REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC. APPEAL NO. 8 OF 2018

MARY NJERI NJOROGE.....APPELLANT

VERSUS

BENJAMIN SIRONKA METOYU.....1ST RESPONDENT

DAVID LESHOO METOYU.....2ND RESPONDENT

(Being an Appeal from the Judgment and Order of the Resident Magistrate at Kajiado

(Hon. E M Mbicha) dated 23rd May, 2014 in Kajiado CMCC No. 234 of 2011

consolidated with Kajiado CMCC No. 235 of 2011.)

JUDGEMENT

Introduction

By a Memorandum of Appeal dated the 20th June, 2014, the Appellant appeals against the whole of the Judgment delivered by Hon. E M Mbicha Resident Magistrate's Court at Kajiado on the 23rd May, 2014. The genesis of this appeal is the Judgement of the Resident Magistrate Hon. E M Mbicha in the Kajiado CMCC No. 234 of 2011 consolidated with Kajiado CMCC No. 235 of 2011, where the Court dismissed the Appellant's Counterclaim and entered judgement in favour of the Respondents in the following terms:

> 1) The Defendant to vacate the Plaintiffs' parcel of land No. LOITOKTOK/NGAMA/2053 and LOITOKTOK/NGAMA/2054 within a period of Four (4) months from the date hereof failure to which eviction orders to issue against the Defendant to be enforced with the assistance of the officer commanding ILLASIT Police Station thereafter; during this period, the Defendant should not cut down trees or burn charcoal on the said parcels of land.
>
> 2) Thereafter a permanent injunction restraining the Defendant by herself, servant, agent or otherwise whatsoever from entering into the subject parcel of land, cutting trees, burning charcoal, cultivating, or interfering with the Plaintiffs right of occupation, possession and/or use of title or any part thereof of the parcels of land LOITOKTOK/NGAMA/2053 and LOITOKTOK/NGAMA/ 054.

There will no award on general or exemplary damages.

There shall be no order as to cost.

This orders apply to this two respective matters herein above captured.

The Appellant being dissatisfied by the whole Judgement filed an appeal at the Environment and Land Court (ELC) in Machakos which matter was later transferred to the ELC Kajiado on 13th April, 2018.

The Memorandum of Appeal contained the following grounds;

> 1. That the Learned Magistrate erred in law and in fact entirely allowing the Respondents suit for Permanent & Mandatory Injunction when it was obvious they had proved his case as required in **Giella Vs Cassman Brown** on injunctions.
>
> 2. That the Learned Magistrate erred in law and in fact by misdirecting herself and failing to consider, appreciate and uphold the Appellant's Counterclaim, evidence and submissions and subsequently issuing orders of Permanent & Mandatory Injunction as

prayed for by the Respondent.

3. That the Learned Magistrate erred in law by imposing Jurisdiction on the court whereas the court lacked the same to entertain and hear the counterclaim.

4. That the Learned Magistrate erred in law and in fact by failure to appreciate the special circumstances where mandatory injunctions are granted and also failure to state in the Ruling, whether this was a special circumstance as provided for in law.

5. That the Learned Magistrate erred in law and in fact in directing his mind to matters that were not directly in issue and extraneous and thus overlooking the main claim and the cause of action by the Appellants.

6. That the Learned Magistrate erred in law and in fact disregarding the evidence of the Appellant.

The Appellant proposes that the Honourable Court grants the following:

a) An Order setting aside the Honourable Magistrate's Judgement and Order dated 23rd May, 2014.

b) An Order that the Respondents do pay the costs of this Appeal.

The Appeal was canvassed by way of written submissions.

Submissions

The Appellant in her submissions contended that she has been on the suit land from 1993 hence acquired the land through adverse possession. She averred that she did not file a suit in the High Court to seek orders of adverse possession as she had to await the outcome of the lower court suit. Further, that out of abundant caution she was avoiding the issue of the other party claiming her suit was res judicata. She insists the trial magistrate did not have jurisdiction to deal with the issue of adverse possession. She reiterates that the Respondents had not proved their case and their title deeds were not processed out of good will. She states that there were no special circumstances to warrant the granting of a mandatory injunction. To buttress her averments, she relied on the following decisions: **Satya Bhama Gandhi v Director of Public Prosecutions & 3 Others (2018) eKLR; Supreme Court In the matter of Interim Independent Electoral Commission (2011) eKLR; Samuel Kamau Macharia & Another V Kenya Commercial Bank & 2 others – Supreme Court Civil Appeal (Application) No. 2 of 2011; Wambugu V Njuguna (1983) KLR 173; Mbira V Gachuhi (2002) IEALR 137; Maweu Vs Liu Ranching and Farming Cooperative Society (1985) KLR 430; Samuel Miki Waweru Vs Jane Njeri Richu Civil Appeal No. 122 of 2001; and M'ikiarai M'rinkanya & Another V Gilbert Kabeere M'mbijiwe (2007) eKLR.**

The Respondents in their submissions insist the Appellant ought to have filed a suit in the High Court which has competent jurisdiction to deal with the issue of adverse possession. They reiterate that they demonstrated to the satisfaction of the Court to warrant the granting of Orders as the balance of convenience tilted in their favour. Further, the issue of jurisdiction as raised by the Appellant is an afterthought. They claim they obtained title to the suit lands on the 1st August, 2008 following succession proceedings in Succession Cause No. 2609 of 2002. Further, that the Appellant has not tendered evidence to show that the Respondents or the deceased were dispossessed of their title to the suit land. They reiterate that the Appellant has never been in actual physical possession of suit land save for acts of trespass committed around 2007.

To support their arguments, they relied on the following decisions: **Simiyu Timotheo Khangasi & Jephether Wekhuyi Masinde (2019) eKLR; Mary Wamuyu Mwangi Vs Joseph Kahara Thinwa (2015) eKLR; Hamisi Juma Mbaya V Asman Amakecho (2018) eKLR; and Virginia Wanjiku Mwangi V David Mwangi Jonathan Kamau (2013) eKLR.**

Analysis and Determination

Upon consideration of the materials presented in respect to the Appeal herein including the Memorandum of Appeal, Record of Appeal and parties' submissions, I have summarized the following issues for determination:

· Whether the Appellant is entitled to the three (3) acres of land from LOITOKTOK/NGAMA/2053 and LOITOKTOK/NGAMA/2054 owned by the Respondents.

· Whether the Appeal is merited.

As to whether the Appellant is entitled to the three (3) acres of land from LOITOKTOK/NGAMA/2053 & LOITOKTOK/NGAMA/2054 owned by the Respondents. It is not in dispute that the Respondents are the owners of land parcel numbers LOITOKTOK/NGAMA/2053 and LOITOKTOK/NGAMA/2054. Further that these two parcels of land were a subdivision from LOITOKTOK/NGAMA/548. It is further not in dispute that the Appellant occupies a portion of both parcels of land which the Respondents claim is an act of trespass since the year 2007. The Appellant in the lower court produced a Sale Agreement dated the 16th January, 1993 which she entered into with the deceased SIMEON METOYU MASHAREN who passed away in 1994 and was the father to the Respondents. The Appellant in the lower court testified that she took possession of the suit land from 1993 when she purchased it and it is the deceased who showed her the said portion of land. She insisted that she has been cultivating the said land since she took possession thereon. She even produced a copy of the Bills from the Kenya Power & Lighting to confirm she connected power to a structure she has constructed on the suit lands and continued to pay the electricity bills. The Respondents in their evidence in the lower court denied that their father sold three acres of land to the Appellant, and insisted KPLC connected Power to the disputed parcel of land without their knowledge or permission. I note in the testimony of one witness CHRISTOPHER NJOROGE KIMANI, he confirmed that in 1997, the Appellant in the company of the Respondents approached him with

regard to subdivision of LOITOKTOK/NGAMA/548 and informed him there were ongoing succession proceedings in court. Further, that he visited the said land in the presence of the parties and demarcated three (3) acres but they told him issue of title would be dealt with later on. It was his further testimony that the Defendant (Appellant) was in possession of the land which was between the two Plaintiffs lands and there was a small timber house which he was informed belonged to her. The Appellant also sought for orders of adverse possession in her counterclaim.

The trial Magistrate after considering the evidence entered judgement in favour of the Respondents and dismissed the counterclaim. I will proceed to reproduce an excerpt from the said judgement which states as follows: **'I have considered the evidence adduced, the vigorous cross examination, the documents adduced as evidence and the submissions herein. From the evidence adduced, I am satisfied that the Defendant has been cultivating and using the subject land from the year 1993 upon the agreement with the Plaintiffs' father on 16th January, 1993. However, there are other considerations which come into play. I wish to point out to the Land Control Act, (Cap 302) ……. The Transaction between the Defendant and the deceased SIMEON METOYO MASHAREM involved division and transfer of land falling within the Land Control Act (Cap 302) ; there was no consent which has been shown that was obtained by the parties to divide the land and transfer 3 acres to the Defendant within a period of six (6) months from 16th January, 1993 or at all. Therefore the said transaction between the deceased herein SIMEON METOYO MASHAREM and the Defendant was null and void for all intent and purposes and her defence to the Plaintiffs claim herein thereon does not hold water. The Defendant's Counterclaim is premised on adverse possession. ……I therefore hold that for the Defendant to pursue the claim of adverse possession, she had to be through Originating Summons in the prescribed form with copies of titles annexed and in the High Court; this are not procedural technicalities but substantive law.'**

From this excerpt, it is evident that the trial Magistrate indeed found that the Appellant had been on the suit land since she purchased the same from the deceased in 1993. From the proceedings, it also emerged that the Respondents were aware of the Appellant's presence on the suit land. The Learned Magistrate in his Judgement disregarded this fact and proceeded to hold that the transaction between the Appellant and the deceased was void for want of consent of the Land Control Board.

I wish to make reference to section 6 (1) (a) of the Land Control Act which 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.'**

Further, Section 38 (2) of the Land Act provides that:' **(2) Subsection (1) shall not apply to—**

> **(a) a contract made in the course of a public action;**
>
> **(b) the creation or operation of a resulting, implied or a constructive trust; or**
>
> **(c) any agreement or contract made or entered into before the commencement of this Act, provided that—**
>
> > **(i) the verbal contracts shall be reduced to writing within two years from the date of enactment of this Act; and**
> >
> > **(ii) the Cabinet Secretary shall put a notice of the requirement to reduce the contracts in writing, in a newspaper of nationwide circulation.**'
>
> While, Section 7 of the Limitation of Actions Act stipulates thus: '**An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.'**

In the Court of Appeal decision of **Willy Kimutai Kitilit v Michael Kibet [2018] eKLR**, it was 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.'**
>
> Further in the case of **Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri [2014] eKLR** the Court of Appeal observed that**: 'a constructive trust is based on "common intention" which is an agreement, arrangement or understanding**

actually reached between the parties and relied on and acted on by the claimant. In the instant case, there was a common intention between the appellants and the respondent in relation to the suit property. Nothing in the *Land Control Act* prevents the claimants 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.'

While in the case of **William Kipsoi Sigei v Kipkoech Arusei & another [2019] eKLR,** the Court of Appeal while dealing with a case with facts almost similar to the circumstances herein, held as follows:' **Taking into account the *Macharia Mwangi Maina* decision and the *Willy Kimutai Kitilit* decision alongside the circumstances of this case, we are of the view that the fact that the appellant herein, received the full purchase price for the property, allowed the 1st respondent to take possession, and for a period of at least fourteen years, let him remain on the property undisturbed, a constructive trust had been created. We agree with the English decision *Yaxley v Gotts & Another, (2000) Ch 162*, where it was held that an oral agreement for sale of property, created an interest in the property even though void and unenforceable as a contract; but the oral agreement was still enforceable on the basis of a constructive trust or proprietary estoppel. This was also the approach taken in *Macharia Mwangi Maina decision* where the court observed that the appellant had put the respondent into possession of the suit property with the intention that he was to transfer the properties purchased to them and as such, a constructive trust had been created and the appellant could not renege. We come to the conclusion that the in the circumstances of this case the equitable doctrines of constructive trust and proprietary estoppel were applicable and enforceable in regard to land subject to the Land Control Act. We therefore agree with the learned judge of the Environment and Land Court that despite the lack of consent of the Land Control Board, the doctrine of constructive trust applied to the agreement between the appellant and the 1st respondent. In the circumstances, we find that the first appellate court, made the correct decision, and we have no justification to interfere with that decision.'**

Based on my analysis above while relying on the three Court of Appeal decisions, I find that since the Respondents' father had received the purchase price; showed the Appellant the portion of land to occupy, which she did from January, 1993; insofar as there was no consent of the Land Control Board, I conclude that there was an element of part performance of the Sale Agreement. It is my considered view that since the year 1993 when the Appellant entered the suit land todate, an element of trust was created, which became an overriding interest over the said land. Insofar as the Appellant failed to obtain the necessary Consent from the Land Control Board within the required period of six (6) months, to enable her acquire the title of the three acres in her name; I find that the transaction is not void but enforceable by virtue of the doctrine of constructive trust and she is entitled to have the said three (3) acres registered in her name. On the issue of adverse possession, I find that the Learned Magistrate was correct for failing to handle it as he did not have jurisdiction to do so. In the circumstances, I find that the Learned Magistrate erred in law and in fact by entirely allowing the Respondents suit for Permanent & Mandatory Injunction when it was obvious they had not proved their case as required in **Giella Vs Cassman Brown** on injunctions. I hold that the Learned Magistrate erred in law and in fact by failing to appreciate the special circumstances where mandatory injunctions are granted and dealt with matters which were not directly in issue. I suffice to say that the Learned Magistrate by disregarding the set precedents from the Court of Appeal on constructive trust which is an equitable remedy erred in law and in fact in failing to uphold the Appellant's occupation of the suit land.

It is against the foregoing that I find the Appeal merited and will allow it. I will proceed to set aside the Judgment of the Lower Court and make the following final orders:

i. That Judgement and Decree by Honourable Mr. E A. Mbicha Resident Magistrate delivered on 23rd May, 2014 in Kajiado CMCC No. 234 of 2011 as consolidated with Kajiado CMCC No. 235 of 2011 be and is hereby set aside.

ii. The Respondents be and are hereby directed to effect transfer of the three (3) acres of land out of land parcel numbers LOITOKTOK/NGAMA/2053 & LOITOKTOK/ NGAMA/ 2054 where the Appellant occupies, within the next 90 days from the date hereof, failure of which the Deputy Registrar, Environment and Land Court Kajiado will execute the said Transfer Forms.

iii. The cost of the Appeal is awarded to the Appellant.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 6TH DAY OF OCTOBER, 2021

CHRISTINE OCHIENG

JUDGE