27, 2008 is a controlled transaction which can no longer be enforced for lack of the prerequisite consents and the Plaintiff is only entitled to refund of the payments which are proved.
 - b. An order that the Plaintiff do immediately unblock the access road passing through the entire land parcel which was originally known as title No Nzai/Nzi/371 and serving all the parcels that resulted after subdivision.
 - c. General Damages for breach of the terms of the transaction.
 - d. Interest on (b) above and costs of the suit.
3. The Plaintiff filed a Reply to Defence and Defence to Counter-claim denying the averments in the Counter-claim. She further denied blocking the access road serving Nzai/Nzi/371.
4. The matter proceeded for hearing where the Plaintiff had four witnesses while the Defendant called one witness.

Evidence of the Plaintiff

5. The Plaintiff claims she entered into a Sale Agreement dated the November 27, 2008 (hereinafter referred to as the 'Sale Agreement'), with the Defendant for the purchase of eight (8) acres of land, being a portion from Nzai/Nzi/920. Further, that the purchase price was Kshs 200,000 per acre and she paid a total of Kshs 1,441,400 but the Defendant declined to transfer the land to her. It was PW1's testimony that the Defendant allowed her to take possession of the said land and developed it. She explained that the Defendant had declined to obtain consent of the Land Control Board to enable her transfer the land to her, and acquire Title Deed to that effect. She further testified that it is the Defendant who instructed a surveyor and undertook subdivision of land parcel number Nzi/Nzai/920. Further, she now claims Nzi/Nzai/940 which is a resultant subdivision therefrom. PW1 further testified that she did not block the access road as the same was opened in 2014. In support of her testimony she produced the following documents as exhibits: Sale Agreement dated November 27, 2008; Demand Notice; Copy of Reconciliation and Notice confirming payments dated the November 24, 2009; Copies of Payment Cheques; Copy of Receipt for Survey of Nzavi/Nzi/920; Copy of Receipt for Amendment of RIM Nzavi/Nzi/ 920; Copy of Application for consent in respect to Nzavi/Nzi/920; Copy of Consent of the Land Control Board in respect to Nzavi/Nzi/920; Copy of Extract Map in respect to Nzavi/Nzi/920; Copy of Official Search in respect to Nzavi/Nzi/940 and Copy of Letter to Defendant's Advocates dated the 23rd November, 2011.



Evidence of the Defendant

6. DW1 who represented the Defendant's estate admitted that the deceased entered into a Sale Agreement with the Plaintiff but insists the same was not completed as it is the Plaintiff who frustrated it. DW1 contends that the mother entered into the said Sale Agreement when she was sick. Further, she avers that the Plaintiff only paid Kshs 517,000 as per her mother's witness statement. It was her testimony that they never participated in the transaction despite the fact that they were adults and objected to the said sale. DW1 claimed the Plaintiff blocked the access road serving the village but the same was opened in 2014 by the County Commissioner. She admitted that since 2008 the Plaintiff had been in possession of the suit land and constructed thereon. DW1 reiterated that the Plaintiff is only entitled to a refund of Kshs 517,000 which her mother confirmed receipt of. Further, that the Plaintiff had not concluded the payment of the full purchase price. She produced the following documents as her exhibits: KNH Attendance Cards; KNH General Consultation Request Form; Case Summary from KNH and the map of the affected area.

Submissions

Plaintiff's Submissions

7. The Plaintiff in her submissions contend that there was a valid contract, for sale of land parcel number Nzau/Nzui/940, a subdivision of Nzau/Nziu/920 between the Defendant and herself. She argued that the Defendant procured consent for subdivision from the Matiliku Land Control Board, pursuant to the Sale Agreement, but declined to obtain consent for transfer. She contends that the intention of the parties was clear and the court has powers to extent time to apply for consent of the Land Control Board. She explains that the Defendant though claiming she received less purchase price, did not provide evidence of bank accounts to demonstrate this averment. She refers to clause (4) of the Sale Agreement that confirmed the Sale was subject to the Law Society of Kenya Conditions of Sale (1988). Further, that the impugned Agreement did not contain a special clause stipulating that time was of essence, hence the Defendant cannot claim the completion date had lapsed. She challenges the fact that the Defendant purported to rescind the contract but continued to receive payment of purchase price. Further, that there was no ground for rescission of contract since she had performed her obligations as per the said contract. She further reiterates that she is the rightful owner of the suit land as the Defendant created a constructive trust in her favour. She insists the Defendant's counterclaim cannot succeed. To support her arguments, she relied on Section 3(3) of the *Law of Contract Act*; Section 8(1) of the *Land Control Act* including the following decisions: *Joseph Mathenge Kamutu v Joseph Wainaina Karanja & Another (2019) eKLR*; *Anne Murambi v John Munyao Nyamu & Another (2018) eKLR*; *Beatrice Muthio Nzioka v Charles Akelo Ongwen (2014) eKLR*; *Ann Mumbi Hinga v William Mwangi Gathuma & Another (2017) eKLR*; *Willy Kimutai Kitilit v Michael Kibet (2018) eKLR*; *Mamta Peeush Mahajan (Suing on behalf of the estate of Peeush Premlal Mahajan) v Yashwant Kumari Mahajan (sued personally and as executrix of the estate and beneficiary of the estate of the late Krisban Lal Mahajan) (2017) eKLR* and *Thomas Joseph Openda v Peter Martin Ahli (1983) KLR*.

Defendant's Submissions

8. The Defendant in her submissions contends that there was no valid contract for sale of all that property known as Nzau/Nziu/940, a subdivision of Nzau/Nziu/920, between the parties as the contents of the said Agreement cannot be amended by oral evidence. She insists the Agreement for sale was void as consent of the Land Control Board was not obtained. She argues that extension of time to secure a consent can be obtained from the High Court but the same is discretionary as the court has



to be convinced there are valid reasons to do so. She reiterates that the Plaintiff breached the terms of the Sale Agreement as she blocked a public access road. Further, the Agreement is not enforceable as it was not stamped as required by Section 5 of the Stamp Duty Act. She reaffirms that she is the rightful owner of the suit land and the Plaintiff's occupation is unlawful. Further, that the Plaintiff ought to have pleaded the issue of constructive trust in the Plaint and not raise it in submissions. She admits there are developments made on the suit land by the Plaintiff but argues that the Plaintiff did so, while fully aware that there was no consent of the Land Control Board. She avers that the Plaintiff's suit cannot succeed but the Counter-claim is merited. To buttress her averments, she relied on the following decisions: David Sironga Ole Tukai v Francis Arap Muge & 2 Others (2014) eKLR; Kariuki v Kariuki (1982) eKLR; Fred C Fedba v E. Asava Majani (2010) eKLR; Elijah Shamalla Benjamin Momo v Gerry Chibeu (1988) eKLR; Rose Wakanyi Karanja & 3 Others v Geoffrey Chege Kirundi & Another (2016) eKLR; Concepta Nyaboke v Peter Muasya Wangaika & 2 Others (2019) eKLR; Joseph Boro Ngera v Wanjiru Kamau Kaime & Another (2010) eKLR; Julius Charito Kanyongo v Emmanuel M. Lousot (2018) eKLR; Willy Kimutai Kitilit v Michael Kibet (2018) eKLR; Glencore Grain Limited v TSS Grain Millers Ltd (2002) eKLR and Robert Mbui v Kennedy Mwanzia Musembi (2019) eKLR.

Analysis and Determination

9. Upon consideration of the Plaint, Defence including Counter-claim, testimonies of witnesses' including exhibits and rivaling submissions, the following are the issues for determination: Whether an element of constructive trust was created in favour of the Plaintiff. Whether the Plaintiff is entitled to the Orders sought in the Plaint. Whether the Defendant is entitled to orders sought in the Counter-claim. Who should bear the costs of the suit.
10. I will deal with all these issues jointly but before I proceed to do so, I wish to highlight an excerpt from the Sale Agreement dated November 27, 2008 which forms the fulcrum of the dispute herein.

"Whereas the Vendor is the registered owner of all that piece of land title number Nziu/ Nzaui/920 situated in Nzaui Location of Makueni District in the Republic of Kenya with will the improvements thereon and whereas the Vendor is desirous of selling part of her portion measuring 3.27s (20.8 hectares) and whereas the purchaser is ready and willing to purchase the said piece of land.

Now this agreement witnesseth

1. The property to be sold measuring 8 acres is to be annexed from Nziu/ Nzaui/920 measuring 3.27s (20.8 hectares) or thereabout.
2. The property is sold freehold.
3. The purchase price is Kenya Shillings 1, 600,000 (Kshs 1, 600,000) of which sum is to be paid in accordance with special conditions A, B and C hereof.
4. The said is subject to the Law Society of Kenya conditions of Sale (1989) in so far as they are not inconsistent with conditions contained in this agreement.

Special Conditions

- a. The purchaser has already paid and the vendor duly acknowledges receipt of Kenya Shillings five hundred and seventeen thousand (Kshs 517,000) as at time of signing this agreement.



- b. The Purchaser will pay an additional Kenya Shillings one hundred thousand (Kshs 100,000) on signing of this agreement and a further Kenya Shillings Two Hundred Thousand (Kshs 200,000) on or before December 22, 2008.
- c. The balance of the purchase price Kenya Shillings Nine Hundred Thousand (Kshs 783,000) shall be paid on receipt of transfer consent from the Land Control Board.
- d. The transfer of the land purchased unto the Purchaser shall be effected upon full payment of the purchase price unto the vendor which shall not be more than 90 days from the receipt of the transfer consent from the Land Control Board.
- e. The Vendor shall without undue delay obtain all the necessary consents inclusive the Commissioner of Lands or consent of the Land Control Board to facilitate the expeditious transfer.
- f. The Vendor shall allow the purchaser full access and free use of the land until the conditions set out above are fulfilled.”

11. As to whether an element of constructive trust was created in favour of the Plaintiff. Both the Plaintiff and DW1 admit there was a Sale Agreement in respect to the Sale of eight (8) acres of land from a portion of Land Parcel No Nzai/Nziu/920. Further, that the purchase price was Kshs 1,600,000. The Plaintiff claims despite paying most of the purchase price amounting to Kshs 1,441,000, the Defendant declined to transfer the suit land to her. The Defendant on the other hand insists that it is the Plaintiff who breached the Sale Agreement by failing to pay the full purchase price and blocking a public access road which DW1 admitted was opened by the District Commissioner in 2014. From the excerpt of the Sale Agreement which I have cited above, it is evident that the Defendant was paid Kshs 517,000 at the point of signing the said Sale Agreement. PW2 Dorothy Mwanzia Nganga who was the lawyer that drafted the impugned Sale Agreement, in her evidence confirmed that she gave the Defendant a Cheque of Kshs 100,000 from the Plaintiff. Further, at the point of reconciliation of payments made in 2010, the Defendant had received about Kshs 1,084,000. The Plaintiff further produced copies of several cheques she had written to the Defendant in respect to the purchase price for the eight (8) acres land. DW1 insisted that as per evidence of her mother, she had only received Kshs 517,000. However, from the evidence presented above, I note the Defendant actually continued to receive the purchase price from the Plaintiff, after executing the Sale Agreement. DW1 insisted that there was no consent to develop suit land but it emerged in evidence that it is the deceased who granted the Plaintiff access to the said land. Further, in her submissions, she avers that there is no valid contract of Sale for Nzai/Nziu/920. However, from the evidence tendered in court including the consent for subdivision, it emerged that Nzai/Nziu/920 was no longer in existence but the disputed portion was now Nzai/Nziu/940. Further, as per Clause (G) on Special Conditions, the Vendor was to allow the Purchaser free access and use of the land which was done in 2008.
12. The Defendant has mainly dwelt on the issue of the absence of the consent for transfer from the Land Control Board and insists the Sale Agreement is void as the same was not procured within six months.
13. DW1 who was representing the Defendant’s estate insists the contract is rescinded and they are ready to refund the purchase price of Kshs 517,000 only.



14. On rescission of contract, in the case of *Ann Mumbi Hinga v William Mwangi Gathuma & another* [2017] eKLR the Learned Judge had this to say:

Rescission arises where one party in a contract is in default. The party which is not in default gives notice to the party in default to perform the contract. On the failure to so perform the contract is then rescinded. In this case for the Plaintiff to rescind this contract she must show that the Defendant was in default. Secondly, that she gave notice of default and the Defendants were unable to remedy the default by performing their part of their contract. The letter aforesaid does not give notice to the Defendants nor fault them for being in default. In the contract the Defendants' obligation was to pay the purchase price. The Plaintiff did not place any evidence on record that the Defendants defaulted in that obligation. If anything the evidence is that the Defendants paid the Plaintiffs the full purchase price. There is therefore no evidence on record to show that there is a valid ground for rescission of the contract."

15. While in the case of *Anne Murambi v John Munyao Nyamu & Another* (2018) eKLR the Court stated that:-

Secondly, if the estate of the deceased vendor wished to terminate or rescind the contract for any valid reason, they were required to terminate or rescind the contract in accordance with the law. What was the law? The law was and still is that, the party exercising the option to terminate or rescind the contract was required to do so in accordance with the terms spelt out in the contract. The material contract did not have an express clause on termination or rescission. It however incorporated the Law Society Conditions of Sale (1989 Edition). Under Clause 4(7) of the Law Society of Kenya Conditions of Sale, a vendor who is ready, able and willing to complete the sale and is aggrieved by the purchaser's default to complete the contract within the completion period is required to issue a twenty one days' notice requiring the purchaser to complete the contract."

16. Based on the evidence presented in Court, I find that it is the Defendant who indeed breached the contract and hence had no capacity to rescind it at the instance of the Plaintiff.
17. On the issue of procurement of the consent of the Land Control Board, from the excerpt above, it is actually the Vendor who was supposed to procure the Consent for Transfer from the Land Control Board and not the purchaser. It seems to me that the Defendant now seeks to shift the burden to her. Further, the payment of the balance of the purchase price was pegged on the Vendor obtaining the Consent to Transfer which she failed to do. I note the sale was further subject to the Law Society of Kenya Conditions of Sale Rules yet the Defendant did not adhere to condition set in Clause 4(7) of the said Rules which requires that a vendor who is ready and willing to complete the sale but is aggrieved by the purchaser's default to complete the contract within the completion period is required to issue a twenty one days' notice requiring the purchaser to complete the contract. This was not the position in this instance as it is actually the Vendor who delayed in completion of the contract. I note the Defendant insists the Sale Agreement was in respect to Nzai/Nzui/920 but from the Mutation Form, Nzai/Nzui/920 was subdivided by the deceased into Nzai/Nzui/939 and Nzai/Nzui/940 respectively, on January 20, 2009, which was soon after the Sale Agreement had been executed by both parties. Further, Plaintiff took possession of the land in 2008 and has been thereon despite the subdivision.



18. In the Court of Appeal decision of *Willy Kimutai Kitilit v Michael Kibet [2018] eKLR*, it 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.”

19. Further 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.”

20. While in the case of *William Kipsoi Sigei v Kipkoech Arusei & another [2019] eKLR*, the Court of Appeal observed that:-

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.”

22. While in Section 38(2) (b) of the *Land Act* provides that:

(2) Subsection (1) shall not apply to –

- a. a contract made in the course of a public action;
- b. the creation or operation of a resulting, implied or a constructive trust.”

23. Based on my analysis above while relying on the cited Court of Appeal decisions as well as the legal provisions I have quoted, I find that since the Defendant had received most of the purchase price as evident in the Cheques including acknowledgement of payment as well as reconciliations produced as exhibits; noting that the Plaintiff had paid more than she was expected to pay before receiving the consent to transfer; while it is the Defendant who showed the Plaintiff the portion of land to occupy, which she did from 2008 and developed it; I conclude that there was an element of part performance of the Sale Agreement. It is my considered view that since the year 2008 when the Plaintiff entered the suit land to date, an element of trust was created, which became an overriding interest over the said land. Insofar as the Plaintiff failed to obtain the necessary Consent to Transfer from the Land Control Board within the required period of six (6) months, to enable her acquire the title of the eight acres in her name; I find that the transaction is not void but enforceable by virtue of the doctrine of constructive trust and she is entitled to have the said eight (8) acres registered in her name.

24. As to whether the Plaintiff is entitled to the orders sought in the Plaintiff

25. The Plaintiff sought for various orders enumerated above. I note DW1 is the representative of the Defendant’s estate. On the issue of enlargement of time to procure consent of the Land Control Board to effect transfer of the suit land to the Plaintiff, the Defendant submitted that Section 8(1) of the *Land Control Act* provided that the High Court may, notwithstanding that the period of six months may have expired, extend the period to apply for consent of Land Control Board where it considers that there is sufficient reason so to do. It is trite that the ELC Court has equal status with the High Court and it follows that it has jurisdiction to extend time for seeking the said consent to transfer. In the case of *Caroline Cherono Kirui v Liner Cherono Towett (2018) eKLR*, Justice Ohungo while dealing with the issue of enlargement of time to apply for consent of the Land Control Board held as follows:

23. As observed earlier, the plaintiff has sought an order that time within which to apply for the consent of the Land Control Board by the parties herein be extended. As such, the process of seeking the consent as well as consideration of the application for consent is still underway. In the circumstances, I find and hold that the transaction between the plaintiff and the defendant as embodied in the sale agreement dated March 20, 2012, is not voided for want of consent of the land control board. This should be obvious since otherwise it would be pointless to give the court power to enlarge time notwithstanding that the period of six months may have expired.”

24. Since I have already held that an element of constructive trust had been created when the Plaintiff took possession of the suit land after paying most of the purchase price. From the Sale Agreement, the Plaintiff was incapacitated to apply for consent of the Land Control Board as this was the obligation of the Defendant who was the owner of the suit land which she already subdivided. In associating myself



with the decision cited above, I find that this Court has the discretion to order for the enlargement of time to apply for consent of the Land Control Board and will proceed to do so.

25. The Plaintiff however never provided any evidence on damages she has suffered as a result of the breach of contract and will not award her the same.
26. On the question of costs, costs generally follow the event and since the Plaintiff is the inconvenienced party, I will award her the same.
27. As whether the Defendant is entitled to orders sought in the Counter-claim, I find that the Defendant did not have clean hands as she breached the terms of the Sale Agreement. In the circumstances, she is not entitled to the orders sought in the Counter-claim.
28. In the circumstances, I find that the Plaintiff has proved her case on a balance of probability and will proceed to enter Judgment in her favour and dismiss the Counter-claim. I will proceed to make the following final orders:
 - a. The Defendant be and is hereby directed to specifically execute and transfer title number Nzai/Nziu/940 measuring eight (8) acres to the Plaintiff within a period of fourteen (14) days from the date hereof, failure of which, the transfer be executed by the Deputy Registrar, Environment and Land Court Machakos.
 - b. A declaration be and is hereby issued that the period of ninety (90) days contemplated under Clause D within which to effect the transfer has not expired.
 - c. An order be and is hereby issued directing the parties or their legal representatives herein to appear before the relevant Land Control Board to seek for consent to transfer Title Number Nzai/Nziu/940 in favour of the Plaintiff within 90 days from the date hereof, and the balance of the purchase price be paid upon delivery of the completion documents, including the consent of the Land Control Board as well as a signed Transfer in respect to the suit property.
 - d. Costs of the suit is awarded to the Plaintiff.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 7TH DAY OF NOVEMBER, 2022

CHRISTINE OCHIENG

JUDGE

