



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

ENVIRONMENT & LAND CASE NO.103 OF 2015

TITUS LAISA WALIUBA.....PLAINTIFF

VERSUS

CALISTUS BARASA KHISA.....1ST DEFENDANT

MARGARET NABISIMO KHISA.....2ND DEFENDANT

PIUS SIMIYU KUNUSYA.....3RD DEFENDANT

EVANS MASINDE.....4TH DEFENDANT

JUDGEMENT

This case is another illustration of the pitfalls that un-suspecting purchasers of land fall into when they deal with thieving vendors out to make a kill from what they don't own. It also underscores the importance of seeking legal advice before entering into land transactions.

It is not really in dispute that between 27th February 2007 and 23rd September 2008, **TITUS LAISA WALIUBA** (the plaintiff herein) purchased from the 1st defendant two portions of land each measuring $\frac{1}{4}$ acre and a third portion measuring 100 X 25 feet out of the land parcel **No. EAST BUKUSU/NORTH NALONDO/26**. As at the time that the parties executed the three sale agreements dated 27th February 2007, 7th May 2007 and 23rd September 2008, the land parcel was registered in the names of **FELIX KHISA MUGANDA** (deceased) who was the father of the 1st defendant and husband to the 2nd defendant and who died on 11th January 1981 as per the death certificate which is part of the documents in this case. There is no evidence that at the time the three agreements were being executed between the plaintiff and the 1st defendant, a confirmed grant of letters of administration had been taken out in respect to the deceased's Estate by either the 1st or 2nd defendants. It is not clear when the land parcel **No. EAST BUKUSU/NORTH NALONDO/3069** was created but from the certificate of official search dated 9th May 2011, that parcel has since 1st July 2010 been registered in the names of the 2nd defendant but was closed upon sub-division to give rise to three parcels being **EAST BUKUSU/NORTH NALONDO/3154, 3155 and 3156**. Parcel **No. EAST BUKUSU/NORTH NALONDO/3155** was subsequently transferred by the 2nd defendant to the 3rd defendant and parcel **No. EAST BUKUSU/NORTH NALONDO/3156** was also transferred by the 2nd defendant to the 4th defendant. It is this transfer that provoked this suit in which the plaintiff has pleaded fraud on the part of 1st and 2nd defendants in transferring parcels **No. EAST BUKUSU/NORTH NALONDO/3155, 3156** to the 3rd and 4th defendants which was his entitlement in the original land parcel **No. EAST BUKUSU/NORTH NALONDO/3069**. He therefore seeks judgement against the defendants jointly and severally in the following terms:

- 1. Cancellation of the titles EAST BUKUSU/NORTH NALONDO/3154, 3155 and 3156 and that they revert to their original number EAST BUKUSU/NORTH NALONDO/3069.**
- 2. An order for specific performance and alternatively compensation at current market rates and damages for breach of contract.**
- 3. Costs**
- 4. Interest from 27th February 2007 till payment in full.**
- 5. Any other relief that the Court may grant.**

In separate defences, all the defendants denied the allegations of fraud levelled against them.

The 1st defendant **CALISTUS BARASA KHISA** pleaded that by the time he entered into the sale agreement with the plaintiff in respect to the land parcel **No. EAST BUKUSU/NORTH NALONDO/26**, the said land parcel was registered in the names of the deceased who was his father. While admitting receipt of part of the purchase price, the 1st defendant nonetheless pleaded that the plaintiff did not complete paying the whole amount and even refused to assist the 1st and 2nd defendants in the succession process after which the parcel **No. EAST BUKUSU/NORTH NALONDO/26** was sub-divided into parcels **No. EAST BUKUSU/NORTH NALONDO/3065-3070** and registered in the 2nd defendant's names. He denied the allegations of fraud levelled against the deceased who was her husband. She added that the plaintiff did not honour the agreement by paying the whole purchase price and has instead transferred the portion to one **TOM WAFULA KINGORO**.

The 3rd defendant **PIUS SIMIYU KUNUSYA** who is the registered proprietor of the land parcel **No. EAST BUKUSU/NORTH NALONDO** claimed in his defence that he purchased that parcel after conducting a search. He too denied the allegations of fraud.

The 4th defendant **EVANS MASINDE** denied any knowledge of the plaintiff having purchased land from the 1st defendant adding that if there was any purchase, it was null and void as the 1st defendant had not title to pass to the plaintiff. He too denied the allegations of fraud adding that this being a controlled transaction, the necessary formalities were not followed. He added that when he purchased the land, there were no restrictions placed on it and this suit is an abuse of the Court process and should be dismissed.

The plaintiff filed a reply to the defendant's defences joining issues with them and reiterating the averments in his plaint.

The plaintiff and the four defendants were the only witnesses in their respective cases and adopted as their evidence their written statements and list of documents filed herein which I have basically summarized above from their pleadings.

At the end of the trial, submissions were filed both by **MR. BWONCHIRI ADVOCATE** for the plaintiff while **MR. WATTANGA** filed on behalf of the 4th defendant. The 1st, 2nd and 3rd defendants filed their submissions in person.

I have considered the evidence as contained in the parties statements, the documents filed and the submissions.

It is clear from the documents herein that the 3rd defendant is the registered proprietor of the land parcel **No. EAST BUKUSU/NORTH NALONDO/3155** while the 4th defendant is the registered proprietor of the land parcel **No. EAST BUKUSU/NORTH NALONDO/3156**. Both derived their titles from the 2nd defendant who was the registered proprietor of the original land parcel **No. EAST BUKUSU/NORTH NALONDO/3069** from which those two parcels were hived. Documents have been produced showing how the 2nd defendant transferred those two portions to the 3rd and 4th defendant and in the absence of any complaint from the 2nd defendant, there would be no basis upon which this Court can cancel the 3rd and 4th defendants' titles to land parcels **No. EAST NALONDO/3155 and 3156**. Any allegations of fraud can only be made by the 2nd defendant because **Section 24 of the Land Registration Act** confers on her absolute ownership of the said land together with all the rights and privileges appurtenant thereto which include transferring the said parcels even as a gift.

On the other hand, it is also clear from the plaintiff's own documents that he entered into an agreement with the 1st defendant to purchase portions out of land parcel **No. EAST BUKUSU/NORTH NALONDO/26**. Indeed when he was cross examined by **MR. MAKOKHA** Counsel for the 4th defendant, this is what he said:

“The agreement which is at page 1 of the documents shows that the land I was purchasing is plot No.26. It is not indicated in that agreement that the land being purchased was EAST BUKUSU/NORTH NALONDO/3069. In none of the agreements is it indicated that the seller is the 2nd defendant.”

It is common ground that by the time the plaintiff purchased the three portions of land from the 1st defendant, the land parcel **No. EAST BUKUSU/NORTH NALONDO/26** was registered in the names of the deceased. Neither the 1st nor 2nd defendant held any confirmed grant in respect to the Estate of the deceased. Therefore the 1st defendant had no interest in the land parcel **No. EAST BUKUSU/NORTH NALONDO/26** which he could pass to the 1st plaintiff. The 1st defendant was simply meddling with the Estate of the deceased contrary to the provisions of Section 45 of the Law of Succession Act and as was held by the Court of Appeal in the case of **JANE GACHOKI GATHECHA V PRISCILLA NYAWIRA GITUNGU & ANOTHER C.A. CIVIL APPEAL NOS. 343 and 345 of 2002 [2008 KLR]**

“A thief acquires no right or interest which is transferable in stolen property. The transaction would be void ab initio and the property is traceable.”

A claim for specific performance arising from such a void transaction is therefore not available to the plaintiff. A Court of Law will not enforce an illegality. In **MISTRY AMAR SINGH V KULUBYA 1963 E.A. 408**, the Court cited the following passage from **SCOTT V BROWN DOERING MC NAB & CO(3) 1892 2QB 724**:

“Ex turpi Causa non oritur action. ... No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal if illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves illegality, the Court ought not to assist him.”

See also **STANDARD CHARTERED BANK V INTERCOM SERVICES LTD 2004 eKLR**. It is also clear from the plaintiff's own evidence that when he entered into the agreement with the plaintiff for purchase of a portion out of the land parcel **No. EAST**

BUKUSU/NORTH NALONDO/26, he knew it was registered in the names of the deceased. This is what he said when cross examined by **MR. MAKOKHA**:

*“I went to the Lands Office to do a search before I bought the land. It was registered in the names of **PHILIP MUKANDA KHISA** who was then deceased. I was aware that the registered proprietor was deceased”.*

The plaintiff therefore knew that he was engaging in an illegal transaction.

Although the agreement between the plaintiff and 1st defendant did not mention if their transaction was subject to the consent of the Land Control Board, the plaintiff conceded in cross – examination that he was aware that he ought to have sought the consent of the Land Control Board within six months and that was not done. **MR. BWONCHIRI** has submitted on his behalf that notwithstanding lack of the consent of the Land Control Board, the plaintiff is entitled to the land in dispute on the basis of a constructive trust. Reliance has been placed on the decision of the Court of Appeal in the case of **WILLY KIMUTAI KITILIT V MICHAEL KIBET C.A. CIVIL APPEAL NO.51 of 2015 [2018 eKLR]** where the Court held that the equitable doctrines of constructive trust and proprietary estoppel are applicable and enforceable to land subject to the Land Control Act. The Court however added that *“this is subject to the circumstances of the particular case.”* I do not see how the **KITILIT Case (supra)** can aid the plaintiff in this case bearing in mind that he no longer has any interest in the land that he purchased from the 1st defendant having sold it to a third party. Among the documents filed by the 1st defendant is a charge sheet in **BUNGOMA COURT CRIMINAL CASE NO.273 OF 2013** in which the 1st defendant was the accused in a case of obtaining money by false pretences from the plaintiff. In his statement to the police dated 23rd January 2013 and which is part of the documents filed, the plaintiff states in paragraph 5 and 6 as follows:

*“After this agreement I was allowed to take possession of the land and made some development which include two dwelling houses and I infact stayed there for four years with my family and even planted some trees and some coffee. Later I decided to move away to another place and so I disposed off my piece of land to one **PASTOR TOM WAFULA KINGORO** at a cost of **Ksh.180,000**”.*

Having sold the land to a third party, the plaintiff cannot claim any interest in it and therefore any reference to his claim being based on a constructive trust, as submitted by **MR. BWONCHIRI**, is misplaced.

The case of **KITILIT (supra)** which his Counsel seeks to rely on is therefore distinguished because in that case, the party alleging a constructive trust was still in possession of the land in dispute. That is not the case herein where the plaintiff has relinquished his interest in the land in dispute by selling it to a third party. The **KITILIT Case (supra)** may have come to the plaintiff’s aid had he remained on the land that he claims. There is no evidence that he was evicted therefrom. He voluntarily sold it to a third party at a consideration and moved away. To award him compensation would therefore amount to unjust enrichment on the part of the plaintiff.

The plaintiff also seeks an order for damages for breach of contract. Having found that the agreement between the plaintiff and 1st defendant was illegal by virtue of the provision of **Section 45 of the Law of Succession Act**, the plaintiff cannot be entitled to damages for its breach because an illegal contract cannot be breached. That remedy is therefore not available to the plaintiff either.

The up-shot of the above is that the plaintiffs suit is dismissed with costs.

Before I end, however, I need to observe that the **KITILIT Case (supra)**, cites the case of **MACHARIA MWANGI MAINA & OTHERS V DAVIDSON MWANGI KAGIRI 2014 eKLR** which is at variance with the case of **DAVID OLE TUKAI V FRANCIS arap MUGE & OTHERS 2014 eKLR** on the consequences that should follow in a land transaction which has not been consented to by the Land Control Board. While the Court of Appeal Bench in the **KITILIT** and **MACHARIA MAINA Cases (supra)** took the view that a purchaser of land can still enforce an agreement which has not been consented to by the Land Control Board by invoking the equitable doctrines of constructive trust, the Bench in the **OLE TUKAI** Case was of the view that there is no room for the Court to import the doctrines of equity in the Land Control Act. It is in the interest of the Courts handling such disputes and indeed the litigants and practitioners that this matter is settled at the earliest possible opportunity. Perhaps if this judgment goes on appeal, that opportunity may arise although I must point out that in this case, it was **Section 45 of the Law of Succession Act** rather than **Section 6(1) of the Land Control Act** that carried the day.

BOAZ N. OLAO

JUDGE

22ND NOVEMBER 2018

Judgement dated, delivered and signed in open Court this 22nd day of November 2018 at Bungoma.

Mr. Makokha for 4th defendant – present

1st defendant – present

2nd defendant – present

3rd defendant – present

Mr. Wekesa for Mr. Bwonchiri for Plaintiff – present

Right of Appeal.

BOAZ N. OLAO

JUDGE

22ND NOVEMBER 2018