



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT KAJIADO

ELC APPEAL NO. E06 OF 2021

BARCLAYS BANK OF KENYA LIMITED.....APPELLANT

VERSUS

JOSEPHAT GITHINJI GICHOBII.....RESPONDENT

(being an Appeal against the Judgement and Decree of the Learned Hon. Kahuya I.M.

(Principal Magistrate) delivered on 7th October, 2020 in Kajiado

CMC ELC NO. 159 OF 2018.

BETWEEN

JOSEPHAT GITHINJI GITHOBI.....PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LIMITED.....DEFENDANT

JUDGMENT

1) This Judgement is on the Appeal from the Judgement of Hon. M. Kasera, Senior Principal Magistrate, delivered on 7th October, 2020 by Hon. I. Kahuya Principal Magistrate.

In the Judgment the respondent succeeded by being awarded (b) Ksh. 6,000,000/- being the current market value of the land that he was buying from the Appellant.

(d) Costs of the suit and interest at Court rates from the date of judgment.

2) By a plaint dated 11th July, 2017, the Plaintiff/respondent had sought for the above reliefs, among others, for what he called breach of sale of land agreement and fraud on the part of the Appellant.

3) The undisputed facts of the case are that on 15th October, 2007, the Appellant and the Respondent entered into an agreement for sale of LR. NO. KAJIADO/KITENGELA/16792 measuring approximately 0.4 hectares.

The sale was subject to the vendor obtaining the relevant Land Control Board Consent and a Court Order authorizing the sale. This consent was never obtained. The Respondent did not pay the full purchase price by the completion date but the Appellant nevertheless accepted payment outside the agreed period.

4) In the meantime, the Appellant sold the suit land to a third party by the name of Anthony Mugo Muraya. The sale to the third party was on 27/7/2008 yet on 15th March, 2012 the advocates for the Appellant namely Walker Kontos had acknowledged receipt of documents sent by the Respondent for the processing and registration of the title deed to him.

5) Dissatisfied with the Judgment of the Learned Trial Magistrate, the Appellant filed a Memorandum of Appeal dated 19th February 2021 seeking that the Appeal be allowed and the Judgment of the Lower Court be set aside and the Respondents claim in the Lower Court be

dismissed.

6) The Grounds for Appeal are as follows;

- a) The Learned Magistrate erred in Law and in fact in entering Judgment in favour of the Respondent, contrary to the weight of the evidence before Court.
- b) The Learned Magistrate erred in Law and in fact in failing to take into account **Sections 6 (1) and 8 (1) of the Land Control Act (Chapter 302)** which provisions are mandatory.
- c) The Learned Magistrate erred in Law in failing to take into account the admitted breach by the Respondent
- d) The Learned Magistrate erred in fact in failing to make a finding that the suit property was sold following breach by the Respondent but before the Respondent had paid the balance of the purchase price, which fact was admitted by the Respondent during the hearing.
- e) The Learned Magistrate erred in Law and in fact in failing to take into account and give effect to the express provisions of the Sale Agreement which regulated the rights and obligations of the parties.
- f) The Learned Magistrate erred in Law and in fact in failing to take into account the special conditions contained in the Sale Agreement especially clause A of the special conditions.

7) Counsel for the parties filed written submissions pursuant to directions given by the Court on 29/4/2021.

In his submissions dated 17th September, 2021, the Respondent's Counsel urged this Court not to interfere with the findings of the Learned Trial Magistrate because there was sufficient evidence to support the verdict, there was no misapprehension of the evidence and the Learned Magistrate did not act on any wrong Principles of Law.

Regarding **Section 6(1) and 8 (1) of the Land Control Act**, the Respondent's Counsel urges that the Appellant was precluded by the conduct and record from alleging that the contract was void.

Counsel relied on the authorities of **Macharia Maina Mwangi & 87 others –vs- Davidson Mwangi Kagiri (2014) eKLR** and **Willy Kimutai Kitilit –vs- Michael Kibet (2018) eKLR** which held that nothing in the Land Control Board prevents a claimant from relying on the doctrine of constructive trust even where the consent of the relevant Land Control Board has not been given.

8) On the other hand, the Counsel for the Appellant urged that it was in the agreement for sale of the land that consent of the Land Control Board had to be obtained as a prerequisite to the agreement taking effect.

Relying on the authority of **National Bank of Kenya Limited –vs- Pipeplastic Samkolit (K) Limited and another (2001) EKLR**, Counsel urged the Court to find as was found in the above Court of Appeal decision that;

“A Court of Law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved”.

Further, Counsel urged that **Section 7** of the **Land Control Board Act** is the remedy the Respondent was entitled to and no other.

I have carefully considered the entire appeal including the memorandum, evidence adduced at the trial, the decision of the Learned Magistrate, the grounds of appeal, the submissions by the Learned Counsel for the parties and the case law contained therein.

I make the following findings;

Firstly, the doctrine of constructive trust does not arise in this case because unlike the cases of **Macharia Maina Mwangi & 87 others –vs- Davidson Mwangi Kagiri (2014) eKLR** and **Willy Kimutai Kitilit –vs- Michael Kibet (2018) eKLR** (Supra) where the Plaintiffs were in occupation of the land, the Respondent herein never occupied **L.R. NO. KAJIADO/KITENGELA/16792**. He cannot therefore avail himself of the said doctrine of constructive trust.

Secondly, while I agree with the Respondent's Counsel's submission that this Court should be cautious before interfering with the findings of the trial Court, the authority of **Mwanasokoni –vs- Kenya Bus Service (1982- 88) 1 KAR 870** acknowledges that the Appellate Court may interfere where the Trial Court acts on wrong Principles in reaching a finding.

Thirdly, the agreement entered into between the parties was very clear at special condition A that the sale was subject to the vendor obtaining the consent of Land Control Board. It is not in dispute that this consent was never obtained.

Fourthly, the Respondent did not pay the purchase price as per the agreement and even his own advocate J.M. Mugo warned him more than once that he risked losing the property and losing the deposit. He was therefore in breach.

Fifthly, the Appellant made the Respondent believe that the property was available to him when in fact it had already been sold by the

Appellant to a third party.

Finally, I find that it is immaterial which party breached the agreement for sale because Sections 6(1) and 7 of the Land Control Board Act are emphatic on the fate of transactions bereft of the consent of the Land Control Board and the only available remedy.

It is my finding that a Court of Law cannot go outside these very clear provisions of Law. **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)

(c)

is void for all purposes under 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.

Section 7;

“If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to section 22.”

Faced by these clear provisions of Law, the Learned Trial Magistrate had no choice but to apply them in the case before her.

For the reasons set out hereinbefore, I order as following’

- (a) The Judgement of the Lower Court dated 7th October 2020 be and is hereby set aside.
- (b) The Appellant to refund to the Respondent the purchase price together with interest at Court Rates, from the date of payment to the date of refund.
- (c) Costs of this suit and those in the Lower Court to the Appellant.

It is so ordered.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 25TH DAY OF NOVEMBER, 2021.

M.N. GICHERU

JUDGE