



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC NO. 175 OF 2014

FAST TRACK

SARAH JEPTOO MAIYO.....PLAINTIFF

VERSUS

PAUL KIPNGETICH.....1ST DEFENDANT

ISAAC KOSKEI KIMITEL.....2ND DEFENDANT

JAMES K. KEMEL.....3RD DEFENDANT

LAEH KIPSIGIS.....4TH DEFENDANT

JUDGMENT

By a plaint dated 30th May 2014, the plaintiff herein sued the defendant's jointly and severally seeking for the following orders:

- a) Eviction of the defendants by themselves, their servants and/or agents, family members be evicted from the land parcel known as NGERIA/MEGUN BLOCK 3 (KIMURI)/ 171.
- b) Costs and interests.

The defendants were served with summons to enter appearance however, only the 2nd and 3rd defendants entered appearance. They filed a joint statement of defence and a counter-claim on the 14th July, 2014. The plaintiff filed a reply to defense and counterclaim on 30th September, 2014.

Plaintiff's case

The plaintiff adopted her statement as part of her evidence in court and testified that she is the administratrix of the estate of the late ELIUD KIPKEMBOI MAIYO. She produced a grant of letters of administration intestate to his estate. She stated that the grant was issued by the High Court and that land parcel known as NGERIA/MEGUN BLOCK 3 (KIMURI)/171 measuring 1.686 Hectares was the property of the late ELIUD KIPKEMBOI MAIYO who died on the 25th August, 2002. The plaintiff also produced the certificate of official search.

PW1 testified that she has sued the defendants herein because she sold to them land but they did not pay the full purchase price. It was further her evidence that on the 21st October, 2005 the 1st 2nd and 3rd defendants entered into an agreement for the purchase of 1.2 acres comprised in the suit land.

It was the plaintiff's testimony that the defendants were to pay Kshs. 120,000/ but they only paid Kshs.80,000/ leaving a balance of Kenyan shillings 20,000/ each. She further stated that she stays on the suit land together with the 3rd defendant's worker and that the 2nd defendant does not stay in the suit land. It was further her evidence that the 4th defendant stays on the suit land having taken possession in 2006. She therefore urged the court to grant her orders for the eviction of the defendants as they neither completed payment of the purchase price nor got the requisite consent of the Land Control Board within six months.

On cross-examination by Counsel for the 2nd and 3rd defendants, PW 1 stated that they had agreed on Kshs. 250,000/ as the purchase price but they paid leaving an unpaid balance of Ksh. 20,000/. PW 1 also stated that she was not aware that their lawyer was supposed to be paid Kenyan shillings 20,000/ as legal fees for the Succession cause.

PW 1 further confirmed that the 3rd defendant paid her Ksh. 10,000 but they had agreed on Kshs. 20,000 which was to be paid upon getting a confirmation of grant. She stated that her children objected to the sale of the land and therefore they would like to refund the money paid as purchase price to the defendants. It was her evidence that she filed a succession Cause in Nairobi and that her brother-in-law filed another one in Nakuru. She confirmed that she does not have a confirmed grant. The plaintiff therefore closed her case.

Defense case

The 3rd defendant adopted his statement and stated that he bought 1.2 acres of land from the plaintiff at a consideration of Kshs. 120,000/ of which he paid Kshs. 110,000 /leaving a balance of Kshs.10,000/which he was to pay upon confirmation of grant of letters of administration. He further stated that the seller was to cause the land to be surveyed, subdivided and transferred to him but this was not done.

DW1 also stated that he took possession of the suit land in 2005 and that he filed a counterclaim for the suit land. He prayed that the plaintiff's suit be dismissed with costs and his counterclaim be allowed as prayed. He therefore closed his case.

On cross examination by Counsel for the plaintiff DW1 stated that the agreement was subject to filing of the Succession Cause of which he paid Kshs. 80,000/ to the plaintiff and a further Kshs. 20,000/ to Kimaru Kiplagat Advocates for filing of Succession Cause.

On re exam he confirmed that the money paid to the Advocates for filing of succession Cause was a term of the agreement.

The 2nd defendant adopted his statement and testified that he bought 2 acres to be excised from land parcel number NGERIA/MEGUN BLOCK 3 (KIMURI)/171 from the plaintiff at a consideration Kshs. 250,000/ of which he paid Kshs. 230,000/ leaving a balance of Kshs. 20,000/ which he was to pay on or before 31st December 2006.

DW2 further stated that the plaintiff deliberately refused to execute transfer forms and the application for consent of the Land Control Board despite several reminders and requests. On cross examination by the Plaintiff's Counsel, DW2 stated that he built a house which the plaintiff demolished and that the balance of Kshs. 20,000/ was not paid because the plaintiff was elusive and 9 years have lapsed since they entered into the sale agreement. He further stated that he has not seen any confirmation of grant.

Plaintiff's Submissions.

Counsel for plaintiff submitted that the 1st and 4th defendants despite service of summons failed to enter appearance hence the plaintiff's evidence that they are trespassers is unchallenged. Counsel therefore prayed that judgment be entered according to the plaint. Counsel reiterated the evidence of the parties and submitted that it is clear that the plaintiff and the defendants entered into a sale agreement but the defendants breached the terms by not paying the consideration in full and therefore cannot seek to enforce the agreements through specific performance.

Counsel urged the court to be guided by the authority in **Purple Rose Trading Co. Limited v Bhanoo Shashikant Jai, (2014) eKLR** in which it was observed,

"The moment the plaintiff went into equity, and asked for specific performance, and it was proved that he himself was guilty of the breach of contract... the court of equity would refuse to grant specific performance and would leave the parties to their other rights... when the appellants came to court seeking the relief of specific performance of the agreement, they had not performed an essential part of the agreement, namely, payment of the purchase price of the suit property. Indeed, right up to the proceedings in the Superior Court, they had not done so. In these circumstances, no court of equity properly directing its mind to the same would have considered it just and equitable to grant them the equitable relief of specific performance of the agreement with a view to doing more perfect and complete justice. "

Mr. Mogambi submitted that the remedy of specific performance also cannot be issued in favour of the defendants due to laches because the defendants ought to have sued for the enforcement of their rights within 6 years in tandem with section 4 (1) (a) of the Limitation of Actions Act, Cap. 22. The counter-claim was brought long after the said period had lapsed.

Counsel further submitted that the transaction was a controlled transaction which required the consent of the Land Control Board within a period of six months and that the defendants have not applied for the extension of time to make the application to the Land Control Board.

Counsel relied on the case of **Rose Wakanyi Karanja & 3 others v Geoffrey Chege Kirundi & another, [2016] eKLR** in which it was observed,

"However, this is not to say we are unsympathetic to the respondents but this being a court of law, our sympathies have no place. Suffice to state that the provisions of the Land Control Act are harsh, but regrettably equity cannot be of any help.

Further in the case of **Karuri —V- Gituru** (supra), the court held that:-“ The provisions of the Land Control Act are of an imperative nature, there is no room for the application of any doctrine of equity to soften its harshness”. Counsel therefore urged the court to allow the plaintiff's claim and dismiss the defendants' counterclaim with costs.

2ND AND 3RD DEFENDANTS' WRITTEN SUBMISSIONS

Counsel for the 2nd and 3rd defendants gave a brief background to the case and submitted that the parties entered into a sale agreement and

paid the purchase price in full and took immediate possession as per the terms of the agreement.

Counsel submitted that the land parcel is still under subdivision as the Plaintiff sold it to all the four Defendants in different portions and that it is the 2nd and 3rd Defendants contention in their counter claim that the plaintiff should be compelled to surrender the original title deed and to execute transfer forms in their favour. That the defendants produced the agreements and payment receipt from Kimaru Kiplagat Advocates for the payment of the legal fees for the Succession Cause as per the agreement.

Mr. Yego Counsel for the 2nd and 3rd defendants submitted that the doctrine of proprietary estoppel applies to the current case as the plaintiff cannot be allowed to keep the money and the land having entered into an agreement and allowed the defendants to take possession of the suit land. He cited the case of **William Kiptarbei Korir & 6 Others —VSDanson Muniu Njeru (2018) eKLR** where the judges held that:-

“This is a case where the deceased by a written agreement sold the entire land to three joint purchasers including the 1st and 2nd appellants, received the purchase price, gave each vacant possession and left the land, the deceased in addition obtained the consent to sub-divide the land pursuant to the agreement but died before he transferred the land.

The 1st and 2nd appellants settled their families on respective portions and each developed the land by building dwelling houses. By the time the respondent filed a suit for eviction, each of the 1st and 2nd appellants had been in possession of the land for over ten years. It is clear that the deceased and the 1st and 2nd appellants had common intention that each purchaser would get the interest purchased. The doctrine of constructive trust applies in those circumstances. Moreover, the deceased by a written agreement made representation to each of the 1st and 2nd appellants that they would get an interest in land and each acted to his own detriment by settling the family on the land and developing the land. Similarly, the doctrine of proprietary estoppel applies in those circumstances.”

Further that in Halsbury's laws of England Vol. 16 (2) 4th Ed. Re-issue state at para 1089: states that:

"Unlike other kinds of estoppel, proprietary estopped may be a cause of action but only where it involves the promise of an interest in land. "

Counsel also referred the court to section 28 (b) of the Land Registration Act, which provides for trusts as overriding interests to which registered land is subject. Counsel also relied on the case of **Mwangi & another —vs — Mwangi (1986) KLR 328**, where 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. Further that as was stated by Lord Reid in **Steadman — vs- 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".

Counsel therefore submitted that the plaintiff entered into an agreement with the defendants, received the purchase price, took possession and she should not be heard to say that the transaction is void for want of a land Control Board Consent as she is estopped as she created a constructive trust on their behalf He therefore urged the court to didmiss the plaintiff's claim and allow the counterclaim and order the Deputy Registrar of this Court should execute the transfer documents on behalf of the 2nd and 3rd defendants.

Analysis and determination

The plaintiff filed this claim against the defendants for eviction but as was earlier stated the 1st and 4th defendants neither entered appearance nor filed a defence within the stipulated period therefore judgment was entered against them. The 2nd and 3rd defendant defended the plaintiff's claim against them by filing a defence, counterclaim and tendering evidence before the court.

The issues for determination in this case are as to whether the sale agreement entered into between the plaintiff and the defendants are valid, whether the purchase price was paid in full, whether the defendants took occupation of the suit land, whether the plaintiff is entitled to rescind the agreements and whether the plaintiff created a constructive trust on behalf of the 2nd and 3rd defendants.

On the 1st issue as to whether there was a valid agreement between the plaintiff and the defendants, it is not in dispute that the parties entered into a sale agreement for the sale of the suit plots. The agreements were drawn and signed by all the parties in an Advocates office. What is in dispute is as to whether the full purchase price was paid.

From the agreement dated 21st October 2005, it was a term of the agreement that the consideration was Kshs. 120,000/ of which Kshs. 80,000/ was paid to the vendor who acknowledged receipt thereof and Kshs. 20, 000/ was to be paid to KIMARU KIPLAGAT & CO ADVOCATES to file and prosecute a Succession Cause. The balance of Kshs. 20,000/ was to be paid upon confirmation of grant of letters of administration. The vendor was also supposed to cause the suit land to be subdivided and transferred to the purchaser.

It is on record that the 3rd defendant paid the purchase price of Kshs. 80,000/ to the plaintiff of which she acknowledged, Kshs. 20,000/ to KIMARU KIPLAGAT ADVOCATES as legal fees for filing of the succession Cause and a further Kshs. 10,000/ to the plaintiff which she further acknowledged on 28th March 2006. What was the plaintiff acknowledging to have received and it is clearly indicated that it is in respect of the balance of consideration as per the agreement dated 21st October 2005? There is glaring evidence that the plaintiff entered into an agreement with the 3rd defendant and received the purchase price as per the terms of the agreement and cannot be heard to use the

provisions of the Land Control Act for lack of a consent from the Land Control Board to deny the defendant land that he took immediate possession off.

The plaintiff cannot be allowed to rescind the sale agreement on the flimsy reason that she was not paid a balance of kshs. 10,000/ and that her children are opposed to the sale of the land. Parties should not be allowed to use the courts to sanitize their acts of greed using the provisions of the law that transactions involving Agricultural land must get the consent of the Land Control Board. The plaintiff should be ready to tell her children that the court will not allow them to use that line of argument to frustrate the defendants who used their hard earned money to buy the land and later tell them after 9 years that they should now leave and get purchase price back. Let the plaintiff use the money that she intends to refund the defendants to look for alternative land if she can get the equivalent acreage for the same amount.

I find that the plaintiff did not fulfil her part of the bargain where she was to get letters of administration and a confirmed grant to enable her transfer the land to the defendants. She did not produce a copy of the grant to indicate the good faith in fulfilling the terms of the agreement. She only thought of moving the court to rescind the agreements and have the defendants evicted.

The 2nd and 3rd defendants having entered into the agreement with the plaintiff, paid the purchase price, took occupation and waited for the plaintiff to do her part which she did not honor have acquired an interest by constructive trust therein recognized by virtue of Section 25 and 28 of the Land Registration Act 2012 which provides that:

"The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever"

In the case of **William Kiptarbei Korir & 6 others v Danson Muniu Njeru [2018] eKLR** the Court of Appeal held that the doctrine of constructive trust applied in this case where the deceased by a written agreement sold the entire land to three joint purchasers including the 1st and 2nd appellants, received the purchase price, gave each vacant possession and left the land. The 1st and 2nd appellants settled their families on respective portions and each developed the land by building dwelling houses. By the time the respondent filed a suit for eviction, each of the 1st and 2nd appellants had been in possession of the land for over ten years. It was clear that the deceased and the 1st and 2nd appellants had common intention that each purchaser would get the interest purchased.

The above case is similar to the current one as the parties entered into a binding agreement and the defendants paid the purchase price and took possession. I find that the plaintiff has been holding the land in trust for the 2nd and 3rd defendants. The plaintiff should not be allowed to benefit from the provisions of the Land Control Act to further her greed as was held in the case of **Hannah Mugure Karago v Peter Karuri Waweru & Another [2016] eKLR** where the Court of Appeal stated that "The statutory provisions for attaining these salutary considerations do however provide fertile opportunity for unscrupulous persons to use them as a cloak for mischief. I will not allow such mischief to thrive and get a life of its own in our courts.

Finally in the most recent case of **Willy Kimutai Kitilit v Michael Kibet [2018] eKLR** applied the doctrine of constructive trust by stating that "By the time the appellant caused himself to be registered as the proprietor of the whole piece of land he was a constructive trustee for the respondent and it would be unjust and inequitable to allow the appellant to retain the 2 acres that he had sold to the respondent in the circumstances of the case."

The court further stated that: "As we have held in essence that, the lack of the consent of Land Control Board does not preclude the court from giving effect to equitable principles, in particular the doctrine of constructive trust, we find that the trial court reached the correct decision and therefore the appeal has no merit."

I am also persuaded to follow this route that lack of land Control Board Consent does not preclude the court from applying equitable principles to do justice. We should also look at the purpose behind the enactment of the Land Control Act and more particularly on the provision of the requirement of land control Board consent. It was enacted at a time when the country did not want fragmentation of small pieces of land to boost agriculture. Is it time to relook whether the provisions should be amended to work better for Kenyans?

Having found that the plaintiff was paid the purchase price by the 2nd and 3rd defendants save for kshs, 10,000/ by the 3rd defendant and kshs. 20,000/ by the 2nd defendant, I find that the plaintiff is holding the suit parcel of land in trust for the defendants. The plaintiff to fulfil part of the terms of the agreement by ensuring that she does what is necessary to enable the 2nd and 3rd defendants get the suit land transferred to them. The evidence of the defendants were credible and corroborated with documentary evidence.

I find that the plaintiff has failed to prove her case and is therefore dismissed with costs to the 2nd and 3rd defendants. The 2nd and 3rd defendants' counterclaim is hereby allowed with costs.

I therefore make the following orders:

- a) The plaintiff's suit is dismissed with costs to the 2nd and 3rd defendants.
- b) The 2nd and 3rd defendants' counterclaim is allowed, the plaintiff to surrender the original title deed in respect of land parcel No. NGERIA/MEGUN BLOCK 3 (KIMURI) and execute in favour of the 2nd and 3rd defendant in respect of land parcel No. NGERIA/MEGUN BLOCK 3 (KIMURI)171.
- c) A declaration that the 2nd and 3rd defendants are lawful proprietors of 2acrs and 1.2 acres respectively comprised of land parcel No. NGERIA/MEGUN BLOCK 3 (KIMURI)171.

d) The 2nd and 3rd defendants to pay the balance of the purchase price of Kshs. 20,000/ and 10,000/ respectively to the plaintiff within 30 days.

e) Costs of the counterclaim.

Dated and delivered at Eldoret this 2nd day of May, 2019

M.A ODENY

JUDGE

JUDGMENT read in open court in the presence of Mr.Mogambi for the Plaintiff and Mr.Odhiambo holding brief for Mr.Yego for 2nd and 3rd Defendants.

Mr. Mwelem – Court Clerk