



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELC APPEAL NO. 53 OF 2019**

**GEORGE KENNEDY ODHIAMBO.....APPELLANT**

**VERSUS**

**ANDREW ODUOR OTIENO (Sued as the administrator of**

**the estate of Penina Gaudencia Odhiambo).....RESPONDENT**

***(Being an appeal from the Judgment and decree of the Hon. J. n. Wambilyanga given at Kisumu on 8<sup>th</sup> November 2019 at Kisumu Civil Suit No. 11 of 2018)***

**JUDGEMENT**

George Kennedy Odhiambo (hereinafter referred to as the Appellant) has appealed against the Judgment of Hon. J.N. Wambilyanga Senior Resident Magistrate in suit no. Kisumu Civil Suit No. 11 of 2018 dated 8/11/2019. The suit in the Lower Court revolved on property No. Kisumu/Nyalenda "A"/1118 which was registered in the name of Penina Gaudencia Odhiambo (deceased).

In the lower court, Andrew Oduor Otieno (*hereinafter referred to as the Respondent*) filed a plaint against the appellant seeking a permanent order restraining the appellant from interfering with land parcel No. Kisumu/Nyalenda "A"/1118. He also sought costs of the suit.

The Respondent's contestation was that his mother Penina Gaudencia Odhiambo was the duly registered owner of land parcel No. Kisumu/Nyalenda "A"/1118. That prior to her death, his mother was indebted to one lady known as Herina Apiyo Oluoch who is now deceased. That his late mother had constructed/developed the suit land in the year 1985 and the houses on the suit property were rental houses of his mother and used to collect the rents from her tenants on monthly basis.

He further stated that when his late mother Penina Gaudencia Odhiambo became sick she was unable to repay the amount which was lent to her by Herina Apiyo Oluoch and therefore agreed that Herina Apiyo Oluoch was to collect rents from the tenants in the plot to recover the debt owed. He claimed that the appellant without any lawful authority and without letters of Administration of the Estate of the late Herina Apiyo Oluoch (Deceased) invaded and interfered with the land Parcel No. Kisumu/Nyalenda "A"/1118, misrepresenting himself as the son to the late Herina Apiyo Oluoch a matter which the appellant knows very well and within his own knowledge to be false. The respondent averred that the late Herina Apiyo Oluoch did not have a son by the name of the appellant, and the claim by the appellant was strange and unfounded.

That due to the appellants conduct and to his illegal land claim, the respondent prayed for a permanent injunction from the lower court to restrain the appellant from interfering with the land parcel No. Kisumu/Nyalenda "A"/1118.

In his defence in the lower court, the appellant, the 2<sup>nd</sup> born in the family of Mr. Robinson Oluoch Ojal and Mrs. Herina Apiyo Oluoch both deceased states that their mother bought a portion of land parcel No. Kisumu/Nyalenda "A"/1118 from Penina Gaudencia Odhiambo and later developed it in the year 1985 by building a semi-permanent structure containing four rooms for residential purposes which are still there to date.

He states that during their stay with their mother, some relatives also lived with them on the suit plot No. Kisumu/Nyalenda "A"/1118 and that he used to go to St. Mark Nyabera Primary school until he did his K.C.P.E exams in the year 1990. That this matter has not been determined in the Family Division Court and what Andrew Oduor Otieno is doing is just a duplication of cases.

In her determination, the trial court rightly found that the respondent's mother was the 1<sup>st</sup> registered proprietor of the said parcel of land and that the issue for determination was whether part of the land belonged to the Appellant's family.

The Learned Magistrate found that there was a sale agreement which was in writing, signed as required and was executed on 20/8/1991. The Learned Magistrate found that the sale agreement existed but there was no consent of the Land Control Board for the sale of the parcel of

land. Judgment was entered for the Respondent and a permanent injunction was issued against the appellant not to interfere with Land Parcel No. Kisumu/Nyalenda "A"/1118.

The appellant appealed to this court on grounds:

- 1. The Learned Magistrate completely misunderstood the evidence before her, wrongly analysed the evidence thus ordering the Appellant, his agents, workmen, assignees or heirs to permanently not to interfere with land parcel No. Kisumu/Nyalenda "A"/1118,**
- 2. The Learned Magistrate erred in law and fact by failing to appreciate the fact that there was a sale agreement on record, the totality of the evidence before her and thus reaching to a conclusion that was contrary to the evidence before her.**
- 3. The Learned Magistrate erred in law in failing to follow the law<sup>3</sup> as established through judicial precedent.**
- 4. The Learned Magistrate erred in law and in fact in considering frivolous, vexatious and unsupported facts.**
- 5. The Learned Magistrate totally misunderstood and wrongly evaluated the evidence before her and therefore arrived at a wrong conclusion.**

The appellant prays for the appeal be allowed and the Judgment dated 8/11/2019 be set aside with costs to the Appellant.

This being a first appeal to this court, the duty of the court is to reconsider the evidence and evaluate and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect.

The gravamen of the Appellant's submissions is that there was a valid sale agreement that was not rescinded and therefore the Learned Magistrate erred in holding that the parties to the sale agreement had not intended to sell the suit land. That a court of law can't rewrite a contract between the parties and that the parties are bound by the terms of their contract unless coercion fraud or undue influence are pleaded and proved. The appellant argues that the Magistrate ought to have ordered specific performance.

The Appellant further argued that the Respondents case was time barred as Penina Gaudencia sold the suit parcel in 1991 to Herina Apiyo Oluoch and yet the matter was brought to court in 2018 twenty seven years after the sale of property.

Moreover, the appellant submits that there was no evidence of fraud on the part of the appellant and that fraud had not been pleaded. The appellant claims adverse possession in her submissions.

The Respondent raises issues based on technicalities that the decree or order appealed from **as required under the provisions of the law, Civil Procedure Act Section 65, 65 (A) and 78 (B) of the Act has not been included in the record, failure to comply to the stated provisions renders the appeal herein incompetent and a nullity.**

**Order 42 Rule 2 of the Civil Procedure Rules 2010 requires the appellant to comply and file certified copy of the decree or order appealed against together with the Memorandum of Appeal or the same should be filed as soon as possible after the Memorandum of Appeal has been duly filed. This essential point of law has been ignored by the appellant and therefore the appeal is not competent for argument before the Honourable Court and the same be dismissed forthwith.**

**The statement of defence which was duly filed by the appellant in the lower court is not fully on record of appeal and leaves this Honourable Court in doubt of the prayers in the defence. Despite the defence was in nature of counter claim the defendant did not accompany the statement of Defence with verifying Affidavit as required under Order 7 Rule 5 of the Civil Procedure Rules 2010.**

**Due to stated irregularities and omissions, the respondent filed Notice of Objection dated 24<sup>th</sup> September 2020 and served the same to the appellant herein praying to this Honourable Court to expunge the submission of the appellant because of the following reasons: -**

- a) On 31<sup>st</sup> August 2020 this Honourable Court granted an order that by consent the appellant to file and serve submission within 14 days and the respondent to file and serve within another 14 days, mention 28<sup>th</sup> September 2020.**
- b) The appellant breached the order of this Honourable Court and took 23 good days to file and serve, which is contrary and abuse of court process. So at all events the appellant submission be disallowed by the Honourable Court.**

I have considered the appeal, rival submissions and do find that it is clear on record that Kisumu/Nyalenda "A"/1118 was registered in the name of Penina Gaudencia Odhiambo on the 2/6/1989 as a 1<sup>st</sup> registration. It is clear that on 20/8/1991 Penina Gaudencia Odhiambo agreed to sell part of her land Parcel No. Kisumu/Nyalenda "A"/1118 measuring approximately 26 x 7 x 25 x 13 to one Herina Apiyo Oluoch. The agreed purchase price was KShs. 12,000. The late Gaudencia received all the amount and agreed to appear before the Land Control Board for consent.

The agreement was witnessed by 4 persons and was executed in compliance with Section 3 of the Land Control Act Cap 23 laws of Kenya

which provides:

The only short coming was that the consent of the Land Control Board in compliance with the provisions of Section 6 (1) of the Land Control Act was not obtained.

Section 6 (1) of the Land Control Act provides.

**(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;**

**(b) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 (L.N. 516/1961) for the time being apply;**

**(c) Deleted by Act No. 22 of 1987, Sch. 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.**

It is clear that the late Penina Gaudencia Odhiambo entered into a sale agreement with the mother of the respondent Henina Apiyo Aluoch. It is clear from the evidence that the appellant's mother took possession in 1991. The respondent alleges that the agreement was for the repayment of a debt of Kshs. 4,000 but there is no such evidence. The only evidence available is that the mother to the Respondent sold part of the property to the mother of the appellant.

The failure by the Land Control Board to give consent for the transaction or sale does not invalidate the sale agreement where the buyer has been given possession of the part he purchased and that the same has been developed by the buyer.

The court of Appeal has invoked the principles of Equity to do justice to buyer who purchase land but the seller fails to obtain consent of the Land Control Board.

In the case of **Willy Kimutai Kitilit v Michael Kibet [2018] eKLR** 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.

I do find that the Learned Magistrate erred in finding that the sale agreement was invalid for failure to obtain the consent of the Land Control Board as the appellant had paid the full purchase price and had taken possession.

The issues of Limitation of Actions Act, Section 7 thereof were raised in the submissions of the appellant but not pleaded in the lower court claim. Moreover, fraud and adverse possession were not issues in the lower court.

The upshot of the above is that the appeal is allowed and the Judgment of the lower court is set aside. Costs to the appellant.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 3<sup>RD</sup> DAY OF SEPTEMBER, 2021**

**ANTONY OMBWAYO**

**JUDGE**

*This Judgement has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2019.*

**ANTONY OMBWAYO**

**JUDGE**