



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO 568 OF 2013

TITUS KIRAGU1ST PLAINTIFF

SUSAN W KIRAGU.....2ND PLAINTIFF

VERSUS

KIORIAH NJOKA (Being sued as the Administrator of the

estate of the late NJOKA WAKIORIAH).....DEFENDANT

J U D G M E N T

1.The plaintiffs commenced the instant suit by way of plaint dated 23rd October 2013 filed in the court on the same date. The plaint was amended on 16th May 2019 and hence the hearing of the suit was on the basis of the amended plaint filed on 17th May 2019. It was the plaintiffs claim that vide an agreement dated 3rd October, 1989 entered into between themselves and the late Njoka Wa Kioriah they agreed to purchase a portion of 50 acres that was to be excised from LR No.10317/14 for a consideration of Kshs1,000,000/=. That after the execution of the agreement the plaintiffs averred that they paid to the deceased sums of money well in excess of Kshs1,000,000/= and hence by a further agreement dated 8th May 2000 it was agreed that the excess funds paid would be applied proportionately towards the acquisition of additional acres of land.

2. The plaintiffs stated that they paid to the deceased a total of Kshs.2,112,265.55 resulting in an overpayment of Kshs1,112,265.55 which proportionately translated to an additional 55.6 acres. The plaintiffs further stated a subdivision scheme of land parcel LR No.10317/14 was done and subdivisions ' F ' and ' C ' were identified as the portions purchased by the plaintiffs and appropriate consent to the Land Control Board for subdivision and transfer was made but unfortunately the vendor died before the transaction was completed.

3. In Nairobi High Court Succession cause No.3279 of 2003 the administrators admitted the plaintiffs purchased 50 acres but disputed the additional 55.6 acres. The succession court ordered that the 50 acres admitted by the estate administrators be transferred to the plaintiffs. In the present suit the plaintiffs pray for the following orders:-

a. That the honorable court be pleased to declare that the 1st and 2nd plaintiff's made a purchase of 55.6 acres of land on sub-plots number F and C on L.R No.10317/14 for the value of Kshs.1,112,264.55.

b. That the honorable court be pleased to declare that the 1st and 2nd plaintiffs are the rightful owners of 55.6 acres of land on sub-plots number F and C on L.R 10317/14.

c. That the defendants be directed to hive off the transfer the 55.6 acres of land on sub plots number F and C on L.R No.10317/14 to the plaintiffs.

d. (a) An order of permanent injunction restraining the defendant by himself, his servants, employees, and/or agents from occupying entering taking and/or agents from occupying entering, taking and/or being in possession, ploughing, grazing, and erecting any structures and/or in any other manner dealing with sub plots F and C our of Land Reference Number 10317/14 situated North East of Naivasha Municipality.

e. General damages

f. An eviction order do issue against the defendant and/or anyone living within the 55.6 acres to be hived off from sub-plots number F and C on L.R No.10317/14.

g. Any further orders that the honorable court may be pleased to issue.

h. Costs of the suit.

4. The defendant sued as the administrator of the estate of the late Njoka WaKioriah filed a statement of defence dated 21st November 2013 and subsequently amended the statement of defence on 6th May 2015. The defendant denied there was any subdivision of LR No.10317/14 in January/February 2002 stating that the same was carried out between 27th and 30th November 2001. The defendant denied that the plaintiffs agreement with the deceased was for plot Nos 'F' and 'C' and stated that the agreement only related to plot No 'C' and not both 'F' and 'C' as alleged by the plaintiffs. The defendant averred that the letter of consent of the Land Control Board was not validly obtained as it was obtained over six months from the date of the sale agreement and was procured at a time when the deceased was critically sick and could therefore not voluntarily have participated in obtaining the same. The defendant in the premises denied the plaintiffs would be entitled to the orders that they sought.

5. The suit was fixed for hearing before me on 19th February 2020 but was adjourned on the application of the defendant's counsel. The matter was refixed for hearing on 28th September 2020 when only the plaintiffs counsel attended court. Owing to the prevailing covid-19 pandemic, the Court adjourned the hearing and fixed the matter for hearing on 11th February 2021. The plaintiff was directed to serve the defendant with a hearing notice.

6. On 11th February 2021 once more only the plaintiffs advocate, Mrs Mbanya advocate and the plaintiff attended court. The defendant's advocates had been served electronically via the email address given in the filed Notice of change of Advocates. There being no explanation as to the defendant's counsel's absence together with the defendant and the court being satisfied service had duly been effected, the court allowed the plaintiff to proceed with the hearing exparte.

7. The 1st plaintiff in his evidence adopted his witness statement filed together with the amended plaint on 17th May 2019. The 1st plaintiff further relied on the bundle of documents filed with the amended plaint as per the list dated 16th May 2019. The documents were admitted in evidence as **PEX 1 to 13**. The plaintiff additionally produced a subdivision plan of the suit property as **PEX14**. The 1st plaintiff affirmed that in the High Court Succession Cause (**HC Succ. Cause No.3270 of 2003**) he was awarded 50 acres out of the 105.6 acres that he claimed in the present suit and stated that it was now the balance of 55.6 acres that he was now claiming. He stated he had taken occupation of the 50 acres he was awarded by the succession court.

8. In the witness statement the 1st plaintiff outlined in considerable detail his engagement with the deceased, the late Njoka WaKioriah who was the registered owner of LR No.10317/14 situate North East of Naivasha Municipality measuring 416 acres or thereabouts. He explained on or about 3rd October 1989 he and his wife entered into an agreement of sale with the deceased to purchase a portion of 50 acres that was to be excised from LR No.10317/14. This agreement is not disputed and it was the basis upon which the High Court in the Succession case awarded the plaintiffs 50 acres.

9. The 1st plaintiff however explained in his witness statement that after the execution of the agreement aforementioned, the deceased required funds to inject into his business and for the education of his children. The plaintiffs cumulatively paid to the deceased a sum of kshs2,112,264.55 and by a further agreement signed on 8th May 2000 it was agreed that the amount of Kshs1,112,264/55 paid in excess of the consideration of Kshs1,000,000/= for the 50 acres would be applied proportionately to acquire additional land.

10. The 1st plaintiff stated that the said Kshs.1,112,264/55 translated to an additional 55.6 acres. The 1st plaintiff explained that in January and February, 2002 a subdivision plan for the property was done and subplots 'F' and 'C' were identified by the deceased and themselves as the plots that they had purchased. He stated that around August, 2002 the defendant was sent by his father (the deceased) to show them the plots 'F' and 'C'. The plaintiff stated that the consent of the Land Control Board for the transfer of the land to the plaintiffs was obtained on 20th August 2002. The consent issued was for the transfer of 100 acres which signified that in addition to the 50 acres purchased as per the agreement dated 3rd October 1989 the deceased was prepared to transfer another 50 acres to the plaintiffs.

11. The plaintiffs stated that the said Kshs1,112,264/55 translated to an additional 55.6acres. The 1st plaintiff explained that in January and February, 2002 a subdivision plan for the property was done and subplots F and C were identified by the deceased and themselves as the plots that they had purchased. He stated that around August,2002 the defendant was sent by his father, the deceased to show them the plots F and C. The plaintiff stated that the consent of the Land Control Board for the transfer of the land to the plaintiffs was obtained on 20th August 2002. The consent issued was for the transfer of 100 acres which signified that in addition to the 50 acres purchased as per the agreement dated 3rd October 1989 the deceased was prepared to transfer another 50 aces to the plaintiff.

12. The plaintiffs stated further after the death of the deceased the defendant refused and declined to allow the plaintiffs access to utilize the land that they had purchased. The succession court however on 28th February 2019 ordered that the 50 acres admitted as having been bought by the plaintiffs be transferred to them. The plaintiffs in the present suit claim the balance of 55.6 acres that they stated they also paid for.

13. The plaintiffs counsel filed written submission following the closure of the trial as per the court's directions. The submissions were filed on 22nd March 2021. The plaintiffs reiterate in the submissions, the facts as set out in the 1st plaintiffs witness statement and as pleaded in the amended plaint. The plaintiff submitted they had entered into a valid sale agreement with the deceased and that the Land Control Board that was obtained on 20th August 2002 was valid and that the sale agreement was not null and void as alleged by the defendant. Indeed the defendant in the filed defence admit the sale agreement save that he averred it was rendered null and void as no consent of the Land Control Board was obtained within the prescribed period. The High court in HC.Succ Cause No. 3270 of 2003 held that although the administrator of the deceased estate had contended that the consent obtained on 20th August 2002 was invalid for having been obtained out of time the administrator had admitted the agreement between the deceased and the objectors (the plaintiffs in the present suit) for the initial 50 acres

and proceeded to award the objectors the 50 acres. The court took the view that the deceased participated in the process of obtaining the consent of the Land Control Board and in doing so was in effect recognizing and validating the sale agreement entered into.

14. The plaintiffs in support of their submissions relied on the court of appeal decisions in the cases of ***Macharia Mwangi Maina & 87 others -vs- Davidson Mwangi Kagiri (2014) eKLR*** and ***Willy Kimutai Kitilit -vs- Michael Kibet (2018) eKLR*** which cases were cited with approval in the High Court Succession Cause. In the High Court Succession Cause, Ali Aroni, J referring to the case of ***Willy Kimutai Kitilit -vs- Michael Kibet (supra)*** stated thus:-

“---the court of appeal found that though the Land Control Act has not been repealed it is not a modern law nor in sync with the 2020 constitution or the current Land Act.

The said court went further to hold that there is a stronger reason to apply the doctrine of constructive trust and proprietary estoppel to such transactions because Article 10 (2) (b) of constitution, equity is one of the National Values which binds the courts in interpreting the law. Further Article 159 requires the court to uphold the constitution, whereas the sixth Schedule of the Transitional and consequential provisions requires that the Land Control Act be construed in such a way as to bring it in conformity with the Constitution.

The Court of Appeal further in the case of ***Willy Kimutai Kitilit -vs- Michael Kibet (2018) eKLR*** stated:-

“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”

15. The court in holding that the doctrine of constructive trust and proprietary estoppel are applicable and enforceable to land subject to the Land Control Act, however noted that whether or not the doctrines are applicable depends on the circumstances of each particular case. The court further held where the doctrines are held to be applicable the court in its discretion may award damages and where damages are inadequate remedy may grant the equitable remedy of specific performance.

16. In the present suit the issues for determination are whether there was a valid agreement for sale entered into between the plaintiffs and the deceased; and if so, whether such sale transaction was null and void on account of the land control consent not being obtained within the prescribed period. On the issue whether there was a sale agreement it is not disputed that indeed the deceased and the plaintiffs entered into a sale agreement on 3rd October 1989 for sale of 50 acres out of LR No.10317/14. This is admitted and indeed in HC Succession Cause No.3270 of 2003 as per the ruling delivered on 28th February 2019, the plaintiffs were awarded the 50 acres on the basis of this initial agreement. The plaintiffs pleaded a further agreement dated 8th May 2000 signed by the plaintiffs and the deceased. Under the later agreement the deceased acknowledged having been paid the full purchase price of Kshs1,000,000. The agreement dated 8th May 2000 against the heading ‘MODE OF PAYMENT’ provided:-

The whole purchase price has been paid in cash and execution hereof is acknowledgment of safe receipt. Any excess amount paid by the purchasers to the vendor will be used to buy extra acreage proportionally or refund the excess amount in 4 equal instalments.

17. The plaintiffs testified that in total they paid to the deceased Kshs2,112,264/55 and accordingly the extra payment of Kshs1,112,264/55 entitled them to an additional 55.6 acres. According to the plaintiffs the deceased agreed to give them 100 acres for all the payments that they had made and that was what informed the application to the land control board for sale of 100 acres approximately 40.7 Hectares. The Land Control Board gave its consent for sale of 100 acres to the plaintiffs on 29th August 2002 on the basis of the application for consent dated 20th August 2002 which was duly signed by the deceased.

18. Although the defendant in his defence averred that his father, the deceased did not voluntarily participate in processing the consent of the Land Control Board as he was sickly at the time, it is evident that the application for consent was duly signed by the deceased and there is no evidence to suggest the deceased lacked capacity to sign or to understand that which he was signing.

19. The application to the Land Control Board dated 20th August 2002 was specific that the sale was to the plaintiffs for part of LR No.10317/14 measuring 100 acres or 40.7Ha. The application was signed by the plaintiffs and the deceased. This application was after the agreement dated 8th May 2000 denoting that the deceased and the plaintiff had agreed to translate the extra payment of Kshs.1,112,264/55 over and above the initial consideration for 50 acres to extra land of 50 acres to make an aggregate of 100 acres. The deceased notwithstanding the agreement of sale with the plaintiffs entered into in 1989 and 2000 respectively went ahead to make an application for consent to the Land Control Board. In my view the act of the deceased in applying for the consent of the Land Control Board on 20th August 2002, as he did, after the agreements had lapsed, had the effect of renewing, recognizing and validating the agreements. In my opinion where both parties to an agreement of sale of land combine to make an application for land board consent whether the period of six months prescribed under the Land Control Act Cap 302 Laws of Kenya has lapsed, their act constitutes a waiver of the requirement and the lapsed agreement is given a fresh lease of life. The contracting parties are the owners of the agreement and as long as they are co-operating there should be nothing to prevent them from completing their agreement.

20. In the present matter it does appear that the defendant’s deceased father was intent on completing the transaction with the plaintiffs and to that end even went to the extent of subdividing the land and having the plaintiffs portions F and C identified which both aggregated 100 acres. Following the subdivision he processed the Land Control Board consent in favour of the plaintiffs for the portion of 100 acres. Unfortunately, he died just a few months after the consent was given before the transaction was completed. The son who is the defendant and the administrator wants to reverse what his father had agreed to and had initiated the process of completing. I am of the view that would be

inequitable and the court would not condone that. The deceased intention was unequivocal that he desired to have the transaction completed.

21. In the present matter there is uncontroverted evidence that the plaintiffs initially purchased a portion of 50 acres vide the agreement of 3rd October 1989 and have properly been awarded the same by the succession court. The evidence that the plaintiffs paid an extra Kshs.1,112,264/55 to the deceased which was converted to an extra 50 acres pursuant to the agreement of 8th May 2000 is corroborated by the fact that the deceased together with the plaintiffs applied for consent from the Land Control Board for a portion of 100 acres which consent was given. From the date the consent of the Land Control Board was given the deceased and now the defendant as administrator held a portion of 100 acres out of LR No.10317/14 in constructive trust for the plaintiffs and the defendant is obligated to transfer such portion to the plaintiffs.

22. The defendant did not participate in the hearing. I have considered the defence put forth by the defendant which principally was that the sale transactions were null and void for want of valid consent. I have held that the deceased participated in processing the consent of the Land Control Board for 100 acres in favour of the plaintiffs in August 2002. Even if the agreements had lapsed for purposes of the Land Control Act, the deceased action of lodging an application for the consent of the Land Control Board validated the agreement. The deceased in making the application for consent was affirming that he was prepared to complete the transaction after the plaintiffs had honoured their part of the bargain. If he had not unfortunately died, most probably the transaction would have been finalized without any hitch. I see no basis why the plaintiffs should not be facilitated to get what they were entitled to get save for the untimely demise of the deceased.

23. Upon a careful evaluation and analysis of the evidence I am satisfied the plaintiffs have proved their claim on a balance of probabilities. However, though the plaintiffs have made a claim for 55.6 acres after they were awarded 50 acres in High Court Succ. Cause No.3270 of 2003, it is evident that during the lifetime of the deceased they had agreed to get an aggregate of 100 acres being in respect of the initial agreement for 50 acres and the extra payment of Kshs1,112,264/55 that they made which was prorated in terms of land. The application to the land Control Board dated 20th August 2002 duly signed by the plaintiff and the deceased indicated the land purchased was 100 acres and confirmed the compromise and/or agreement struck by the parties. The court will go by what is on the Land Control Board application forms as that is the land the plaintiffs would have got if the transaction had been progressed to completion by the deceased as he intended.

24. In the premises the court enters judgment in favour of the plaintiffs in the following terms:-

a. That in addition to 50 acres awarded to the plaintiff in Nairobi HC Succ Cause No.3270 of 2003, the plaintiffs are separately entitled to a further portion of 50 acres (both aggregating 100 acres) to be excised from L.R No. 10317/14 Naivasha registered in the name of Njoka Wa Kioriah (deceased).

b. The defendant is hereby ordered to subdivide and cause to be transferred to the plaintiffs a portion of 50 acres out of LR No.10317/14 being the commensurate land equivalent in respect of the prorated overpayment of Kshs.1,112,264/55 over and above the initial purchase price of Kshs.1,000,000/=

c. The plaintiff to be granted vacant possession of the 50 acres to be excised from LR NO.10317/14 within 90 days from the date of this judgment failing which eviction to issue on application of the plaintiffs

d. The costs of the suit are awarded to the plaintiffs.

JUDGMENT DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 15TH DAY OF JULY 2021

J M MUTUNGI

JUDGE