



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAKURU**

**APPEAL NO. 14 OF 2019**

**MARY AKAI LUTERE.....APPELLANT**

**VERSUS**

**JOHNSTONE KAMAU MWANGI.....RESPONDENT**

(Being an appeal from the judgment and decree of the Chief Magistrate's Court

at Nakuru (Hon. S. Mungai, Chief Magistrate) delivered on 22<sup>nd</sup> April 2015

in Nakuru CMCC No. 34 of 2014 Johnstone Kamau Mwangi v Mary Akai Lutere)

**JUDGMENT**

1. The respondent herein filed Nakuru HCCC No. 196 of 2010 against the appellant herein on 28<sup>th</sup> July 2010. The suit was later transferred to the subordinate court on 16<sup>th</sup> January 2014 and became Nakuru CMCC No. 34 of 2014. In his plaint, the respondent averred that he entered into a sale agreement dated 22<sup>nd</sup> September 2003 with the appellant pursuant to which the appellant sold to him a parcel of land measuring 50 feet by 100 feet to be hived off the parcel known as Bahati/Bahati Block 1/1546. He added that he paid the full purchase price of KShs 85,000 on signing the sale agreement and that the appellant refused to sign the transfer documents to enable him get title to the land. He therefore sought judgement against the appellant for a permanent injunction to restrain the appellant and her agents from harassing him or evicting him from the property and an order compelling her to execute transfer documents and in default the executive officer of the court to execute the said documents. He also prayed in the alternative that the appellant compensates him at the current value of the land and all the developments therein.

2. The appellant filed a defence and counterclaim in which she generally denied the respondent's allegations. She added without prejudice that the sale agreement was objected to by her family and that the respondent refused to collect a refund of the purchase price. She added that if at all there was a sale agreement then the agreement was null and void and unenforceable for want of consent of the land control board. She averred in the counterclaim that the respondent had occupied the suit property unlawfully. She therefore sought dismissal of the respondent's suit and an order that the respondent be evicted from the suit property.

3. Upon hearing the suit, Hon. S. Mungai, Chief Magistrate delivered judgment on 22<sup>nd</sup> April 2015 in which he entered judgment in favour of the respondent as prayed with the alternative that the appellant compensates him at the current value of the land and all the developments therein. He awarded the respondent costs of the suit and dismissed the counterclaim with costs to the respondent. Aggrieved by that outcome, the appellant filed the present appeal. The grounds of this appeal as detailed in the Memorandum of Appeal dated 29<sup>th</sup> April 2015 are as follows:

1. That the learned trial magistrate erred in law and fact in believing the respondents evidence before the court.
2. That the learned trial magistrate erred in law and fact in failing to appreciate the appellant's evidence.
3. That the learned trial magistrate erred in law and fact in refusing to consider the substantial issues raised by the appellant's (sic) in her evidence and submissions.
4. That the learned trial magistrate dismissed the appellant's (sic) counter claim without any basis and or justification at all.
5. That the learned trial magistrate erred in law and fact in failing to appreciate that the respondent had approached the court with unclean hands.

6. That the learned trial magistrate considered extraneous circumstances in her judgment.

7. That the learned trial magistrate was unfair and arrived on the judgment without considering the evidence and the applicable law.

8. That the entire judgment was arrived at without proper consideration of law and fact.

9. That the entire judgment is oppressive to the appellant and should be set aside entirely.

4. The appellant therefore urged the court to set aside the judgment of the subordinate court, dismiss the respondent's suit and enter judgment in favour of the appellant as sought in the counterclaim.

5. The appeal was canvassed through written submissions followed by brief oral highlighting. For the appellant, it was argued that the learned magistrate erred by failing to consider and determine the issues of the transaction being void for want of consent of the Land Control Board and the claim being barred by virtue of **section 4(1) of Limitation of Actions Act**. Among others, the cases of **David Sironga Ole Tukai v Francis Arap Muge & 2 others [2014] eKLR** and **Jones M. Musau & another v Kenya Hospital Association & another [2017] eKLR** were relied on. It was further argued that by ordering compensation for the market value of the land, the magistrate erred by making a vague order, by rewriting the contract between the parties and by disregarding clause 8 of the agreement which limited liability of a defaulting party to 10% of the purchase price.

6. For the respondent it was argued that the allegation that the suit property was owned by the appellant through transmission was not proven and that the appellant having put the respondent in possession and the respondent having developed the property, the transaction was not nullified by failure to obtain consent of the Land Control Board. The respondent urged the court to apply the principles of constructive trust and proprietary estoppel so as to ensure that substantive justice is upheld. The cases of **Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri [2014] eKLR** and **Willy Kimutai Kitilit v Michael Kibet [2018] eKLR** were cited in support of these arguments.

7. I have considered the grounds of the appeal and the respective submissions of parties. This being a first appeal, my mandate is to re-evaluate, re-assess and re-analyse the record and then determine whether the conclusions reached by the learned trial magistrate are to stand or not and give reasons either way. I also bear in mind that I have neither seen nor heard the witnesses and I will therefore make due allowance in that respect. I further remind myself that it is the responsibility of this court to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence. See **Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR**.

8. Looking at the grounds of appeal, it is clear to me that they can be collapsed into two grounds: firstly, that the trial court did not properly appreciate the evidence before it and secondly, that the trial court did not properly appreciate and apply the law.

9. Starting with the issue of evidence, there is no dispute that the appellant was the registered proprietor of the parcel of land known as Bahati/Bahati Block 1/1546 from 6<sup>th</sup> December 1993 and that title deed was issued to her in that regard. The subordinate court was not shown any encumbrances against the title.

10. There is equally no dispute that pursuant to sale agreement dated 22<sup>nd</sup> September 2003, the appellant agreed to sell to the respondent a portion of the aforesaid property measuring 100 feet by 50 feet at a consideration of KShs 85,000 which sum the respondent paid fully. I reproduce the terms of the agreement below:

1. THAT the Vendor is the registered owner of Title Number BAHATI/BAHATI / BLOCK 1/1546 situated in Nakuru District.
2. THAT the Vendor agreed to sell and Purchaser has agreed to buy that part of one plot size 100ft by 50ft of the property herein above mentioned.
3. THAT the Purchase price for the said property is Ksh.85,000.00 and the vendor do hereby acknowledge receipt of Ksh.85,000 (Eighty Five Thousand only).
4. THAT the purchaser shall take immediate ownership and possession of the property herein above mentioned free from any encumbrances whatsoever.
5. THAT the Vendor undertakes to execute all assurances and documents necessary for the completion of this transaction.
6. THAT the Vendor covenant with the Purchaser that she is the sole owner of the said property and no other person has an interest over it.
7. THAT the vendor shall obtain all required contents to transfer the said property and change the names in the land registry in favour of the purchaser.
8. THAT in event of any party who will fully terminate the terms of this agreement shall pay the party not in default 10% of the purchase price herein being liquidated damages for breach of contract.
9. THAT the agreement shall remain valid and binding to both parties herein until the necessary changes are effected. [Emphasis supplied]

11. The appellant contended that she did not transfer the property to the respondent because her children objected to the agreement. Clauses 1 and 6 of the agreement as well as the title deed all confirm that she is the registered proprietor of the property. As a registered proprietor she had the liberty to deal with the property and she was entitled to the privileges and benefits accorded by **Sections 27 and 28** of the then prevailing **Registered Land Act** (repealed). The said sections provided as follows:

**27. Subject to this Act –**

**(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;**

....

**28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject –**

**(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and**

**(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:**

**Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.** [Emphasis supplied]

12. In view of the clear provisions of **Sections 27 and 28** of the then prevailing **Registered Land Act** (repealed) and clauses 1 and 6 of the agreement, there is no basis for the argument that the appellant owned the suit property as an administratrix of the estate of her late husband or that she could withdraw from the agreement owing to objections by her children. Even if there were other persons who also purchased other portions of Bahati/Bahati Block 1/1546 and who later agreed to refunds, the respondent was not obligated to accept a refund when he had entered into a binding agreement with the appellant. Clearly, the argument that the learned magistrate did not properly appreciate the evidence before him has no basis.

13. Under clauses 3 and 4 of the agreement, the appellant acknowledged receipt of the full purchase price and the respondent was to take immediate possession and ownership of the suit property. Indeed, as confirmed by both the appellant and the respondent, the respondent not only took possession but also constructed on the suit property. Under clauses 5 and 7 of the agreement, the appellant was under an obligation to execute all the necessary documents and obtain all required consents to ensure that title is passed to the respondent.

14. Having received the full purchase price and having put the respondent in possession, can the appellant's argument that the transaction is void under **section 6** of the **Land Control Act** hold? I do not think so. Equity and justice would not allow that. Having placed herself under a contractual obligation to execute all the necessary documents and obtain all required consents, including consent of the Land Control Board, the appellant is estopped from using her own breach of the agreement as a ground to seek to nullify the transaction. Despite the lack of consent of the Land Control Board, the doctrines of constructive trust and proprietary estoppel applied to the agreement between the appellant and the respondent and the transaction is therefore not void.

15. In **William Kipsoi Sigei v Kipkoech Arusei & another** [2019] eKLR the Court of Appeal stated:

**17. The appellant urged us to disregard this authority as the court proceeded on an erroneous view that a transaction based on trust is not a controlled transaction on the basis of decisions which were made before the Land Control Act was amended to clarify that transactions based on trust are controlled transactions.**

**18. In Willy Kimutai Kitilit v Michael Kibet [2018] eKLR (Willy Kimutai Kitilit decision), we considered similar arguments and had the opportunity to consider the Macharia Mwangi Maina decision alongside another decision of this Court, differently constituted, David Sironga Ole Tukai v Francis Arap Muge & 2 others [2014] eKLR (Sironga Ole Tukai Decision), where the Court in finding that the Macharia Mwangi Maina decision was made in error expressed the view that the clear provisions of section 3(1) of the Judicature Act precluded the application of the doctrines of equity and as such, a transaction that required the consent of the Land Control Board, would, without such a consent, be void and therefore unenforceable in law. In rejecting the arguments in the Sironga Ole Tukai decision and following the Macharia Mwangi Maina decision this Court in Willy Kimutai Kitilit decision noted among other things, that:**

**“the phrase ‘declaration of trust of agricultural land’ refers to an express creation of a trust by parties over agricultural land by deed or instruments envisaged by section 36 as read with section 66 of the Land Registration Act or section 126 of the repealed Registered Land Act, not a constructive trust or trust created by operation of the law.”**

**19. In addition, in the same case, the Court noted that equity is one of the national values that the Courts must apply in interpreting the Constitution stating as follows:**

“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.”

20. 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 1<sup>st</sup> 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.

21. We come to the conclusion that 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 1<sup>st</sup> respondent. ...

16. Regarding the issue of whether or not the claim was statute barred, I note that limitation was never raised by the appellant in her submissions before the subordinate court. She cannot now raise it in this court and cannot fault the learned magistrate for not addressing that issue. In any case, I note that clause 9 of the agreement states that “... *the agreement shall remain valid and binding to both parties herein until the necessary changes are effected*”. The appellant is yet to give the respondent title to the property that he purchased and fully paid for. As I have noted above, the appellant is in breach and the said breach has kept the respondent from getting title. Even if limitation had been raised in the subordinate court, this court would have risen to its calling to render substantive justice, to ensure that there is no wrong without a remedy, that the appellant shall not benefit from her own wrongdoing and that there is no unjust enrichment. See Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri (supra). I therefore find no merit in the argument that the trial court did not properly appreciate and apply the law.

17. The learned magistrate has been faulted for ordering in the alternative that if she so wishes the appellant compensates the respondent at the current value of the land and all the developments therein. None of the parties led any evidence on the value of the land and all the developments thereon as at the date of the hearing before the subordinate court. It would therefore be impossible for the parties to know from the judgment the amount the appellant was to pay in that regard. So as to get rid of that ambiguity, I reverse that particular alternative order. I will also rephrase the final orders in such a manner as to bring finality to the dispute. Save for the order that the appellant compensates the respondent at the current value of the land, the learned magistrate appreciated the issues before him and resolved them well.

18. In view of the foregoing discourse, I find no merit in the appeal. I therefore make the following orders:

**a. This appeal is dismissed with costs to the respondent.**

**b. For the avoidance of doubt and so as to bring more clarity on the outcome of the matter and the way forward, judgment is entered in favour of the respondent as follows:**

**i. A permanent injunction is hereby issued against the appellant, her servants, agents or family members from harassing or evicting the respondent and his family members from the portion of land parcel number BAHATI/BAHATI BLOCK 1/1546 measuring 50 feet by 100 feet where the respondent has constructed.**

**ii. An order is hereby issued compelling the appellant to execute transfer documents and all other necessary documents in favour of the respondent within 45 (forty five) days from the date of delivery of this judgment to ensure completion of the transaction comprised in the Sale Agreement dated 22<sup>nd</sup> September 2003. In default, the executive officer of the subordinate court to execute the said transfer documents and all other necessary documents on behalf of the appellant.**

**iii. The appellant’s counterclaim is dismissed.**

**iv. Costs of the suit in the subordinate court as well as costs of the counterclaim are awarded to the respondent.**

19. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 3<sup>rd</sup> day of March 2020.

**D. O. OHUNGO**

**JUDGE**

In the presence of:

No appearance for the appellant

Ms Wangari holding brief for Ms Njoroge for the respondent

Court Assistants: Beatrice & Lotkomoi