



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELC APPEAL CASE NO. 23 OF 2018**

**JOSEPH KABURU KIARA ..... APPELLANT**

**VERSUS**

**JOHN GUANTAI ..... RESPONDENT**

*(Being an appeal from the Judgment of Hon. S. Abuya (S.P.M.) delivered on 27<sup>th</sup> June, 2018, in Meru CMCC No. 291 OF 2013)*

**JUDGEMENT**

1. The appellant faults the lower court judgment on the ground that the court erred in fact and law by finding him a trespasser yet he had been lawfully put in to possession and occupation by the respondent.

2. This being a first appeal the court is mandated under **Section 78** of the **Civil Procedure Act** to rehearse, rehear and reappraise itself on the pleadings, facts, evidence and law so as to establish if the lower court correctly made the aforesaid decision, while at the same time appreciating the lower court had the benefit of seeing or hearing witnesses. **See Selle –vs- Associated Motor Boat [1968] E.A, 123.**

**A. PLEADINGS**

3. The appellant by a plaint dated 26.9.2013 sued the respondent for eviction, permanent injunction and general damages on account of **½ acre** of **L.R No. Timau Settlement Scheme/1279** measuring **1.164** Ha allegedly sold to the respondent for **Kshs. 75,000/=**. It was pleaded the respondent only paid a deposit of **Kshs. 70,000/=** moved in and occupied the entire land.

4. The respondent denied the claim, alleged he had cleared the entire purchase price, took vacant possession but the appellant declined to attend the land control board consent meeting, denied he was a trespasser, and pleaded a constructive trust had been created in his favour relating to half acre of the aforesaid land.

He counterclaimed for:

**(a) declaration of his overriding interests.**

**(b) declaration of constructive trust**

**(c) order for subdivision and transfer of half share and**

**(d) order to attend Land Control Board to sign and transfer half share of the suit land in the alternative the Executive Officer of the court to sign the aforesaid documents.**

5. The appellant filed a reply to defence and defence to the amended defence and counterclaim, admitted the respondent was in possession and had made developments thereon, but denied any constructive trust.

**B. EVIDENCE**

6. The appellant adopted his witness statement dated **26.9.2018**, produced two agreements dated **29.3.2005** and **12.7.2005** as **P exh 1 & 2** respectively. He testified the respondent got into the land before paying the balance, though the subdivision had not been done by a surveyor. He eventually sought the respondent vacate the land, collect his deposit through a letter dated **29.6.2013** which he produced as **P exh 3**.

7. In **cross examination**, the appellant insisted he reported the respondent to the area chief all in vain, before filing the suit. He admitted monies for survey and transfer fees were to be met by the respondent though he had allegedly taken over the land, made the subdivision alone and declined to clear the balance.

8. Further the appellant insisted he was always ready to refund the money, wanted the respondent to vacate his land. He claimed he did not refuse to attend the land control board meeting and that the respondent was one in breach of the sale agreement. He accepted he filed the suit after 8 years but insisted the agreement was clear the respondent could only take up possession after the transfer. He insisted the respondent moved in to the land without consent and or clearance of the balance and lastly he said it was the respondent who refused to collect the refund from his lawyers despite notice to that effect.

9. **DW1 (the respondent)** testified he bought the land through two agreements he produced as **D exh 1**, paid Kshs. **40,000/=** which the appellant acknowledged receipt vide a receipt which he produced as **D exh 2**. Later on bought another portion for **Kshs. 35,000/=** as per the 2<sup>nd</sup> agreement which he produced as **D exh 3**, claimed he developed the land, stated that upon the death of his wife, the appellant tried to stop the burial. He admitted attending a meeting at the chief's office over alleged breach but denied he forcefully entered the land. He stated he could not collect the refund after he got the demand letter since he had not breached the sale agreements. He produced the demand letter as **D exh 4** and **D exh 5** another letter dated 19.10.2005. He further alleged he attended Njuri Ncheke elders meeting but the appellant declined to attend as per letters he produced as **D exh 6, 7 and 8**. He insisted on his demand for half acre which he bought out of the appellant's land.

10. In **cross-examination** the respondent testified that after the 1<sup>st</sup> agreement, the appellant allowed him to move in, claimed there was no surveyor who came to subdivide the land and that though no surveyor formally subdivided the land, it was the appellant who showed him the portion, which may have been bigger than half an acre. He stated after the appellant refused to attend the land control board, he never took any other action.

11. In **re-examination** the respondent insisted all he wanted was the land and not a refund. He stated he was ready to comply with the agreements and that the appellant had never alleged he had allegedly taken more land than he was entitled to.

12. **DW2** testified that as a Njuri Ncheke elders secretary, they had summoned the appellant but in vain. He confirmed having authored **D exh 6, 7 and 8**. Likewise **DW3**, the chairman of Njuri Ncheke elders testified the appellant failed to honour their summons.

13. Through written submissions dated 28.10.2021, the appellant submits he was not a trespasser since he lawfully bought the land, was allowed to take vacant possession by the respondent, paid full purchase price and made developments thereon. He relies on **Section 3 (1) of the Trespass Act Cap 294** and **Clerk and Lindsell on Torts 18<sup>th</sup> Edition**.

14. Secondly the appellant relies on the doctrine of proprietary estoppel **Halsbury's Laws of England Vo. 16 (2) 4<sup>th</sup> Edition at pg 1089** and **Steadman –vs- Steadman [1976] AC 536, 540**.

15. Thirdly the appellant submits by virtue of accepting the purchase price, putting him into possession, an equitable doctrine implied or constructive trust had arisen hence the respondent held the half acre of **L.R. No. Timau Settlement Scheme/1279** in trust for him and should execute all relevant consents and transfer form in his favour.

16. He urges the court to be guided by the case law of **Lloyds Bank plc –vs- Rosset, [1991] 1 AC 1070, Macharia Mwangi Maina & 87 Others –vs- Davidson Mwangi Kagiri [2014] eKLR, William Kiptarbei Korir & 6 others –vs- Danson Muniu Njeru [2018] eKLR and William Kipsoi Sigei –vs- KipKoech Arusei & Another [2019] eKLR.**

17. Fourthly as concerns the implications of the lack of land control board consent, reliance was made on **Macharia Mwangi Maina case Supra** and **Willy Kimutai Kitilit –vs- Michael Kibet [2018] eKLR** on the proposition that equitable doctrine of constructive trust and proprietary estoppel under **Article 10 (2) (b)** of the Constitution supercede the **Land Control Board Act**. On the other hand, the respondent did not file written submissions as ordered by the court.

### **C. ANALYSIS AND FINDING**

18. The learned trial court determined there were three issues for determination:-

**i. if the entire purchase price of Kshs. 75,000/= had been paid**

**ii. if the appellant was a trespasser to the suit land**

**iii. if the parties were entitled to the reliefs sought.**

19. Looking at the pleadings, and evidence tendered, all the parties were in agreement there was meeting of minds on the sale and the consideration. What the parties disagree is who breached the terms and conditions of the aforesaid agreements and if so the resultant implications.

20. Clause 2 of the said agreements states the possession of the said land measuring 1.4 of an acre will be given to the purchaser upon the official transfer while clause 6 states the vendor further undertakes to give the purchaser exclusive use and possession of the said land without any interference whatsoever from his side or by anybody else claiming under his name.

21. Even though clauses 3 and 4 thereof require the vendor and the purchaser to pay , subdivision and transfer fees, no timelines were indicated on when to do so though the final balance was to be given on 14<sup>th</sup> April, 2005 for the 1<sup>st</sup> agreement and 12.7.2005 for the 2<sup>nd</sup> agreement.
22. In essence therefore, the agreements were vague, uncertain and contradictory in nature yet none of the parties to this suit was able to throw any light as to what exactly they meant and agreed to be the timelines at the time the agreements were made.
23. The agreements were made before M/s Kiogora Arithi & Associates. Noteworthy, it was the same law firm which wrote **D exh 4** also produced as **P exh 3** claiming the agreements had been frustrated. It is also the same law firm which has been acting for the plaintiff/respondent yet they were a key witness to this agreements. If the said law firm had been called as a witness perhaps they would have shed light as to the intention of the parties at the time they made the two agreements.
24. Essentially however, the parties through acquiescence allowed the agreements to be varied to the extent that as at the time the 2<sup>nd</sup> agreement was drawn, the appellant had already taken vacant possession though the transfer for the 1<sup>st</sup> agreement had not been effected. Similarly **P Exh 3** was made on **29<sup>th</sup> July 2013** which is over eight years after the deadline of **July 2007**.
25. Each of the parties is accusing the other of breaching the agreements, yet it is apparent, there was no clarity on the timelines at the time the agreements were signed and monies paid.
26. Whilst the respondent blames the appellant for not clearing the purchase price, the **D exh 2** is clear that **Kshs. 15,000/=** was paid on **11.4.2005** and Kshs. 35,000/= was wholly cleared on 12.7.2007. So the question is who was to take the first move to effect transfer.
27. Ordinarily the parties would book the land control board, attend the same for subdivision consent, after which a second board is booked for the eventual transfer. The respondent in his cross examination denied he was the one to cater for survey and subdivision costs yet clause 4 states he had the duty to do so. Further, in cross examination the respondent insisted the Land Control Board fees was to be met by the appellant who he had sought through a letter to comply by paying **Kshs. 5,000/=** but in vain.
28. On the other hand the appellant testified the respondent was the one to pay survey and subdivision fees. Further the appellant was categorical the parties did not attend any land control board meeting but claimed it was the respondent who refused to attend though he was unable to state what action he took after the respondent refused to attend. It is apparent therefore each of the parties construed the agreement in their own ways.
29. Given the above findings that the agreements were uncertain and neither party took an extra mile to perform his obligations to complete the agreements, my considered view is that by merely waiting for the other party to make the first move, the parties simply walked out of the agreements, hence discharging each other over their performance.
30. Further and more importantly, the law firm which witnessed the two agreements declared the same as frustrated through **P exh 3** also produced as **D exh 3** and called upon the appellant to collect the purchase price. The appellant unfortunately did not respond to the letter and state the breach was not on his part but the respondent.
31. In **cross-examination**, the respondent maintained the lawyer did not give him the reason why he was alleged to have breached the agreements. Further, though he was in occupation, the appellant did not show any willingness to salvage the situation even after it was made clear, he had breached the agreements.
32. At paragraph 5 of the plaint the respondent alleged the breach was by the appellant. Paragraph 5 of the defence and counterclaim does not allege any breach on the part of the respondent save the issue of Land Control Board. However as I have stated in this judgment, there was no clarity on the timelines hence the issue of the delay by the respondent does not arise at all.
33. Similarly the appellant did not plead any breach of the agreements by the respondent in his counterclaim save on account of constructive trust. The appellant did not in my considered view lead any evidence to demonstrate how, when and where the respondent refused, declined and or denied to attend any Land Control Board meetings so as to turn around and accuse the respondent of the same. The agreements were vague, unclear and uncertain as to the timelines and events to follow so as to complete the agreements.
34. The appellant sought for the orders of specific performance of the agreements. In ***Openda –vs- Ahn [1984] KLR 208*** the court held ***a condition precedent to specific performance of an agreement for the sale of land is that the purchaser must pay or tender the purchase price at the time and place of completing the sale.***
35. The appellant took vacant possession before the official transfer took place. He was the first in time to breach the sale agreements. He did not wait and ensure the respondent took the steps required to book the land control board meeting for consent. He did not pay the requisite transfer fees. In ***Muchira –vs- Gesima Power Mills Ltd [2004] eKLR*** the Court of Appeal held an agreement which had contradictory and vague clauses was void for uncertainty. Just like in the current case, parties have been inactive and reluctant to complete the agreements.
36. My finding is that the court is incapable of constrain, the intention of the parties as at the time the agreements were made.
37. Since I have found the common intention of the parties was evident in relation to one acre of land, and that the appellant was allowed to get into the premises, it is apparent the doctrine of constructive trust was created by the facts of this case, guided by the reasoning in ***Kimutai Kitilit –vs- Michael Kibet [2018] eKLR.***

38. Consequently I find learned trial magistrate erred by misapplying the law and finding the appellant to have been a trespasser.

39. I there set aside the lower court judgment, dismiss the respondent's suit and enter judgment as prayed in the counterclaim for the exact portion sold as per the sale agreements.

40. Since the appellant has been in occupation of a larger portion as per the sale agreements, he shall meet the costs for land control board consent, transfer, subdivisions and costs for this appeal as well as the lower court at a lower scale.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 17<sup>TH</sup> DAY OF NOVEMBER, 2021**

**In presence of:**

C.P. Mbaabu for applicant

Orimbo for respondent

Court Clerk: Kananu

**HON. C.K. NZILI**

**ELC JUDGE**