REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC APPEAL NO. 38 OF 2014

1. JOSEPH GICHUHI KARIUKI and

2. NJUGUNA MUGO (officials of AIC Kamangu)

3. BENSON MWANGI MUGO and

4. DANIEL THUO WANJOHI (officials of

AIC Kikuyu District Church Council) .....APPELLANTS

VERSUS

ROBERT KIMANI.....RESPONDENT

JUDGMENT

Background:

The appellants filed a suit against the respondent at the Principal Magistrate's Court at Kikuyu on 7th December, 2010 namely, Kikuyu PMCC No. 361 of 2010. The appellants amended their plaint in that suit on 1st November, 2011. In the amended plaint, the appellants sought the following reliefs;

1. The defendant do sign all transfer and/or registration documents related to KARAI/KARAI/2149 and in default the Executive Officer Kikuyu Court do endorse the aforesaid transfer/registration documents.

2. Costs and interest.

In the amended plaint, the appellants averred that they had entered into agreements for sale dated 25th March, 2003, 8th September, 2003, 2nd December, 2003, 9th February, 2004, 14th June, 2004, 15th December, 2004, 29th March, 2005 and 13th December, 2005 with the respondent all for the purchase of a portion measuring one (1) acre of all that parcel of land known as KARAI/KARAI/1518 at a consideration of Kshs. 360,000/- which was paid in full. The appellants averred that the respondent after a lot of pushing obtained consent of the Land Control Board (LCB) to subdivide KARAI/KARAI/1518 and proceeded to carry out subdivision on 12th October, 2006. The appellants averred that after the subdivision, the parcel of land that was sold to them by the respondent was given parcel number, KARAI/KARAI/2149(hereinafter referred to only as "the suit property").

The appellants averred that after paying the balance of the purchase price on 13th December, 2005, the respondent gave them vacant possession of the suit property. The appellants averred that after fencing the suit property, they constructed thereon a permanent church building which was opened formally in 2007 and was serving over 200 congregants. The appellants averred that they delayed in the payment of the balance of the purchase price because of the delay on the part of the respondent to subdivide KARAI/KARAI/1518 and transfer the suit property to them. The appellants averred that despite payment of the purchase price in full and the subdivision of KARAI/KARAI/1518 as aforesaid, the respondent had still failed to transfer the suit property to them. The appellants sought the assistance of the court to have the suit property transferred to them by the respondent in default of which the instrument of transfer be executed by the court.

The respondent filed amended defence on 13th October, 2011. The respondent admitted that he entered into the agreements for sale the particulars of which were set out in the amended plaint with the appellants in respect of the suit property. The respondent averred that the initial agreement for sale dated 25th March, 2003 provided that the appellants were to complete the payment of the purchase price of the suit property on or before 1st December, 2003. The respondent averred that the appellants breached the said term of the agreement for sale in that they completed the payment of the purchase price after 7 years. The respondent averred that as a result of the failure on the part of the appellants to complete the payment of the purchase price as provided for in the agreement for sale, he did not apply for the consent of the

LCB as the completion of the transaction was uncertain.

The respondent averred that the orders that were sought by the appellants could not be granted since no LCB consent was obtained in respect of the transaction in accordance with the provisions of the Land Control Act, Chapter 302 Laws of Kenya. The respondent averred that the only remedy that was available to the appellants was the recovery of the purchase price that they had paid for the suit property. The respondent averred that even the recovery of the purchase price was not available to the appellants because such claim was time barred. The respondent urged the court to dismiss the appellants' suit with costs.

The appellants suit was heard by the lower court which rendered its judgment on 9th December, 2014. In the judgment, the lower court framed two issues for determination. The first was whether the appellants breached the agreements for sale that they entered into with the respondent in respect of the suit property and, secondly, the effect of failure to obtain consent of the LCB on the transaction. On the first issue, the lower court found that the appellants did not breach the initial agreement for dated 25th March, 2003 that they entered into with the respondent which provided that the payment of the purchase price was to be completed on or before 1st December, 2003. The lower court found that the respondent continued to receive payment from the appellants even after the expiry of the payment period without any protest. The lower court held that by accepting payment of the purchase price after 1st December, 2003 without protest, the respondent had extended the payment period and as such the appellants did not breach the agreement for sale aforesaid by completing the payment of the purchase price after 1st December, 2003.

On failure to obtain LCB consent, the lower court cited sections 2 and 6 of the Land Control Act and held that the transaction between the appellants and the respondent was a controlled transaction under the Act and as such required consent of the LCB. Upon review of the evidence on record, the lower court found that no consent was obtained for the transfer of the suit property to the appellants. The lower court found further that the consent that was obtained by the respondent was for the subdivision of KARAI/KARAI/1518. The lower court considered a number of authorities from the Court of Appeal on the effect of failure to obtain LCB consent for a controlled transaction and held that the sale agreement between the appellants and the respondent was null and void for want of LCB consent. The lower court relied on the case of Wamukota *v* Donati [1987] KLR 280 and made a finding that the only remedy that was available to the appellants was the recovery of the payment that they had made to the respondent pursuant to the said void transaction. In conclusion, the lower court found no merit in the appellants' suit and dismissed the same with each party bearing its own costs.

It is that judgment of the lower court that has given rise to this appeal. In their amended Memorandum of Appeal dated 23rd September, 2015, the appellant challenged the lower court's judgment on the following 14 grounds;

1. That the lower court erred in dismissing the appellants suit.

2. That the lower court erred in failing to find that the appellants were misled by the respondent to believe that the respondent had obtained consent of the LCB to transfer the suit property to the appellants.

3. That the lower court erred in holding that neither party was at fault for the failure to obtain the LCB consent while the evidence on record showed that it was the respondent who breached the agreement for sale by his failure to obtain the requisite consent.

4. That the lower court erred in holding that the agreement for sale between the parties was void even after making a finding that the appellants did not breach the agreement and as such the same was valid and binding.

5. That the lower court erred in failing to make a finding that the respondent having sold the suit property, received the full purchase price and put the appellants in possession of the suit property created a constructive trust and/or proprietary estoppel in favour of the appellants.

6. That the lower court erred in failing to make a finding that the respondent having put the appellants in possession of the suit property and having undertaken in the sale agreement dated 25th March, 2015 to obtain consent of the LCB had created an enforceable agreement in favour of the appellants on the basis of constructive trust and/or proprietary estoppel.

7. That the lower court erred in law and fact in failing to note that LCB consent was not required where trust was created over agricultural land.

8. That the lower court erred by failing to note that the respondent having placed the appellants in possession of the suit property had created an enforceable overriding interest in favour of the appellants in relation to the suit property.

9. That the lower court erred in failing to appreciate that there was common intention for the appellants to obtain proprietary interest in the suit property and that the responded could not in equity and good conscience be allowed to defeat that common intention by invoking the provisions of the Land Control Act.

10. That the lower court erred by failing to find that all the decisions that were cited by the respondent before it were made prior to 2010 Constitution which enjoins the court to dispense justice without undue regard to legal technicalities.

11. That the lower court erred in the circumstances in holding that it could not order specific performance because the sale agreement stood vitiated and void for all intents and purposes.

12. That the lower court erred in failing to find that it was the duty of the respondent to obtain LCB consent to subdivide and transfer the suit property to the appellants.

13. That the lower court erred in failing to find that the appellants were seeking equitable relief thereby failed to apply the applicable equitable principles.

14. That the lower court erred and misdirected itself in the application of the applicable law in all the circumstances of the case and thereby failed to exercise its discretion judiciously.

The appellants urged this court to set aside the judgment and/or orders made by the lower court on 9th December, 2014 and to substitute the same with an order allowing the appellants' claim in the lower court.

This being a first appeal, the court has a duty to consider and re-evaluate the evidence on record and to draw its own conclusions although it has to bear in mind that it did not have the advantage of seeing and hearing the witnesses who testified before the lower court. See, the case of Verani t/a Kisumu Beach Resort *v* Phoenix of East Africa Assurance Co. Ltd [2004] 2 KLR 269 and Selle *v* Associated Motor Boat Co. Ltd. [1968] E.A 123 on the duty of the first appellate court.

It is also well established in law that an appellate court will not ordinarily interfere with the findings of fact by the trial court unless they were not based on evidence at all, or they were based on misapprehension of the evidence or where it is demonstrated that the court acted on wrong principles in reaching its conclusion. See, Peter *v* Sunday Post Ltd. [1958] E.A 424 and Makube *v* Nyamuro[1983] KLR 403. After carefully reviewing the evidence that was placed before the lower court, I am unable to disturb its findings on the issues that were before it for determination.

As correctly observed by the lower court, from the pleadings filed by the parties, there were only two issues arising for determination by the court namely, whether it was the respondent or the appellants who had breached the agreements for sale that the parties had entered into in respect of the suit property and whether the relief sought by the appellants was available in view of the provisions of the Land Control Act. On the first issue, the lower court found that the appellants did not breach the agreement for sale dated 25th March, 2003 with regard to the payment of the purchase price for the suit property. The lower court did not express itself on the issue as to whether or not the respondent was in breach of the agreement. I am of the view however that having made a finding that the LCB consent was not obtained by the respondent who had the obligation to secure the same, it went without saying that the respondent was in breach of the agreement in that respect. The appellants did not however fault the lower court on these findings.

On the issue as to whether the appellants were entitled to the relief sought in view of the provisions of the Land Control Act, the lower court as I have stated earlier, held that the agreement for sale between the appellants and the respondent was a controlled transaction and since LCB consent was not obtained, the agreement was null and void in accordance with section 6 of the Land Control Act and unenforceable in the manner sought by the appellants. The lower court held further that the only remedy that was available to the appellants was to seek a refund of the purchase price that they had paid to the respondent. I am fully in agreement with the findings of the lower court on this issue. The findings in my view were a restatement of the provisions on the Land Control Act on controlled transactions. Having regard to the way the appellants' case was pleaded, the lower court could not have arrived at any other decision. The appellants have attacked the findings by the lower court on this issue on various grounds in their grounds of appeal.

I find no merit in ground 1 of appeal. The lower court rightly held that the sale agreement between the appellants and the respondent was void for want of LCB consent. A void agreement for sale could not be enforced through an order of specific performance. Since the only relief that was sought by the appellants was specific performance, the suit was rightly dismissed. In **Chitty on Contract, 30th edition, volume 1 at paragraph 27-003 the authors have stated as follows**:

> **"The jurisdiction to order specific performance is based on the existence of a valid, enforceable contract…it will not be ordered if the contract suffers from some defect, such as failure to comply with formal requirements or mistake or illegality, which makes the contract invalid or unenforceable."**

With regard to ground 2 of appeal, the fact that the appellants were misled of which there was no evidence, that the respondent had obtained LCB consent did not change the fact that no consent was obtained and the provisions of section 6 of the Land Control Act had to take effect. The fact that the appellants were misled if they were, that the LCB consent had been obtained by the respondent could not exempt the agreement for sale between the parties from the effect of section 6 of the Land Control Act. The same would apply to grounds 3 and 4 of appeal. The fact that the appellants fulfilled their part of the bargain and that it was the obligation of the respondent to obtain LCB consent which he breached by failing to obtain the same could not change the effect of section 6 of the Land Control Act.

Grounds 4A, 4B, 4C, 4D and 4E of appeal are not sustainable. As rightly submitted by the respondent, these are new issues that were not raised in the pleadings in the lower court and as such the lower court was not called upon to express its opinion thereon. The issues that have been raised in these grounds of appeal have been raised for the first time before this court. I do not think that it would be in order for this court to fault the lower court on the basis of legal issues and arguments that were not made before it and on which it did not base its decision. To buttress my view on this point, I wish to cite the decision of my sister Kasango J. in Hemed Kassim Hemed *v* Fatuma Sheikh Abdalla [2014] eKLR , where she stated as follows:

> **"2. I am under a duty as the first appellate Court to re-evaluate the evidence tendered before the lower Court and to draw my own conclusions: see the case KENYA PORT AUTHORITY –Vs- KUSTON (KENYA) LIMITED [2009]2 EA 212.**
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> **3. Before embarking on that duty I wish to deal with Ground of Appeal No. 3 presented by the Appellant. On that ground Appellant faulted the Learned Magistrate for failing to make a finding that Plot Mombasa/Block XXXIV/60 (the suit property) the property in question, in this dispute, was family land. I have gone through the pleadings in this matter and I could not find any allegation that the said suit property is family land. To therefore fault the Magistrate for not considering that which was not in issue at the trial Court is in error on the part of the Appellant.**

4. The Court of Appeal in the case INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & ANOTHER – Vs- STEPHEN MUTINDA MULE & 3 OTHERS [2014]eKLR, considered with approval two foreign cases on the issue of parties being bound by their pleadings as follows-

"… the decision of the Malawi Supreme Court of Appeal in MALAWI RAILWAYS LTD –Vs- NYASULU [1998]MWSC 3, in which the learned Judges quoted with approval from an article by Sir Jack Jacob entitled "The present Importance of Pleadings." The same was published in [1960] Current Legal problems, at P174 whereof the author had stated-

'As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings … for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice….

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice.'

The Appellants also cited the Ugandan case of LIBYAN ARAB UGANDA BANK FOR FOREIGN TRADE AND DEVELOPMENT & ANOR Vs. ADAM VASSILIADIS [1986]UG CA 6 where the Uganda Court of Appeal (judgment of Odoki J.A) cited with approval the dictum of Lord Denning in JONES Vs. NATIONAL COAL BOARD [1957]2 QB 55 THAT-

'In the system of trial which we have evolved in this country, the Judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries.'"

Referring also to a decision of Nigerian Supreme Court our Court of Appeal stated-

"ADETOUN OLADEJI (NIG) LTD Vs. NIGERIA BREWERIES PLC S.C. 91/2002, Judge Pius Aderemi J.S.C. expressed himself, and we would readily agree, as follows;

'…. it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded."

5. From the above discussion Appellant's ground No. 3 is rejected for seeking to advance an issue not in the pleadings."

In the said grounds of appeal, the appellants have raised the issue of constructive trust, proprietary estoppel, overriding interest, equity and good conscience. I have at the beginning of this ruling set out the parties' respective pleadings. It is clear from those pleadings that the issues raised in these grounds of appeal to challenge the decision of the lower court were not pleaded. I have also looked at the submissions that were made by the parties in the lower court particularly the submissions by the appellants. The issues raised in these grounds of appeal were not raised in the said submissions. The lower court cannot therefore be said to have overlooked the same.

I am not in doubt that if these issues had been pleaded and raised in the lower court the lower court may have arrived at a different decision on the evidence that was before it. In Macharia Mwangi Maina & 87 others *v* Davidson Mwangi Kagiri[2014]eKLR that was cited by the appellants in their submissions, the Court of Appeal granted an order of specific performance in favour of the appellants where the LCB consent had not been obtained. In **overturning the decision of the High Court which had held** that failure to obtain the LCB consent rendered the transactions between the appellants and the respondent void and unenforceable against the respondent, the court stated that the respondents who had paid the purchase price and were in possession of the suit properties had acquired an implied or constructive trust which was not a disposal or dealing with land for purposes of section 6(1) of the Land Control Act. I am aware, that a differently constituted bench of the Court of Appeal i**n David Sironga Ole Tukai *v* Francis Arap Muge & 2 others (2014) eKLR** disagreed with the decision in **Macharia Mwangi Maina** (supra). That bench held that the decision in **Macharia Mwangi Maina** (supra) was a departure from previous consistent decisions of the court on the application of the doctrines of equity to the Land Control Act. The Court stated as follows:

"… First and foremost, we have already stated that in our opinion granted the express unequivocal and comprehensive provisions of the Land Control Act, there is no room for the courts to import doctrine of equity in the Act. This is one simple message of Section 3 of the Judicature Act. Consequently, invocation of equitable doctrines of constructive trust and estoppel to override the provisions of the Land Control Act has, in our view, no legal foundation. We have also noted that this Court has previously held in a line of consistent decisions and in very clear terms that there was no room for application of the doctrines of equity in the Land Control Act."

I am also aware of the most recent decision on the issue by the Court of Appeal in Willy Kimutai Kitilit *v* Michael Kibet (2018) eKLR in which another bench of that court disagreed with the **David Sironga Ole Tukai** (supra) decision and held that doctrines of constructive trust and proprietary estoppel are applicable to and supersede the Land Control Act. The Court stated as follows:

> ***"A contract for the sale of land to which the Land Control Act applies is not void from inception nor is it an illegal contract. It becomes void when no application for consent of the Land Control Board is made or if made, it is refused and the appeal from the refusal, if any, has been dismissed (see Section 9 (2))…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…Since the doctrines of constructive trust and proprietary estoppel apply to oral contracts which are void and unenforceable, in our view, and by analogy, they equally apply to contracts which are void and unenforceable 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…*****There is another stronger reason for applying the doctrines of constructive trust and proprietary estoppel to the Land Control Act. By Article 10(2) (b) of the Constitution of Kenya, equity is one of the national values (emphasis supplied) which binds the courts in interpreting any law (Article 10(1) (b)). Further, by Article 159(2) (e), the courts in exercising judicial authority are required to protect and promote the purpose and principles of the Constitution. Moreover, as stated before, by virtue of clause 7 of the Transitional and Consequential Provisions in the Sixth Schedule to the Constitution, the Land Control Act should be construed with the alterations, adaptations, and exceptions necessary to bring it into conformity with the Constitution. The word equity broadly means a branch of law denoting fundamental principles of justice. It has various meanings according to the context but three definitions from Black's Law Dictionary, Ninth Edition will suffice for our purpose: "1. ---2. The body of principles constituting what is fair and right. 3. The recourse to principles of justice to correct or supplement the law as applied to particular circumstances --- 4. The system of law or body of principles originating in the English Court of Chancery and superseding the common and statute law (together called "Law" in the narrower sense) when the two conflict" 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 unenforceable for lack of consent of the Land Control Board. For the reasons in paragraphs 20, 21, 22, 23, 24 and 25 above, we are in agreement with the Macharia Mwangi Maina decision that the equitable doctrines of constructive trust and proprietary estoppel are applicable and enforceable to land subject to the Land Control Act, though this is subject to the circumstances of the particular case. Upon the application of the equitable doctrines, the court in its discretion may award damages and where damages are an inadequate remedy grant the equitable remedy of specific performance."**

For myself, in the circumstances of this case, I would not have hesitated to adopt the decisions of the Court of Appeal in **Macharia Mwangi Maina** (supra) and **Willy Kimutai Kitilit *v* Michael Kibet (supra). This in my view was an appropriate case in which the doctrines of constructive trust and proprietary estoppel would be been applied to moderate the harshness of the Land Control Act. I would have held that by receiving the purchase price in full and giving the appellants possession of the suit property with an undertaking that he was going to transfer the property to the appellants, the respondent had created a constructive trust in favour of the appellants that he had an obligation to honour by transferring the suit property to them.**

I am however not the trial court. These issues should have been pleaded and supported by evidence before the lower court so that the court could made a decision on the same one way or the other. If I was to uphold grounds 4A to 4E of appeal, I would have usurped the power of the trial court. Those grounds of appeal are rejected on the ground that the issues raised therein were not raised before the lower court and the court did not make any decision thereon that can form a basis for an appeal.

I also find no merit in ground 4 of appeal. In their submissions in the lower court, the appellants did not cite any case law. The appellant cannot therefore fault the lower court for relying on the cases that were cited before it by the respondent which in my view were good law since constructive trust and proprietary estoppel were not pleaded. This ground of appeal also fails. For the reasons which I have already given above, I find no merit in grounds 5, 6, 7 and 8 of appeal.

In conclusion, the appellants' appeal fails wholly. The same is dismissed with each party bearing its own costs of the appeal and of the lower court suit.

Delivered and Dated at Nairobi this 5th day of May 2020

S. OKONG'O

JUDGE

Judgment read through Microsoft Teams Video Conferencing platform in the presence of;

Mr. Kenyatta for the Appellants

Mr. Gikonyo for the Respondent

Ms. C. Nyokabi-Court Assistant