



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 938 OF 2017

ANDREW MULILI MWAITHYA.....PLAINTIFF

VERSUS

SHEKEINE OLE KOILEKINE.....DEFENDANT

JUDGEMENT

By a Plaint dated the 21st November, 2017, the Plaintiff prays for judgment against the Defendant for:

- a) An order directing the Defendant forthwith and unconditionally complete the sale transaction subject of the agreement dated 6th April, 1997 between the Plaintiff and the Defendant by processing the title document and all completion documents for sale of the 11 acres of land and for which the entire consideration was received by the Defendant.
- b) If the Defendant does not abide by the orders in (a) supra within 30 days of issue, the Registrar of this Honourable Court does execute, in place and stead of the Defendant, all the documents necessary to complete the transaction including transfer with the Defendant being liable to pay all the costs to be thereby incurred.
- c) Costs of the suit plus interest at court rates from the date of filing suit till payment in full.
- d) Any other and / or further relief as this Honourable Court may deem fit to grant.

The Defendant though duly served as evidenced in the affidavit of service dated the 18th December, 2017 and filed in court on 1st March, 2018 failed to enter appearance nor file a defense. Interlocutory judgment was entered on 28th March, 2018 and the matter proceeded for formal proof on 15th November, 2018.

Evidence of the Plaintiff

The Plaintiff called three witness. The Plaintiff as PW1 testified that he entered into a series of agreements, commencing from 1986 with the Defendant for the purchase of 11 acres from land parcel number KAJIADO/ KAPUTIEI/ 626 measuring 73.8 hectares situated at Eraukau Group Ranch No. 9. He explained that the initial purchase price was Kshs. 2,600 per acre, which was adjusted to Kshs. 7,000 and finally Kshs. 10,000 in 1997 culminating in the signing of a final as well as all inclusive Sale Agreement dated the 6th April, 1997 before an advocate. The entire consideration was Kshs. 110,000 for the 11 acres of land. As per clause 6 of the said Sale Agreement, the Defendant was expected to execute all the requisite documents to effect the transfer of the portion of land into the Plaintiff's name. As per clause 9 of the Sale Agreement, the Plaintiff was allowed to take possession of the 11 acres he had purchased. It was the Plaintiff's testimony that despite fulfilling his obligation in the Sale Agreement and taking possession of the 11 acres he purchased, the Defendant has declined to effect the transfer to him and has proceeded to subdivide the mother parcel into two separate parcels resulting in the change of the Defendant's remaining title number Kajiado/ Kaputiei Central/ 1052. Both PW2 and PW3 testified and confirmed that the Defendant sold land to the Plaintiff who has been in possession of the same. The Plaintiff produced the various Sale Agreements as exhibits to support his case.

The Plaintiff thereafter closed his case and filed submission, which I have considered.

Analysis and Determination

Upon consideration of the pleadings herein and hearing testimony of the Plaintiff's witnesses, the issue for determination is whether the Plaintiff is entitled to the orders sought in the Plaint.

The Plaintiff sought orders for the Defendant to be compelled to finalize the transfer of the 11 acres of land he had purchased from him; or in

the alternative for the Deputy Registrar to execute the transfer forms and he be awarded costs of the suit. The Defendant did not enter appearance nor file a Defence hence the averments of the Plaintiff remain uncontroverted. As per the Sale Agreement at Clause 2, the Defendant acknowledged receipt of Kshs. 110,000 being the purchase price of 11 acres. At Clause 6 of the said Agreement the Defendant had accepted to execute the relevant documents and effect transfer of the 11 acres to the Plaintiff. He further accepted to pay the partitioning fee. At Clause 9 the Plaintiff was allowed to take possession of the 11 acres. It was the testimony of all the three witnesses that the Plaintiff took possession of the 11 acres and has been cultivating it.

The Plaintiff contends that despite fulfilling his obligation within the Sale Agreement, the Defendant has declined to effect the transfer of the 11 acres to him and proceed to subdivided the mother title. Further, that the Defendant's remaining title is number Kajiado/ Kaputiei Central/ 1052. The Plaintiff submitted that it had proven his case and relied on the case of *Willy Kimutai Kitilit Vs Michael Kibet (2018) eKLR* to buttress his claim. I note the Plaintiff purchased land which is agricultural and subject to Land Control Act. From the evidence present, it is clear the Defendant never obtained Consent of the Land Control Board to enable him effect transfer of the 11 acres of land to the Plaintiff. It emerged that the Plaintiff took occupation of the suit land and has been thereon from the time they executed the Sale Agreement which in essence is April 1997.

Section 6 (1) (a) of the Land Control Act provides that: '**(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;

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.'

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.'

In relying on this Court of Appeal decision, and from analysis of the evidence presented, above which was not controverted, I find that since the Plaintiff and the Defendant duly executed the Sale Agreement dated the 6th April, 1997 which culminated in the Plaintiff taking occupation of the 11 acres of land which he purchased, I hold that an element of trust was created, which became an overriding interest over the Defendant's land. Insofar as the Defendant failed to procure the necessary Consent from the Land Control Board within the required period of six (6) months, to enable him transfer the 11 acres into the Plaintiff's names; I hold that the transaction is not void but enforceable by virtue of the doctrine of constructive trust which is a constitutional principal and the Plaintiff is entitled to be transferred to the 11 acres of land which he purchased from the Defendant, from land parcel number Kajiado/ Kaputiei Central/ 1052.

Who should bear the costs of the suit.

Since the Plaintiff has been inconvenienced with the Defendant's failure to effect transfer of the 11 acres of land to him, he is entitled to costs of the suit.

In the circumstances, I find that the Plaintiff has proved his case on a balance of probability and will proceed to make the following orders:

- a) A declaration be and is hereby issued that the Plaintiff is entitled to 11 acres of land out of KAJIADO/ KAPUTIEI CENTRAL/ 1052 which belongs to the Defendant.
- b) The Defendant be and is hereby ordered to execute the necessary documents and facilitate transfer of 11 acres of land out of parcel number KAJIADO/ KAPUTIEI CENTRAL/1052 to the Plaintiff's name within 60 days from the date hereof, failure to which the Deputy Registrar, Environment and Land Court at Kajiado is directed to execute the said documents.
- c) Upon execution of the necessary transfer documents, the Land Registrar Kajiado, be and is hereby directed to register the Plaintiff on the 11 acres out of KAJIADO/KAPUTIEI CENTRAL/ 1052
- d) The Costs of the suit is awarded to the Plaintiff

Dated signed and delivered in open court at Kajiado this 4th day of July, 2019

CHRISTINE OCHIENG

JUDGE