



**REPUBLIC OF KENYA**

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

**ELC APPEAL NO. 3 OF 2018**

**KAMPALI OLE KIOK.....APPELLANT**

**VERSUS**

**SIMON H. IGECHA WAITHAKA.....RESPONDENT**

**JUDGMENT**

*(Being an appeal from the Judgment of the Senior Resident Magistrate's Court at Kajiado Hon. M. O Okuche made on 25<sup>th</sup> August, 2015 in Kajiado PMCC No. 122 of 2013)*

**Introduction**

By a Memorandum of Appeal dated the 21<sup>th</sup> September, 2015, the Appellant appeals against the whole of the Judgment delivered by Hon. M. O Okuche Senior Resident Magistrate's Court at Kajiado on the 25<sup>th</sup> August, 2015. The genesis of this appeal is the Judgement of the Senior Resident Magistrate Hon. M. O Okuche in the Kajiado PMCC No. 122 of 2013 where the Court ruled in favour of the Respondent as per the prayers sought in the Counterclaim. In the said suit the Respondent had sought for the following orders in the Counterclaim:

- a) A permanent injunction to restrain the Defendant (Plaintiff in original action) by himself, his family, servants or agents or otherwise whomsoever from remaining on or continuing in occupation of, or grazing his livestock upon, or in any manner utilizing the parcel of land comprised in title number KJD/ LOODARIAK/ 804.
- b) An order directing the Defendant (Plaintiff in original action) to remove himself, his family, livestock and structures from the land comprised in title number KJD/ LOODARIAK/ 804 at his cost within a time to be specified by this Honourable Court.
- c) Failure to comply with order (b) above, an eviction order do issue for the removal of the Defendant (Plaintiff in original action) his family, livestock and structures from the land comprised in title number KJD/ LOODARIAK/ 804 with the assistance of the local administration and the police.
- d) Costs of this suit and costs of the eviction contemplated in prayer ( c) above, if it shall be necessary, be granted to the Plaintiff ( Defendant in original action).

The appellant being dissatisfied by the whole Judgement filed an appeal at the High Court of Kenya in Kajiado on 21<sup>st</sup> September, 2015.

The Memorandum of Appeal contained the following grounds;

1. That the Lower Court erred in law and in fact by allowing the Plaintiff's/ Respondent's prayers in the Counterclaim.
2. That the Lower Court erred in law and in fact by ignoring the Appellant's pleadings and evidence and totally relied upon Respondent's evidence and pleadings.
3. That the Lower Court erred in law and in fact by making a finding that there was no sale between the Appellant and the Respondent and thus allowing the Plaintiff's claim

The Appellant prays;

1. That the Judgment of the Lower Court be set aside and that the same be substituted by an Order dismissing the Plaintiff in Kajiado PMCC Number 122 of 2013 with costs to the Defendant.

2. That costs hereof be to the Appellant.

The Appellant and Respondent filed their respective submissions to canvass the Appeal.

### Submissions

The Appellant submits that the Respondent admitted receipt of Kshs. 140,000 from him although he claimed the Agreement presented in Court was a forgery. He contends that the particulars of forgery (fraud) were neither pleaded specifically in the Defendant's Defence and Counterclaim as is mandatorily stipulated under the provisions of Order 2 Rule 4 of the Civil Procedure Rules. Further, that once the Defendant's signature was proved or admitted, the Plaintiff had discharged his burden and it then shifted to the Defendant to prove fraud, misrepresentation, illegality, duress or whatever the Defence might have. He relied on the case of **Mamta Peush Mahajan Vs Yashwant Kumara Mahajan Civil Case Number 571 of 2015** to support this argument. He insisted the transaction met the threshold envisaged in section 3 (3) of the Law of Contract Act on the requirement for writing and attestation. Further, the Agreement was admitted and formed part of the Plaintiff's exhibits. He explains that the Agreement was not specific to the Plaintiff only but also applied to his two brothers. Further, that the Defendant admitted that the Sale Agreement was not completed because of Caution/ Restrictions on the whole of Loodariak. He submitted that the Land Disputes Tribunal Award which found that the Plaintiff is entitled to 14 acres of suit land is yet to be adopted by the Lower Court. He claims the Plaintiff lodged the lower court suit as the Land Disputes Tribunal Act had been repealed but the Lower Court ignored the findings from the Tribunal, although it was essentially continuing the proceedings of the said Land Disputes Tribunal. He relied on section 23 of the Interpretation and General Provisions Act to support this line of argument. He further submitted that the Plaintiff is entitled to 14 acres of land since the consideration was paid on 19<sup>th</sup> September, 2003. Further, that to date a period of 12 years have elapsed and accordingly he would be entitled to ownership by way of adverse possession. He relied on the decision of **Peter Mbiri Michuki Vs Mugo Michuki (2014) eKLR** to buttress these averments. He reiterated that the Plaintiff purchased 14 acres from suit land and the Defendant put him in possession but the Defendant sought to cancel the Agreement because the value of land had appreciated due to infrastructural development within Loodariak Area.

The Respondent submitted that the Appellant (Defendant) had trespassed on his land and he seeks orders of eviction. He insists his case was one on trespass only and once he proved ownership of suit land, it was incumbent upon the Appellant (Defendant) to adduce credible evidence why he was violating the Respondent's right of possession of land. He submitted that the Appellant (Defendant) failed to prove he had registrable interest on the fourteen (14) acres over the suit land and the trial Magistrate found him as a trespasser. He submitted that the two Sale Agreements produced by the Appellant did not provide evidence of the sale of fourteen (14) acres from parcel number Kajiado/ Loodariak/ 804 to the Appellant for the sum of Kshs. 140,000/=. Further, that the Appellant has failed to prove purchaser's interest. He reiterates that there was no Sale Agreement, no Consent of the Land Control Board nor subdivision of the fourteen (14) acres, the trial Magistrate could only determine the matter in conformation with the tenets of the law. He further submitted that the Land Disputes Tribunal did not have jurisdiction to determine matters of ownership as it relates to registered land. Further, that the claim as titled TC / 393/3/012 is indicative that the same was filed in 2012 and yet the Land Disputes Tribunal Act was repealed by section 31 of the Environment and Land Court Act 2011 which later commenced operation on 30<sup>th</sup> August, 2011. He contends that all acts of the Kajiado North Land Dispute Tribunal in purporting to adjudicate in the year 2012, a dispute under the repealed Act between the parties herein was void as well as ineffectual.

### 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 fourteen (14) acres of land from Kajiado/ Loodariak/ 804 owned by the Respondent.
- Whether the Appeal is merited.

As to whether the Appellant is entitled to the fourteen (14) acres of land from Kajiado/ Loodariak/ 804 owned by the Respondent. It is not in dispute that the Respondent is the owner of land parcel number Kajiado/ Loodariak / 804. It is further not in dispute that the Appellant occupies a portion of Kajiado/ Loodariak/ 804. The Appellant in the lower court produced a receipt of Kshs. 140,000 issued by the Respondent to prove he paid for the land. I note the receipt which is dated the 19<sup>th</sup> September, 2003 indicates being payment of Loodariak 804. I note the Respondent in his witness statement actually admitted that in 2007 the Appellant had approached him to purchase land on terms to be agreed upon later on. He also admitted that negotiations commenced but collapsed as they disagreed on the exact position of the land. He further admitted that the Appellant actually paid him Kshs. 140,000/=. In the Counterclaim, he claimed the Appellant entered the suit land in the year 2008 and erected structures thereon without his consent. However, the Appellant in his Defence contended that he entered the suit land in 2003. On perusal of the Sale Agreement dated the 19<sup>th</sup> September, 2003, I note the Appellant was a witness thereon while in the second Agreement it was for the Sale of 80 acres of land between Kampari Ole Kiok, David Backson Ole Kiok and Kasengi Ole Kiok and the Respondent herein. However, there was no Agreement for the sale of fourteen (14) acres of land. DW2 and DW3 who were brothers to the Appellant confirmed that the Respondent was selling them land but he was yet to transfer it to them. DW4 who was the Chief for the area where the suit land was situated confirmed that there was a dispute between the Appellant and the Respondent in respect to the said land. To my mind all these averments intimate that indeed there was a land transaction between the Appellant and the Respondent. The Respondent stated in court that the Appellant had trespassed on his land. I note in the Land Disputes Tribunal proceedings which were produced as an exhibit, it indicated that the Respondent agreed to give fourteen (14) acres of land to the Appellant if he agreed to pay survey fees, which the Appellant accepted to pay. Further, as per a letter dated the 19<sup>th</sup> February, 2004 from the Respondent addressed to the Chief Keekonyokie Central Location copied to Baxon Ole Kiok, Kampalei Kiok and Seenji Ole Kiok he confirmed that the surveying fees was Kshs. 70,000 and he wanted to know how much each party was ready to pay. Further, he stated therein that the buyers were to complete the remaining purchase price and surveying fees to enable them move forward. On 23<sup>rd</sup> April, 2007, the Respondent wrote to the Appellant as follows: **'I write to notify you that Kshs. 80,000/= is required immediately from you so that I make the exercise of beaconing your plot.....'** In his testimony in the lower court, the Respondent admitted that he entered into a verbal agreement with the Appellant. He further admitted that the Appellant came with his family, built a semi-permanent structure thereon, fenced off two acres, cut trees and shrubs

and is grazing thereon. In cross examination he admitted selling to the Appellant twenty (20) acres of land and there was a caveat restriction on the whole of Loodariak on no sale or subdivision. The Appellant confirmed he entered the suit land in 2007 and that he paid Kshs. 70,000 to the tribunal for subdivision. Further, that the Tribunal subdivided for him fourteen (14) acres of land and there are beacons thereon. In cross examination, he confirmed connecting water on his land and paying the survey fees in 2012. He explained that he never entered the suit land by force but it is the Respondent who permitted him to enter thereon until they formalized the transaction. I note DW4 who was the local Chief also confirmed that the Appellant was residing on the suit land and had put up structures thereon. Further, that the Respondent had stated that the Appellant was to stay on the parcel of land he had been allocated or leave. In the Judgment, the Learned Magistrate proceeded to hold that the transaction was void as there was no consent of the Land Control Board. Further, that since the Agreement was not reduced in writing, the contract was unenforceable. He hence directed the Respondent to refund the Kshs. 140,000/=, Appellant to remove his structures and livestock from the portion of land he occupied at his own cost. From the evidence I have analysed above, I note that the transaction herein was a controlled one and required the consent of the local land control board, before the transfer could be effected. In respect to the dispute herein, I wish to rely on various legal provisions as highlighted hereunder:

Section 3(3) of the Law of Contract Act provides that:’ **(3) No suit shall be brought upon a contract for the disposition of an interest in land unless—**

**(a) the contract upon which the suit is founded—**

**(i) is in writing;**

**(ii) is signed by all the parties thereto; and**

**(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:**

**Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.’**

While section 6 (1) (a) of the Land Control Act 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.’**

In the current scenario, I note the Learned Magistrate held that there was no contract of the sale of the fourteen (14) acres which fact I uphold. He further proceeded to find that the Appellant was indeed a trespasser on the land contrary to the evidence presented which revealed that it is the Respondent that allowed him entry therein. He further held that the purported Sale was void due to lack of consent of the Land Control Board.

In Court of Appeal decision of **Willy Kimutai Kitilit v Michael Kibet [2018] eKLR**, it 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'**

In relying on the two Court of Appeal decisions, I find that since the Respondent had received the purchase price from the Appellant and allowed him to occupy a portion of the suit land; insofar as it was an oral agreement, there was an element of part performance. From the letter I have highlighted above, the Respondent even referred to the land as the Appellant's plot and proceeded to demand for payment of survey fees. It is my considered view that since the 2007 when the Appellant entered the suit land to date, 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 him transfer the suit land into his names; I hold that the transaction is not void but enforceable by virtue of the doctrine of constructive trust which is a Constitutional principle and he is entitled to have the said fourteen (14) acres registered in his name. Based on the evidence analyzed above, I find that the Learned Magistrate erred in Law and Fact by failing to appreciate the evidence before him by holding that there was no sale and hence allowing the Respondent's prayers in the Counterclaim.

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 direct that the Respondent do effect transfer of the fourteen (14) acres of land out of land parcel number Kajiado/ Loodariak/ 804 to the Appellant, within the next 90 days from the date hereof, failure of which the Deputy Registrar, Environment and Land Court will execute the said Transfer Forms.

The costs of the Appeal are awarded to the Appellant.

**Dated Signed and Delivered via email this 26<sup>th</sup> Day of May, 2020.**

**CHRISTINE OCHIENG**

**JUDGE**