



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC APPEAL NO. 4 OF 2019

MARGARET WAIRIMU KURIA (Suing as the Administrator of the

Estate of the late Virginia Wanjiku Muritu).....**APPELLANT**

VERSUS

PHILIP WAWERU KURIA.....**RESPONDENT**

(An appeal from the judgment of the Chief Magistrate's Court at Nakuru delivered by Hon J.B. Kalo (C.M) on 18th December 2018 in Nakuru CMC Civil suit No 976 of 2008, PHILIP WAWERU KURIA -Vs- Virginia Wanjiku Muritu).

J U D G M E N T

1.This appeal is against the judgment and decree in Nakuru Chief Magistrate's Court Civil case No.976 of 2008 delivered by Hon. J.B. Kalo CM on 18th December 2018. The Respondent, Philip Waweru Kuria who was the plaintiff in the suit before the subordinate court instituted the suit vide a plaint dated 25th September 2008. In the plaint the respondent sought the following orders:-

(a) A perpetual injunction restraining the Defendant by herself and/or her servants, agents children or workmen from entering occupying, remaining in occupation or otherwise interfering with Title No. Bahati/Kabatini Block1/2099 or any portion thereof.

(b) An eviction order for removal of the defendant and her agents, servants, children from the portion of the parcel of land she is occupying forming part of Title No. Bahati/Kabatini Block1/2099 and an order for demolition of any structures erected by the defendant.

(c). Mense profits.

(d) Costs of this suit.

(e) Interest on (c) and (d) above at court rates.

(f) Any other or further relief as this honourable court may deem fit to grant.

2. The appellant, Virginia Wanjiku Muritu, who was the defendant in the suit before the subordinate court appeared and filed a statement of defence dated 28th October 2008 in person. The defendant denied the contents of the plaint and averred she had purchased from the respondent a portion of land measuring 100 ft by 50 ft which was to be excised from land parcel Title No.Bahati/Kabatini Block1/2099. She claimed she paid the full purchase price of Ksh.70,000/= and took possession and occupation consequent to the purchase. The statement of defence was amended and further amended on 21st April 2013 and 2nd March 2017 respectively and the appellant pleaded a counterclaim where she sought to have the respondent enjoined from interfering with the portion of land she had purchased from him and to further have the respondent ordered to execute all the necessary and appropriate documents to effect the transfer of the plot to her.

3. From the record the matter before the lower court was part heard before Hon. Moranga, PM who took the respondent's and the appellant's evidence. Hon J B Kalo CM took the evidence of the appellant's witnesses and prepared and delivered the judgment the subject of the present appeal. By the judgment the learned trial magistrate held that the respondent had proved his case against the appellant and that the appellant had failed to prove her counterclaim. The learned trial magistrate ordered the appellant to vacate from the portion of land parcel Bahati/Kabatini Block 1/2099 that she was in occupation of within sixty (60) days of being served with the order failing which an eviction order against her to issue.

4. The appellant being dissatisfied and aggrieved by the said judgment has appealed to this court listing a total of 13 grounds of appeal which are reproduced hereunder:-

1. *That the trial magistrate erred in law and in fact in disregarding the appellant's evidence adduced, the submissions filed and the authorities in support hence arriving at the erroneous finding.*
2. *That the trial magistrate erred in law and in fact in failing to consider the demeanor and contradictory evidence of the respondent in giving his testimony vis-a-vis the unshaken corroborated evidence of the appellant hence arriving at an erroneous finding.*
3. *That the trial magistrate erred in law and in fact in failing to consider the appellant's age, health, memory and the fact that he never saw and/or heard the evidence of the appellant hence arriving at an erroneous finding.*
4. *That the trial magistrate erred in law and in fact in disregarding the corroborative evidence tendered by the appellant's witnesses touching on the subject matter hence arriving at an unfair determination.*
5. *That the trial magistrate erred in law and in fact in considering the standard of proof expected of the respondent and his failure to discharge the same hence arriving at an unfair determination.*
6. *That the trial magistrate erred in law and in fact in holding that the appellant caused a breach in the contract between herself and the respondent despite evidence to the contrary.*
7. *That the trial magistrate erred and in fact in failing to find that the respondent in receiving payments after the agreed period and by allowing the appellant to remain on the suit property since 1995 amounted to acquiescence of his rights over the suit property and/or variance of the terms of the initial agreement between the appellant and himself.*
8. *That the trial magistrate erred in law and in fact in failure to consider the constructive trust created in favour of the appellant by the sale agreement and subsequent payment made as well as long possession, occupation and development of the suit land by the appellant.*
9. *That the trial magistrate erred in law and in fact on holding that failure to procure the consent of the Land Control Board rendered the contract void.*
10. *That the trial magistrate erred in law and in fact in holding that transfer of the suit property could not be done after the expiry of the six months statutory provision if the Land Control Board Act Cap 302 Law of Kenya despite clear provisions within the said Act providing for extension of the said period.*
11. *That the trial court erred in its selective interpretation of the decision it relied upon in support of the doctrine of Section 6 of Cap 302 Laws of Kenya in **Willy Kimutai Vs Michael Kibet (2018) eKLR** hence arriving at an erroneous finding and holding.*
12. *That the trial magistrate failed in law by failing to render substantive justice to the parties as enshrined in Article 159 (2) (a) of the Constitution.*
13. *That the trial magistrate failed in law by failing to uphold the principle of equity in determining the suit herein as enshrined in Article 10 (2) (b) of the constitution hence arriving at an erroneous finding.*

5. Grounds of appeal 1 to 6 challenge the learned trial magistrate's analysis and evaluation of the evidence while grounds 7 to 13 basically challenge the trial Magistrate's appreciation and application of the facts and the law.

6. To contextualize the appeal it is necessary to recap, albeit, in brief the facts and the evidence presented before the lower court. Before the lower court the respondent vide the plaint had pleaded that he was the registered owner of land parcel Title No. Bahati/Kabatini Block 1/2099 and that in 1995 the appellant offered to purchase a portion of his land and they entered into a mutual agreement. The respondent pleaded he permitted the appellant to occupy the portion of land but averred that no consent of the land control board was sought and/or obtained for the sale transaction. The respondent further pleaded that in December 2005, the appellant commenced construction of semi-permanent structures contrary to the respondent's wishes which prompted the respondent to withdraw his permission for the appellant's occupation of his land and henceforth the appellant became liable to pay rent and/or mesne profits for unlawful occupation. The respondent contended that to the extent there was no formal conveyance of the portion he had agreed to sell to the appellant, the appellant remained liable to pay to the respondent annual rent for the use of the land assessed at the rate Kshs.20,000/= per annum.

7. The appellant vide the amended defence and counterclaim averred that she paid the full consideration for the plot, and that her occupation and possession was not temporary but as the beneficial owner. She averred that the respondent neglected to make the appropriate application for the consent of the land control board but asserted that she had taken possession and effected development on the portion of the land. She sought orders that the respondent be required to execute all the necessary documents to effect the transfer of the portion of land to her and for the respondent to be restrained from interfering with her peaceful and quiet possession of the land.

The Evidence of the Parties

8. The respondent testified as the sole witness in support of the respondent's case. In his evidence he admitted that he had entered into a sale

agreement for a sale of a portion of 50' X 100' from his parcel of land Bahati/Kabatini Block1/2099 measuring 0.65 at the consideration of Ksh70,000/= hectares. He stated the appellant paid a sum of Kshs.60,000/= leaving a balance of Kshs10,000/= which she never paid. The respondent stated that he made a formal demand to the appellant to pay the balance but she failed to pay. He stated he cautioned the appellant against effecting any permanent developments as he had not fully paid the purchase price. He denied that he had authorized his wife and/or any agent to receive any payment of the purchase price on his behalf. The respondent admitted that the appellant had constructed structures on the portion of land but he objected to Kenya Power & Lighting Company connecting electricity to the structures since the appellant had not fully paid the purchase price.

9. The appellant testified as DW1 and it was her evidence that she purchased a portion of land from the Respondent at the consideration of Kshs.70,000/= which she fully paid, albeit, in installments. She stated she paid some of the money directly to the respondent and the balance through his wife, one Jacinta. It was her evidence that she paid the respondent's wife Kshs.7,000/= in the presence of witnesses while she had earlier paid the respondent Kshs.60,000/= in two instalments of Kshs.30,000/= each.

10. DW2 Margaret Wairimu Kuria was the Appellant's daughter. She testified that her mother was sold a plot by the respondent in 1995 at the consideration of Kshs.70,000/= . She stated her mother paid Ksh.30,000/= in March 1995 and a further sum of Kshs.30,000/= on 14th April 1995 which left a balance of Kshs.10,000/=. It was her further evidence that a sum of Kshs6,000/= was paid to the respondent through one Gichuri and Kshs6,000/= was paid to the respondent's wife, Jancita Wanjiku which she duly acknowledged on 27th June 2000. She testified that the payment to the respondent's wife was the final payment of the purchase price. It was DW2's further evidence that they had lived on the portion of land since 1995 when they purchased the same though the respondent had refused and/or failed to apply for the consent of the land control board to enable the transfer to her mother to be processed . The witness in cross examination maintained that her mother paid Kshs4,000/= through Frankana Agencies who passed the money to the respondent.

11. DW3 Francis Ngene Gichuri testified that he was an estate agent and that he knew both the respondent and the appellant. He affirmed that the respondent sold to the appellant a plot 50' by 100' at Kshs70,000/=. The witness testified that he received Ksh.5,500/= from the appellant to pay to the respondent. He said he paid the respondent Kshs.2,000/= on 11th July 1996 and another Kshs.2,000/= on 8th April 1997 which the respondent acknowledged in writing. He stated though he was not acting as an agent for the respondent, the respondent nonetheless collected the money deposited by the appellant from him as part of the purchase price for the plot. He stated the respondent did not acknowledge the sum of Ksh.1,500/=.

12. DW4 Johnstone Kiiru Thuo testified that he was a neighbour to both the respondent and the appellant at Engashura. He testified that he was present when the appellant gave Jancita Wanjiku Ksh.6,000/= on 27th June 2000 which she acknowledged as per DEX6. He stated that Jacinta Wanjiku was wife to the respondent and she affirmed that her husband had sent her to collect the money. He affirmed that he had known Jacinta as the respondent's wife for more than 35 years since 1989. He stated that the appellant constructed a house on the plot and that was where she had been residing. He stated the appellant had planted fruit trees on the plot and kept cattle, goats and chicken thereon.

13. DW5 Jancita Wanjiku Waweru confirmed that the respondent was her husband since 1977 when they got married . She stated that the appellant bought a plot 50 by 100 from their Ngachura land for Kshs.70,000/= but she denied receiving any part of payment of the said amount. She denied having received Kshs.6000/= on 27th June 2000 from the appellant and denied she executed the acknowledgment of the same date produced as DEX6 . She said the signature appended thereon was not hers. She denied that her husband had at any time authorized her to receive any money towards the purchase of the land from the appellant on his behalf .

Submissions analysis and determination.

14. The appeal was argued by way of written submissions. Both the appellant and the respondent filed their respective submissions. The appellant submitted that she and her witnesses adduced unshaken corroborated evidence that she indeed paid the full purchase price for the plot she purchased from the respondent. She argued that she had performed her part of the bargain as far as the agreement for sale was concerned and the respondent was therefore obligated to perform his part of agreement. The appellant faulted the trial magistrate for finding that she was the one who breached the sale agreement for failure to pay the full purchase price. The appellant submitted that this finding by the learned trial magistrate was erroneous since there was overwhelming evidence that she had paid the full purchase price of Kshs.70,000/=. The appellant submitted that there was documentary evidence buttressed by her witnesses evidence that sufficiently proved the balance of Kshs.10,000/= was indeed paid to the respondent. The appellant further submitted the respondent's denial of receipt of Kshs4,000/= from DW3 was hollow as he had signed acknowledgments for the same. Equally, the respondent's wife's denial of receipt of Kshs.6000/= from the appellant was an attempt to run away from the contract. The appellant submitted the respondent's wife's denial that her signature in the acknowledgment of the money on the document dated 27th June 2000 was not hers was unbelievable since DW4 testified he and DW2 (daughter to appellant) were present when the money was paid to DW5 and she signed for it. The appellant thus submitted the claim of forgery of the documents acknowledging payment on the part of the respondent was not proved and should be disregarded.

15. The appellant submitted that notwithstanding that the balance of the purchase price of Kshs10,000/= ought to have been paid by 1st March 1995 the respondent accepted payment of Kshs.30,000/= on account of the balance on 14th April 1995 and extended time for the payment of the balance of Kshs.10,000/=. The balance of Kshs10,000/= the appellant submitted was eventually paid and acknowledged . The appellant thus submitted the provision in the agreement on the mode of payment of the purchase price was mutually varied by the parties to the agreement . The appellant finally submitted that having fully paid the full purchase price and having been granted possession and having constructed a residential home on the property the learned trial magistrate ought to have applied the doctrine of equity as now espoused under Article 10 (2) (b) of the constitution to find that a trust had been established in favour of the appellant and that the respondent held the portion of land in trust for the appellant. In support of this submission the appellant placed reliance on the cases of *Macharia Mwangi Maina & 87 others -vs- Davidson Mwangi Kagiri (2014) eKLR* and *Willy Kimutai Kitilit -vs- Michael Kibet (2018) eKLR* both decision of the court of appeal where the court held that principles of equity are applicable having regard to the circumstances of each case.

16. The respondent in his submissions submitted that the appellant had failed to prove her counterclaim and in particular that she failed to prove that she had paid the sum of Kshs.10,000/= being the balance of the purchase price. The respondent pointed to the apparent contradictory evidence of the appellant and her witnesses. He submitted the appellant could not remember how and when she paid the balance of Kshs.10,000/= to the respondent only maintaining she paid the amount in full and did not owe the respondent any money on account of the purchase price. To the contrary, DW2, DW3 and DW4 explained how the balance was paid and acknowledged in writing. The respondent submitted the learned trial magistrate made his findings following a careful analysis and evaluation of the evidence tendered and urged the court not to interfere with the findings of the lower court that it was indeed the appellant who breached the sale agreement and could not consequently be entitled to the orders sought in the counterclaim.

17. The respondent further submitted that the sale transaction having been one that related to agricultural land, the same became null and void as no consent of the Land Control Board was sought and obtained as required under the provisions of the Land Control Act, Cap 302 Laws of Kenya. He submitted further that the doctrine of constructive trust was inapplicable in the present matter and hence argued the concept as applied in the court of appeal cases of *Machari Mwangi Maina & 87 others -vs- Davidson Mwangi Kagiri (2014) eKLR* and *Willy Kimutai Kitilit -Vs- Michael Kibet (2018) eKLR* was not applicable in the circumstances of the present case.

18. I have reviewed the evidence adduced and the rival submissions of the parties. I now turn to consider the merit or otherwise of the appeal. This being a first appeal this court is under an obligation and indeed is under a duty to consider and re-evaluate the evidence adduced before the lower court to determine whether or not the decision reached by the trial court was justified. This principle was established by the Court of Appeal in the case of *Selle & Another -vs- Associated Motor Boat Co. Ltd & others (1968) EA 123* where the court stated:-

“ - this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect—”

19. In this appeal as pointed out earlier, the primary issue is whether there was an agreement of sale between the respondent and the appellant. On the evidence there can be no dispute that there was indeed a sale agreement for sale of a portion of land by the respondent to the appellant. On the evidence the respondent did not deny the agreement but averred that the appellant did not pay the full purchase price and he therefore rescinded the agreement on account of breach on the part of the appellant. The respondent's contention was that the appellant did not pay the balance of Kshs.10,000/= of the purchase price. The appellant's position was that she paid the full purchase price and that the final balance of Kshs.6,000/= was received and acknowledged by the respondent's wife on 27th June 2000 on behalf of the respondent.

20. I have carefully considered and re-evaluated the evidence tendered before the lower and I am of the view that even though the oral evidence given by the appellant appeared to be in conflict with the documentary evidence she had availed, there was compelling and overwhelming evidence as per the documents and the evidence of the appellant's witnesses DW2, DW3 and DW4 to demonstrate that the appellant indeed paid the balance of Kshs.10,000/= . It is noteworthy that the oral testimony was being adduced after more than 15 years from the time the parties entered the transaction. As can be expected, memory lapses with time and as one advances in age. The appellant was advanced in age at the time she testified in 2018 and the transaction had taken place over 20 years earlier. To the contrary the contents of documents remain unaffected by the passage of time. I have scrutinized the sale agreement dated 15th February 1995 and the payment vouchers issued by Frankana Commercial Agencies owned by DW3 dated 11th July 1996 and 8th April 1997 and it is apparent the signature on the vouchers attributed to the respondent are strikingly similar to the signatures he signed on the agreement dated 15th February 1995 and the acknowledgment of the further deposit of Kshs.30,000/= on 14th April 1995. These documents were filed in court on 15th May 2013 and the respondent was aware the appellant was placing reliance on them. In the face of the witnesses who stated they were present when the respondent signed the vouchers, it was not sufficient for the respondent to merely state the signatures were not his. If he desired to prove the signatures were forgeries, expert evidence from a hand writing expert would have been required. In the circumstances I would hold and find that the respondent indeed received the sum of Ksh4,000/= acknowledged through the vouchers in part payment of the purchase price.

21. In the same vein I hold and find that the respondent's wife Jacinta Wanjiku Waweru received the sum of Ksh6,000/= on 27th June 2000 on behalf of her husband. The acknowledgment of even date was signed by Jacinta in the presence of DW2, Margaret Wairimu and DW4, Johnstone Kiiru Thuo. The respondent's wife who testified as DW5 merely denied the signature on the document DEX6 was not hers averring that it was a forgery. The document had been disclosed way back in 2013 when the bundle of documents were filed. In the face of the evidence of the witnesses who were present when DW5 signed DEX6 it would not have been sufficient for DW5 to merely state the signature attributed to her was not hers. In the context of this matter, it does appear, the respondent and his wife contrived to deny that the balance of the purchase price was paid by the appellant with the objective of walking out of the agreement that the respondent and the appellant had freely entered into and in respect whereof the appellant had fully satisfied her part of the bargain. There was no suggestion that DW2, DW3, and DW4 had any reason to give false evidence against the respondent and in favour of the appellant.

22. Had the learned trial magistrate properly analyzed the evidence, he ought to have come to the conclusion that the appellant had fully paid the purchase price for the portion of land she was purchasing. The respondent allowed the appellant possession of the portion of 50' by 100' even before the appellant completed paying the purchase price. The appellant constructed her homestead and had since 1995 resided on the portion of land with her family. After the appellant paid the balance of the purchase price to the respondent she became the equitable owner of the portion of land henceforth and applying the principles of equity espoused by the court of Appeal in the cases of *Macharia Mwangi Maina & 87 Others -vs- Davison Mwangi Kagiri (2014) eKLR* and *Willy Kimutai Kitilit -vs- Michael Kibet (2018) eKLR* the respondent was constituted a trustee of the portion of land in favour of the appellant.

23. In the two decisions the court of appeal considered the instances where the provisions of the Land Control Act would be held to be inapplicable and where the doctrine of constructive trust would be held to be applicable. In the *Macharia Mwangi Maina & 87 others* case (supra) the court observed as follows at paragraph 20 of the judgment:-

“ -- In the instant case, it was the respondent who put the appellants in possession of the suit property not as licensees but with the intention that he was to transfer individual plots purchased by them. The respondent went ahead and received the purchase price. We are of the considered view that the doctrines of proprietary estoppel and constructive trust are applicable and the respondent cannot renege. As observed in **Llyolds Banks PLC -vs- Rosset (1991) AC 107, 132** a constructive trust is based on “common intention” which is an agreement, arrangement or understanding actually reached between the parties and relied on the act by the claimant.

In the instant case there was a common intention between the appellant and the respondent in relation to the suit property. Nothing in the Land Control Act prevents the claimant 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”.

24. At paragraph 23 of the same judgment the court stated:

“ The transaction between the parties is to the effect that the respondent created a constructive trust in favour of all the persons who paid purchase price. We are of the considered view that a constructive trust relating to land subject to the Land Control Board is enforceable. Our view on this aspect is guided by the overriding objectives of this court and the need to dispense substantive and not technical justice”.

25. The court of Appeal differently constituted reinforced the views expressed in the *Macharia Mwangi* case *supra* in the later case of **Willy Kimutai Kitilit -vs- Michael Kibet (2018) eKLR** where the court held:-

“ 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 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”.

26. The court further provided guidance on the application of “ equity” as one of the national values captured under Article 10(2) of the constitution when it stated thus;-

“ There is another stronger reason for applying the 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 which binds the courts in interpreting any law (Article 10 (1) (b). Further, by Article 159 (2) (e), the court in exercising judicial authority are required to protect and promote the purpose and principles of the constitution. More over 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”.

27. I am aware of the decision in the court of Appeal case of **David Sironga Ole Tukai -vs- Francis Arap Muge & 2 others (2014) eKLR** which the respondent cited to illustrate that the same court of appeal had reached a different decision respecting the application of equitable principles in regard to land transactions that are subject to the Land Control Act. In the *Sironga* case *supra* the court of Appeal was categorical that application of equitable doctrines could not be resorted to where there were express provisions of the law such as the Land Control Act which expressly provided that a controlled transaction is void for all purposes where the consent of the Land Control Board is not obtained within the prescribed period under the Act.

28. The decisions in the cases of **Macharia Mwangi Maina & 87 others -vs- Davison Mwangi Kagiri (2014) eKLR** and **Willy Kimutai Kitilit -vs- Michael Kibet (2018) eKLR** have not been overruled. In fact in the **Willy Kimutai** case (*supra*) the bench of the court was alive to and reviewed both the earlier case of **Macharia Mwangi Maina** (*supra*) and the **David Sironga** case (*supra*) and opted to uphold the position taken in the **Macharia Mwangi Maina** case (*supra*). Faced with the scenario where there are two contrasting court of appeal decisions I have to make a choice of which of the decisions to follow and given the facts and circumstances of the present matter I would opt to follow and apply the rationale enunciated in the **Macharia Mwangi Maina** case (*supra*) and **Willy Kimutai Kitilit** case (*supra*)

29. Having determined the twin issues whether or not the appellant had paid the full purchase price; and whether there was a constructive trust established in favour of the appellants, that should be sufficient to dispose of the appeal. After carefully re evaluating the facts and applicable law, I am satisfied that the learned trial magistrate erred in his evaluation and analysis of the evidence thereby reaching an erroneous decision.

30. In consequence, I allow the appeal and set aside the judgment delivered on 18th December 2018 by Hon J B Kalo, Chief Magistrate in its entirety and substitute therefore a judgment dismissing the suit filed by the respondent in the lower court and allowing the counterclaim by the appellant in the lower court.

31. The appellant will have the costs of the suit before the lower court together with the costs of the appeal .

Judgment dated signed and delivered virtually at Nakuru this 30th day of September 2021.

J M MUTUNGI

JUDGE