REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELCA CASE NO. 9 OF 2018

EMMANUEL NGALA ANZAYA.....APPELLANT

VERSUS

ELKANA EPICHE AURA .....RESPONDENT

JUDGEMENT

The appellant being dissatisfied with the judgment of Hon. T.A. Odera (SPM) do hereby prefer this appeal and puts forth the following grounds of appeal:-

1. That the Learned Magistrate erred in finding that the appellant had not proved his case against the respondent.

2. That the learned magistrate erred in failing to find that the appellant had title deed to land parcel number Marama/Buchenya/283 and the said title deed was not challenged.

3. That the learned Magistrate erred in failing to find that the appellant being the absolute proprietor of land parcel number Marama/Buchenya/283 had absolute title to the land to the exclusion of anyone else.

4. That the learned Magistrate erred in finding that the respondent had established a colour of right on the suit land when the respondent had not stayed on the suit land for more than 12 years.

5. That the Learned Magistrate erred in fact in failing to find that the respondent did not have title deed to the suit land.

6. That the Learned Magistrate erred in failing to find that the respondent since purchasing the suit land did not follow proper procedure to obtain consent from Land Control Board within 6 months of purchasing the suit land.

7. That the Learned Magistrate erred in failing to find that the respondent's contract was voided for not appearing before Land Control Board and could therefore claim refund from the right party.

8. That the Learned Trial Magistrate erred in fact and in law in believing the respondent's evidence, without subjecting same to exhaustive scrutiny.

9. The judgment and or decision of the learned trial magistrate is contrary to the weight of the evidence and submission on record.

The appellant prays that:-

(a) The appeal herein be allowed.

(b) The entire judgment delivered on 4th September, 2018 be set aside.

(c) The costs of the trial court and of this appeal be borne by the respondent.

The appellant submitted that it is not in dispute that he is the registered owner of land parcel No. Marama/Buchenya/283 which measures approximately 7.5 acres. That he acquired the title in a legal manner. That the respondent produced a sale agreement dated 17th January 2011 and this suit was filed in 2013 hence the respondent only occupied the suit land for a period of 2 years.

This court has carefully considered the appeal and submissions therein. The Land Registration Act is very clear on issues of ownership of land and Section 24(a) of the Land Registration Act provides as follows:

"*Subject to this Act, 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*."

Section 26 (1) of the Land Registration Act states as follows:

"*The Certificate of Title issued by the Registrar upon registration … shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner… and the title of that proprietor shall not be subject to challenge except –*

a. *On the ground of fraud or misrepresentation to which the person is proved to be a party; or*

b. *Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme."*

The law is clear that, the Certificate of Title issued by the Registrar upon registration shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge except – On the ground of fraud or misrepresentation to which the person is proved to be a party; or Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

This court in considering this matter referred to the case of Elijah Makeri Nyangw'ra –vs- Stephen Mungai Njuguna & Another (2013) eKLR where the court held that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme. The Judge in the case while considering the application of section 26(1) (a) and (b) of the Land Registration Act rendered himself as follows:-

"*----------the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme."*

I have perused the records of the lower court and it is a finding of fact the defendant is the registered proprietor of Land parcel No. Marama/Buchenya/283. The plaintiff, PW1 testified that he purchase the suit tile form PW3 and obtained his title in 2012. At the time of purchase the defendant was already on the suit land and has refused to vacate. PW3 the seller corroborated his evidence and stated that she had leased the land to the defendant and the sale agreement produced by the defence is a forgery. Pw3 the seller's son testified that PW3 leased the land to the defendant who later put up structures and started living there from 2011. PW3 stated he witnessed the lease agreement and not a sale agreement with the defendant but pointed out it was DEx1. He confirms that they received Kshs. 262,500/= from the defendant. He stated that his mother later sold the land to the plaintiff. Indeed the Trial Magistrate pronounced in her judgement as follows;

"*These contradictions go to the root of the testimony of PW2 and PW3. I have seen the said agreement (DEx1) and I am satisfied that it is a sale agreement between PW3 and the defendant for the land herein and that the price of Kshs. 297,500/=."*

I also find material contradictions in the plaintiff's case.

On ground 6 of the appeal that the Learned Magistrate erred in failing to find that the respondent since purchasing the suit land did not follow proper procedure to obtain consent from Land Control Board within 6 months of purchasing the suit land. **Section (6(1) of the Land Control Act provides as follows:-**

"*An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any part thereto".*

In the case of Macharia Mwangi Maina & 87 Others v. Davidson Mwangi Kagiri [2014] eKLR the court found that the appellant's action of receiving the full purchase price and putting the respondent in possession created a constructive trust in favour of the respondent, dismissed the appellant's claim and granted an order of specific performance in favour of the respondent.

In the Court of Appeal case of **Willy Kimutai Kitilit v Michael Kibet (2018) eKLR** the court held as follows:

"*A contract for the sale of land to which the Land Control Act applies is not void from inception nor is it an illegal contract. It becomes void when no application for consent of the Land Control Board is made or if made, it is refused and the appeal from the refusal, if any, has been dismissed (see Section 9 (2)). The Land Control Act prescribes the time within which the application for consent should be made to the Land Control Board but does not prescribe the time within which the Land Control Board should reach a decision or the time within which any appeal should be determined. The process from the time of the making the application to the time of the determination of the appeal, if any, may obviously take time. However, the requirement that an application for the consent should be made within six months of the making of the agreement and the provisions of Section 7 of the Land Control Act for recovery of the consideration is an indication that Parliament intended that controlled land transactions should be concluded within a reasonable time.*

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."

In the instant case I find that the delay was caused by the seller who chose to resale the said suit parcel to the appellant knowing very well that the defendant had already taken possession hence the doctrines of *constructive and proprietary estoppel will apply. I find that defendant had bought the suit land and it was not available.*

I see no reason to depart from all these authorities sited above. In the case of Mwanasokoni v Kenya Bus Service (1982 - 88) 1 KAR 870, it was held that this court is duty bound to revisit the evidence on record, evaluate it and reach its own decision in the matter. This court however, appreciates that an appellate court will not ordinarily interfere with the findings of fact of the trial court unless they were based on no evidence at all, or on misapprehension of it or the court is shown demonstrably to have acted on wrong principles in reaching the findings. The court finds that the decision by the Trial Magistrate was judiciously arrived at. I find this appeal is not merited and I dismiss it with no orders as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 24TH DAY OF JUNE 2020.

N.A. MATHEKA

JUDGE