



**REPUBLIC OF KENYA**

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

**ELC SUIT NO. 359 OF 2008**

**ENKASITI FLOWER GROWERS LIMITED.....PLAINTIFF**

**VERSUS**

**PROTEIN & FRUITS PROCESSING LIMITED.....1<sup>ST</sup> DEFENDANT**

**AGRICULTURAL FINANCE CORPORATION.....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

1. By a plaint dated 28<sup>th</sup> July 2008 the plaintiff seeks judgment against the defendants for:-

***1. As against the second defendant an order that it delivers up the title deed to the property known as Land Reference Number 10871/1 together with an executed discharge of charge over the said property to the plaintiff as attorney of the first defendant against payment to the second defendant of the said balance of Kshs.1,027,769.70 or such other sum or sums as may be due under the said charge.***

***2. As against the first defendant:***

***(a) An order of specific performance of the said first and second agreement requiring the first defendant to execute a transfer of the said property known as Land Reference Number 10871/1 free from all encumbrances in favor of the plaintiff upon payment by the plaintiff to the second defendant of the said balance of Kshs.1,027,760.70 or such other sum or sums as may be due under the said charge; and***

***(b) In the event of the first defendant refusing or failing to execute the said transfer within the time limited by the honourable court, an order that such transfer be executed by the deputy registrar of this honourable court on behalf of and in the name of the first defendant.***

***(c) Damages in addition to or in lieu of specific performance.***

2. Upon being served with copies of plaint and summons to enter appearance the 1<sup>st</sup> defendant entered appearance on 19<sup>th</sup> August 2008 and filed a statement of defence and counterclaim dated 3<sup>rd</sup> September 2008. The same was amended on 21<sup>st</sup> October 2009. In its counterclaim it seeks orders that:-

***(i) The plaintiff do give vacant possession of LR No. 10871/1 and a permanent injunction against the plaintiff, restraining them from entering into, remaining into the suit property so as to interfere with the 1<sup>st</sup> defendant's ownership.***

***(ii) In the alternative, the plaintiff do pay for rentals for the continued occupation of the property until the giving of vacant possession of the suit property.***

***(iii) Any other relief that the court may deem fit and just to grant.***

***(iv) A declaration that the discharge of charge and certificate of title LR No. 10871/1 and Muranga Maragua Ridge/347 should be released to the registered owners being the 1<sup>st</sup> defendant herein and Patrick Kirono Mwaura and the estate of Anne Wanjiku Mwaura (deceased) respectively.***

3. The 2<sup>nd</sup> defendant entered appearance on 13<sup>th</sup> August 2008 and filed a statement of defence dated 25<sup>th</sup> August 2008.

4. PW1 Mansukhlal Shantilal Patel a director of the plaintiff adopted his witness statement dated 8<sup>th</sup> December 2011. He told the court there was an agreement of sale between the plaintiff and the defendant in respect of LR No. 10871/1 Thika for a consideration of Kshs. 31 million, which Kshs.18.5 million was to be paid to M/S Munene & Co. Advocates, Kshs.250,000 to the 1<sup>st</sup> defendant and Kshs.3,620,000 to the 2<sup>nd</sup> defendant (page 4 of the plaintiff's bundle of documents). The plaintiff performed its obligations by giving a cheque in favour of Ratana Insurance Brokers for Kshs.250,000. This was one of the companies owned by Patrick Mwaura. On page 19 of the plaintiff's bundle there is a cheque for Kshs.18,500,000 in favour of M/s Munene & Co. Advocates. He told the court that the plaintiff was not issued with a receipt neither was the cheque returned. The plaintiff also paid Kshs. 5 million to the 2<sup>nd</sup> defendant being repayment of the loan owing by the 1<sup>st</sup> defendant. The 2<sup>nd</sup> defendant acknowledged the said payment and issued a receipt as shown in page 22 of the plaintiff's bundle.

5. Patrick Mwaura, a director of the 1<sup>st</sup> defendant also sought an advance of Kshs. 1 million on the understanding that he would give the plaintiff a title for Maragua Ridge/347. The agreement is duly signed and witnessed by his wife. This is shown in page 26 of the plaintiff's bundle. The cheque made in favour of the 1<sup>st</sup> defendant is received and endorsed with the words "received as per the agreement dated 24<sup>th</sup> April 1997". The same was signed by Patrick Mwaura (page 28 in the plaintiff's list of bundle. On page 29 of the plaintiff's bundle, there is a note from the 2<sup>nd</sup> defendant stating that the outstanding loan by the 1<sup>st</sup> defendant is Kshs.1,222,262.46. The same is addressed to the 1<sup>st</sup> defendant. The plaintiff paid the amount and the 2<sup>nd</sup> defendant acknowledged vide a receipt dated 3<sup>rd</sup> September 1998 for Kshs.1,243,373.27 (pages 30-33 of the plaintiff's bundle). The plaintiff also paid Kshs.1,245,637.20 to the 2<sup>nd</sup> defendant on behalf of the 1<sup>st</sup> defendant and also made further payments when they fell due. Every time the plaintiff made payments it got receipts from the 2<sup>nd</sup> defendant (pages 34-38 of the plaintiff's bundle).

6. PW1 stated that all those payments were made on behalf of the 1<sup>st</sup> defendant because the plaintiff owned land neighbouring the suit land. They needed to expand their business of Green houses hence the need for more land. He told the court that they obtained the land control board consent. He produced copies of agreement between the plaintiff and Patrick Mwaura together with a court order seeking the extension in which the time for seeking consent from land control board could be sought. It relates to LR No. 10871/1 IR 58576 ("**the suit property**"). The same is duly signed by Patrick Mwaura (page 107 of the plaintiff's bundle). He stated that the time for which to seek the land control board consent was extended (page 74-82 of the plaintiff's bundle). The 1<sup>st</sup> defendant challenged the extension but its appeal was dismissed. The plaintiff was able to obtain consent from the land control board (page 109 of the plaintiff's bundle). The consent is dated 17<sup>th</sup> June 2008.

7. The plaintiff requested the 2<sup>nd</sup> defendant to avail all the original documents pertaining to the suit property and to discharge the charge. The 2<sup>nd</sup> defendant complied with this request (pages 110-115 of the plaintiff's bundle). All the documents were forwarded to the plaintiff's lawyer who got in touch with the 1<sup>st</sup> defendant to execute the transfers. The 1<sup>st</sup> defendant refused to sign the transfers. The plaintiff therefore filed this suit seeking orders of specific performance. The plaintiff has taken possession of the suit property and are in possession to date. PW1 produced the documents in the list of documents as exhibits P1, 1A – to P21 respectively.

8. DW1 Lawrence Irungu Mwaura a director of the 1<sup>st</sup> defendant adopted his witness statement and the list of documents. He produced the documents on the list of documents as exhibit D1 to D16. He told the court that the entire amount was not paid to the 2<sup>nd</sup> defendant and that one of the directors of the 1<sup>st</sup> defendant declined to sign the second agreement. Anne W. Mwaura the other director did not sign, that Patrick Mwaura signed twice, as a director and in his individual capacity. Further that the agreement was not duly sealed. Mr. L. Vadgama signed on behalf of the plaintiff. The same is not stamped or sealed. It only bears initial 'MSL'. Further that there is a discrepancy of the amounts owing to the 2<sup>nd</sup> defendant.

9. That the application for land control board consent was not signed by Patrick Mwaura, nor sealed by the seal of the 1<sup>st</sup> defendant and that no representative of the 1<sup>st</sup> defendant attended the land control board on 17<sup>th</sup> June 2008 as they were not notified. That the 1<sup>st</sup> defendant was not given a copy of the transfer. He maintained that the full purchase price was not paid. He prays that the plaintiff's suit be dismissed with costs and the 1<sup>st</sup> defendant's counterclaim be allowed.

10. The 2<sup>nd</sup> defendant did not avail any witnesses but tendered written submissions.

#### **The Plaintiff's submissions**

11. They are dated 21<sup>st</sup> March 2019. They outline three issues for determination:-

*(a) Whether the plaintiff fulfilled its obligation under the agreement of sale dated 11<sup>th</sup> June 1996, and if so, is it entitled to an order of specific performance of the said agreement?*

*(b) Whether the counterclaim by the 1<sup>st</sup> defendant discloses any reasonable cause of action against the plaintiff.*

*(c) Whether the said counterclaim is an abuse of the process of this court on the ground of res judicata.*

*(d) Who bears cost of the suit?*

12. This suit was filed for a remedy of specific performance of a sale agreement dated 11<sup>th</sup> June 1996 and the further agreement dated 24<sup>th</sup> April 1997 between the plaintiff and the 1<sup>st</sup> defendant. It has relied on the case of **Reliable Electrical Engineering vs Mantrac Kenya Limited [2006] eKLR; Oscar Ochieng & Another vs Prilscot Co. Ltd [2018] eKLR**. Under section 3 of the law of contract Act, both agreements were executed correctly by the 1<sup>st</sup> defendant and the plaintiff, signed by authorized persons as confirmed in evidence and the plaintiff paid consideration whereby the 1<sup>st</sup> defendant surrendered possession. It has put forward the cases of **Mamta Peeush Mahajan**

**(suing on behalf of the Estate of the late Peeush Premal Mahajan) vs Yashwant Kumari Mahajan (sued personally and as Executrix of the Estate of and beneficiary of the Estate of Krishan Lal Mahajan [2017] eKLR; Macharia Mwangi Maina & Others vs Davidson Mwangi Kagiri [2014] eKLR.**

13. The plaintiff has tendered evidence that he obtained consent from the land control board dated 17<sup>th</sup> June 2008. It has put forward the case of **Isaack Ngatia Kihagi vs Paul Kaiga Githui [2017] eKLR**. The court of appeal restated the principles and applicable law on lack of consent to transfer agricultural land in **Willy Kimutai Kitilit vs Michael Kibet [2018] eKLR**. It urged the court to grant the order of specific performance.

14. The 1<sup>st</sup> defendant's counterclaim discloses no reasonable cause of action. It has put forward the case of **Time Magazine International Ltd vs Michael F Rotich & Another [2000] Eklr**. No particulars of bad faith and undue influence on the part of the plaintiff or evidence that the contracts were shrouded in bad faith was tendered.

15. The 1<sup>st</sup> defendant, had earlier filed civil suit no. 1207 of 2005 against the plaintiff seeking a declaration that the sale agreements were invalid and an order of eviction which are the same orders sought herein. In light of Section 7 of the Civil Procedure Act the counterclaim is an abuse of the process of court for being resjudicata.

#### **The 1<sup>st</sup> Defendant's submissions**

16. They are dated 14<sup>th</sup> June 2019. It raises ten issues for consideration. The agreement dated 11<sup>th</sup> June 1996 between the plaintiff and the 1<sup>st</sup> defendant in respect of LR No. 10871/1 was for a consideration of Kshs.31,000,000 which was to be paid as follows:-

- Kshs.18,500,000 to M/S Munene & Co. Advocates

- Kshs.250,000 to the 1<sup>st</sup> defendant

- Kshs.3,620,000 to the 2<sup>nd</sup> defendant

- The balance of Kshs.8,630,000 was to be paid to the 2<sup>nd</sup> defendant. That this agreement was not validly executed by the directors of the plaintiff as it was signed and sealed in the presence of one Rajendra Thakker who was not a director of the company.

17. The contract was not honoured by the plaintiff as the plaintiff attempted to change the terms of the agreement using the 2<sup>nd</sup> agreement dated 24<sup>th</sup> April 1997. The balance of the purchase price was reduced to Kshs.8,047,500 without any explanation. The 2<sup>nd</sup> agreement was not valid as it intended to vary the terms of the previous agreement to the detriment of the vendor. This agreement is in valid for want of attestation and execution. It has put forward the case of **Kenya Breweries Ltd vs Kiambu General Transport Agency Limited [2000] 2 EA 398**.

18. The plaintiff never paid the full purchase price of Kshs.31,000,000/- as per the agreement. It was unable to prove payment of Kshs.3,299,261 to the 2<sup>nd</sup> defendant. The plaint in HCCC 1207 of 2005 was struck out on technicality. The plaintiff cannot plead for specific performance of a contract in which it is in breach.

19. The consent from the land control board was not signed by the 1<sup>st</sup> defendant. There was no receipt for payments for the application, the application did not have a receiving stamp from Kakuzi Land Control Board. The 1<sup>st</sup> defendant was not invited to attend the said land control board. The agreements were void, illegal and invalid because the 2<sup>nd</sup> defendant did not consent as chargee contrary to the provisions of Section 30 of the AFC Act. The contract was invalid for want of consent from the land control board and the 2<sup>nd</sup> defendant. The 1<sup>st</sup> defendant be cannot be compelled to perform an invalid contract. It has put forward the case of **Gitanga Maniki & Another vs Annunciata Waithira Kibue ELC 541 of 2009**.

20. The plaintiff has come to court with unclean hands. The plaintiff had a balance of Kshs.1,027,796/70. The 2<sup>nd</sup> defendant delivered the title documents during the pendency of this suit. The 1<sup>st</sup> defendant has made out a good case on its counterclaim and urges the court to allow it. It also prays that the 2<sup>nd</sup> defendant be compelled to return the title documents to the 1<sup>st</sup> defendant.

#### **The 2<sup>nd</sup> defendant's submissions**

21. They are dated 15<sup>th</sup> May 2009. They raise two issues for determination. It relied on order 2 rule 15(1) of the Civil Procedure Rules 2010 and submitted that the plaintiff admitted that it had no claim against the 2<sup>nd</sup> defendant. It has put forward the case of **Yaya Towers Ltd vs Trade Bank Ltd (in liquidation) CA Civ Appeal NO. 35 of 2000; Abubakar Zain Ahmed vs Premier Savings and Finance Ltd & 3 Others Civil Appeal No. 109 of 2004**. It prays that it is entitled to costs as it has been sued wrongly in these proceedings.

22. I have considered the pleadings and the evidence on record, the written submissions field on behalf of the respective parties and the authorities cited. the issue for determination are:-

**(i) Whether the plaintiff fulfilled its obligation under the agreement for sale dated 11<sup>th</sup> June 1996. And if so is it entitled to an order of specific performance?**

(ii) Whether the 1<sup>st</sup> defendant's counterclaim filed on 3<sup>rd</sup> September 2008 is merited

(iii) Who should bear costs?

23. Section 3(3) of the Law of Contract Act, Cap 23 provides that:-

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:

The sale agreement dated 11<sup>th</sup> June 1996 between the plaintiff and the 1<sup>st</sup> defendant was for all intents and purposes in writing and validly executed by the contracting parties. PW1 Mansukhlal Shantilal Patel told the court that he is a director of the plaintiff and that Mr. Rajendra A Thakker, the Chief Executive Officer of the plaintiff executed the contract on behalf of the plaintiff. The said Mr. Thakker was authorized to sign the agreement for sale. Consequent to signing the agreement the plaintiff paid the consideration agreed upon and the 1<sup>st</sup> defendant surrendered possession of the suit property to the plaintiff. The 1<sup>st</sup> defendant in several letters gave instructions to the plaintiff on the payment of sums due and owing to the 2<sup>nd</sup> defendant. This evidence has not been challenged by the 1<sup>st</sup> defendant in anyway. I rely on the cited case of **RTS Flexible Systems Ltd vs Molkerei Alois Muller GmbH [2010] UK SC 14** where it was stated as follows:-

**“.....whether there was a binding contract between the parties and if so, upon what terms, depends upon what they have agreed. It depends..... upon a consideration of what was communicated between them by words or conduct and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legal binding relations. Even if certain terms of economic or other significance have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement”.**

The 1<sup>st</sup> defendant herein allowed the plaintiff to repay the loan owing to the 2<sup>nd</sup> defendant on its behalf. It is estopped from departing from the representation it made to the plaintiff that it would transfer the suit property to the plaintiff if the plaintiff paid the consideration. I agree with the plaintiff's submission that the 1<sup>st</sup> defendant through its directors intended to be bound by the agreement dated 11<sup>th</sup> June 1996 and that one dated 24<sup>th</sup> April 1997 in so far as the validity of the sale of the suit property is concerned. It would be noted that the 1<sup>st</sup> defendant changed its attitude after the plaintiff made a demand for completion of the transaction.

24. The agreement was for sale of LR No. 10871/1 Thika for an agreed consideration of Kshs.31,000,000 payable over a period of time. The plaintiff has demonstrated by way of receipts and other documents that the said amount was paid in full. In the case of **Macharia Mwangi & 87 others vs Davidson Mwangi Kagiri [2014] eKLR**, the court of appeal stated thus:-

**“.....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. As was stated by Lord Reid in Steadman vs Steadman [1976] AC 536, 540 “If one party to an agreement stands by and lets the other party incur expense or prejudice his position on the faith of the agreement being valid he will not then be allowed to turn around and assert that the agreement is unenforceable”**

The 1<sup>st</sup> defendant herein allowed the plaintiff offset the loan owing to the 2<sup>nd</sup> defendant on the strength of the agreement. It cannot turn around and claim the agreements are not enforceable.

25. The 1<sup>st</sup> defendant avers that the agreement dated 11<sup>th</sup> June 1996 is void for failure to obtain the land control board consent. The plaintiff has exhibited evidence that it was granted consent on 17<sup>th</sup> June 2008. It was produced as exhibit P17a. No evidence was called by the 1<sup>st</sup> defendant to disprove the legitimacy of this consent. In the case of **Kiplagat Kotut vs Rose Jebor Kipng'ok [2019] eKLR** the Court of Appeal held thus:

**“We have deliberated on the reasoning by the trial court on the validity of the consent of land control board, certain pertinent facts are evident and proven from the record. It is indisputable that the sale agreement was entered into between the appellant and the respondent, pursuant to the agreement, the respondent received the purchase price of Kshs.700,000 from the appellant. The trial judge correctly held that the respondent is estopped from reneging on the sale agreement. We agree with the judge and add that the doctrine of estoppel and constructive trust are applicable in the instant case and the respondent; cannot renege from her contractual obligations as well as fiduciary duty imposed by law and equity. As Lord Bridge observed in Lloyds Bank PLC vs Rosset [1991] AC 107,132 a constructive trust is based on “commons intention” which is an agreement, arrangement or understanding actually reached between the parties and relied on and acted on by a claimant.....”.**

I also rely on the case of **Isaac Ngatia Kihagi vs Paul Kaiga Githui [2017] eKLR**

26. The plaintiff who paid the full purchase price to the 1<sup>st</sup> defendant and has been in quiet possession of the suit property since 1996 is

entitled to be registered as the owner of the suit property. In the case of **Willy Kimutai Kitilit vs Michael Kibet [2018] eKLR**, the Court of Appeal stated thus:-

***“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 and 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 constrictive 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 doctrine of constructive and proprietary estoppel to a contract rendered void by lack of consent of land control board will largely depend on the circumstances of each particular case”.***

27. In the instant case, consent from the land control board was sought and properly granted on 17<sup>th</sup> June 2008. The 1<sup>st</sup> defendant claim that the application for consent was not properly executed is neither here nor there.

28. Its claim that they were not invited to the land control board is also not supported by any evidence. I find that the consent of land control board was properly sought and issued. The fact that the 2<sup>nd</sup> defendant released all the title documents to the plaintiff upon full repayment of the loan means it consented to the said sale. It was aware of all the dealings between the plaintiff and the 1<sup>st</sup> defendant.

29. I find that the plaintiff is entitled to the remedy of specific performance of the sale of land agreement dated 11<sup>th</sup> June 1996 and the further agreement dated 24<sup>th</sup> April 1997 between the plaintiff and the 1<sup>st</sup> defendant. In the case of **Reliance Electrical Engineering vs Mantrac Kenya Ltd [2006] eKLR** Maraga J (as he then was) stated that:-

***“Specific performance like any other equitable remedy is discretionary and the court will only grant it on the well settled principles. The jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or unenforceable”***

I also rely on the cited case of **Oscar Ochieng & Another vs Prilscot Co. Ltd [2018] eKLR**. I find that the sale agreements dated 11<sup>th</sup> June 1996 and 24<sup>th</sup> April 1997 between the 1<sup>st</sup> defendant and the plaintiff were validly executed by the contracting parties and they are enforceable

30. It is the plaintiff’s case that the 1<sup>st</sup> defendant issued no notice to rescind the contract. To date, it has not stated that it will not convey the land. The plaintiff has performed its obligations in the sale agreement dated 11<sup>th</sup> June 1996. I therefore find that the defendant counterclaim is not merited. The sale agreement dated 11<sup>th</sup> June 1996 and 24<sup>th</sup> April 1996 are valid. The 1<sup>st</sup> defendant has no reasonable cause of action against the plaintiff. I agree with the plaintiff’s submissions that no particulars of bad faith nor undue influence were pleaded and no evidence was placed before this court at the hearing in support of the allegations that the contracts were shrouded in bad faith and entered into under undue influence.

31. It is not in dispute that the 1<sup>st</sup> defendant had raised the same issues in HCCC 1207 of 2005. The suit was dismissed. By raising the same issues in the counter claim amounts to an abuse of the court process.

32. In conclusion, I find that the plaintiff has proved its case on a balance of probabilities as against the 1<sup>st</sup> defendant. PW1 told the court that the 2<sup>nd</sup> defendant has honoured its obligations and the plaintiff has no claim against it.

33. Accordingly judgment is entered for the plaintiff as against the 1<sup>st</sup> defendant as follows:-

***(a) That an order of specific performance is hereby issued directing the 1<sup>st</sup> defendant to execute a transfer of the said property known as LR No. 10871/1 Thika free from all encumbrances in favour of the plaintiff.***

***(b) In DEFAULT the Deputy Registrar of this honourable court is hereby directed to execute such transfer on behalf of or in the names of the said 1<sup>st</sup> defendant.***

***(c) The plaintiff and the 2<sup>nd</sup> defendant shall have costs of the suit to be borne by the 1<sup>st</sup> defendant.***

It is so ordered.

**Dated, signed and delivered in Nairobi on this 18<sup>th</sup> day of June 2020.**

.....

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

.....Advocate for the Plaintiff

.....advocate for the 1<sup>st</sup> defendant

.....Advocate for the 2<sup>nd</sup> Defendant

.....Court Assistant