



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAJIADO**

**ELC APPEAL NO. 4 OF 2017**

**(Formerly Nairobi ELC Appeal No. 3 of 2016)**

**KILONZO WAMBUA.....1<sup>ST</sup> APPELLANT**

**NICHOLAS MAUNDU.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**MOSOI P. PARKUT.....3<sup>RD</sup> APPELLANT**

**JUDGEMENT**

*(Being an appeal from the Judgment of the Resident Magistrate's Court at Kajiado*

*Hon. E A MBICHA made on 15<sup>th</sup> January, 2016 in Kajiado PMCC No. 282 of 2010)*

**Introduction**

By a Memorandum of Appeal dated the 21<sup>st</sup> January, 2016 the Appellants appeal against the whole of the Judgment delivered by Hon. E A MBICHA Resident Magistrate's Court at Kajiado on the 15<sup>th</sup> January, 2016. The genesis of this appeal is the Judgment of the Resident Magistrate Hon. E. M. Mbicha in the Kajiado PMCC No. 282 of 2010 where he decided in favour of the Respondent and dismissed the Appellants' suit in totality. In the said suit the Appellant had sought for the following orders as against the Respondent:

- a) A declaration that the agreements of Sale entered into between the parties are legally and equitably valid and created binding agreements of sale.
- b) A permanent injunction restraining the Defendant either by himself, his agents, servants or in any manner however from claiming rights over or in any way dealing with or trespassing onto the Plaintiff's 16 acres' portion of land and/ or interfering with the Plaintiff's rights to quiet possession, occupation and enjoyment thereof.
- c) Specific performance of the Agreement of sale.
- d) Costs and incidental to the suit and interest at court rates.
- e) Any other remedy as the Honourable Court may deem fit and applicable in the circumstances.

The appellant being dissatisfied by the whole Judgment filed an appeal at the Environment and Land Court in Nairobi on 22<sup>nd</sup> January, 2016 which was later transferred to this court.

The Memorandum of Appeal contained the following grounds;

1. THAT the Learned Magistrate erred in law and in fact in failing to find and to hold that there is no legal requirement for Land Sale Agreements to be in any particular format.
2. The Learned Magistrate erred in law and in fact in failing to find and to hold that limitation period for actions for contract for land

matters is 12 years rather than 6 years which is applicable for general contracts.

3. The Learned Magistrate erred in law and in fact for failing to find that the Defendant had taken the Plaintiffs and pointed out to them land measuring 16 acres portion of comprised in land title Kajiado/ Kaputiei Central/ 677 ('the Land') the subject matter of the agreements to the Appellants.

4. The Learned Magistrate erred in law and in fact in failing to hold and find that the Defendant could not raise issue of Land Control Board Consent to defeat the Agreement if he never applied for the Consent.

5. The Learned Magistrate erred in law and in fact in failing to find and hold that the Defendant had signed the agreements and acknowledgment of receipt of money.

6. The Learned Magistrate erred in law and in fact in failing to find and hold that the Defendant acknowledged that there were agreements between him and the Plaintiffs.

7. The Learned Magistrate erred in law and in fact in failing to find and hold that the Defendant had acknowledged receipt of money as consideration for sale of land.

8. The Learned Magistrate erred in law and in fact by failing to find and to hold that Land Control Board application can be pursued at any time as the High Court has jurisdiction to extend time for seeking the consent.

9. The Learned Magistrate erred in law and in fact by failing to hold and find that recent High Court decision on land matters upon enactment of Land Act and the new Constitution were emerging and developing jurisprudence breathing life to equitable remedies and constitutional provisions.

The Appellants pray;

a. This Appeal be allowed.

b. The Judgement and Decree by Honourable Mr. E A Mbicha Resident Magistrate delivered on 15<sup>th</sup> January, 2016 in Kajiado Principal Magistrates Court Civil Case No. 282 of 2010 be set aside and the Court do make such orders as it may deem appropriate.

c. Costs of this Appeal be awarded to the Appellants.

The Appellants filed their submissions to canvass the Appeal.

### **Submissions**

In their submissions, the Appellants reiterated their claim and contended that their suit was not time barred as the Respondent did not hold title at the time they entered into the Sale Agreements. Further that the Respondent was in breach of the said Agreements which were silent on transfer. They proceeded to analyse the evidence as presented and confirmed only having been aware that the Respondent had been issued with a title when they instituted the Tribunal Case Number TC 320/03/06 in Kajiado. Further, the Sale Agreement was silent on transfer of title and time only begun to run in 2006 when the aforementioned Tribunal delivered its Ruling on 27<sup>th</sup> July, 2006. They contended that the suit land was insitu in 1990 hence the findings by the trial court that the Agreements were for a non-existent parcel of land was baseless. They reiterated that parties are bound by their pleadings and insisted that the doctrine of constructive trust was applicable in this suit. Further, that the sale was not invalid for failure to obtain consent of the Land Control Board. To buttress their averments, they relied on the following decisions: **Global Vehicles Kenya Limited V Lenana Road Motors (2015) eKLR; Independent Electoral and Boundaries Commission & Another V Stephen Mutinda Mule & 3 Others (2014) eKLR; Willy Kimutai Kitilit V Michael Kibet (2018) eKLR; Macharia Mwangi Maina & 87 Others Vs Davidson Mwangi Kagiri (2014) eKLR; and William Kipsoi Sigei Vs Kipkoech Arusei & John Tunge (2019) eKLR.**

The Respondent failed to file his submissions despite being granted leave to do so.

### **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 Appellants are entitled to the sixteen (16) acres of land from Kajiado/ Kaputiei Central / 677 owned by the Respondent.
- Whether the Appeal is merited.

As to whether the Appellants are entitled to the sixteen (16) acres of land from Kajiado/ Kaputiei Central/ 677 owned by the Respondent. It is not in dispute that the Respondent is the owner of land parcel number Kajiado/ Central/ 677. It is further not in dispute that the Appellants and or their agents are in occupation of a portion of land parcel number Kajiado/ Central/ 677. What is in dispute is whether the Appellants purchased a total of sixteen (16) acres from the Respondent, paid the full purchase price and were granted possession after which the Respondent declined to transfer the said land to them. The Appellants in the lower court produced various hand written agreements to wit:

For 1<sup>st</sup> Appellant, Agreements dated 9<sup>th</sup> August, 1990; 13<sup>th</sup> August, 1990; and 28<sup>th</sup> August, 2004 which he entered into with the Respondent for purchase of 11 acres of land. As for the 2<sup>nd</sup> Appellant, Agreements dated the 10<sup>th</sup> October, 2000 and 12<sup>th</sup> September, 2005 with the Respondent for purchase of 5 acres. From the said Agreements which were produced as exhibits, the Respondent actually signed by indicating his name thereon. Further, the said Agreements were witnessed. The Respondent confirmed in his evidence in chief that he indeed received Kshs. 50,000/= from Nicholas Maundu (2<sup>nd</sup> Appellant) and Kshs. 40,000 from Kilonzo Wambua (1<sup>st</sup> Appellant). He admitted that he met the Appellants in 1990 and they were involved in a transaction of sale of land before he acquired the title to the suit land in 1998. In cross examination, he claimed he was leasing the land to the Appellants and disowned some of the Agreements. He however admitted showing the Appellant where to settle but they never paid him and that that Nicholas Maundu was on the land but was not sure whether the other person on the land was Kilonzo's employee. He claimed to have an Agreement demonstrate he leased the land but never availed the same in court. From the evidence before the Court, the Learned Magistrate in his Judgement proceeded to disregard the Respondent's admission that he received monies from the Appellants, showed them where to settle on the land and to date they are still thereon; the undisputed handwritten agreements and the fact that the issue of Limitation was never pleaded in the Defense. The Learned Magistrate proceeded to hold that the suit was statute barred and there was no evidence that the Respondent executed the Sale Agreements. He further held that the Sale Agreements and or transaction was null and void for lack of consent of the Land Control Board. He found that there were factual discrepancies and the question of constructive trust could not arise. Based on the facts as presented, I will proceed to make reference to 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.'**

Section 7 of the Limitation of Actions Act stipulates thus: **'An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.'**

The trial Magistrate held that the suit was statute barred but I note the fulcrum of the dispute herein revolved around a claim for land. Further, that the Agreements which were produced as exhibits were executed between 1990 upto 2005. It emerged that the Respondent obtained his title on 17<sup>th</sup> July, 1998 after he had allowed the Appellants to occupy certain portions of the said land. It is trite law that in instances where the subject of a contract involves land, time will only begin to run once the vendor obtains a Certificate of Title. In this instance, I find that time only begun to run on 17<sup>th</sup> July, 1998 when the Respondent acquired his title for land parcel number Kajiado/ Kaputiei Central/ 677 which is the suit land herein. I note the Respondent entered into the Agreements while he had not obtained his Certificate of Title but received certain payments after 1998; Insofar as the Learned Magistrate insisted that the Land was non-existent, I opine that since the Respondent admitted to showing the Appellants their respective portions of land to occupy and continued to receive certain payments after aligning his title. The Trial court erred by disregarding this important piece of evidence.

The Learned Magistrate proceeded to hold that the suit was statute barred but I beg to disagree as the provisions of the Limitations of Actions Act cannot be read in isolation. The Limitation of Actions Act is clear that where the suit involves a claim over land, the same should have been instituted within twelve years and not six years as held by the trial Court. From the evidence in the lower Court, it further emerged that Appellants including their agent were already in occupation of the suit land by the time the Respondent was acquiring the title as well as filing this suit, but with this piece of evidence, the Learned Magistrate proceeded to find that there was no constructive trust as the Appellants never obtained consent of the Land Control Board yet the suit land is agricultural. The Appellants had even produced proceedings from the Land Disputes Tribunal where the Respondent had been directed to effect transfer of the sixteen (16) acres of land to him. However, the said Award was not adopted as the Land Disputes Tribunal Act had been repealed.

In the case of **Willy Kimutai Kitilit v Michael Kibet [2018] eKLR**, the Court 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 which are binding on this court, I find that since the Respondent admitted having received monies from the Appellants, failed to furnish court with the alleged Lease Agreement nor pleaded the same in his Defense, and showed the Appellants the portions of land to occupy which they do todate, insofar there was no consent of the Land Control Board, there was an element of part performance which the Respondent did not deny. From the facts before the trial court, I opine that since the year 1990 when the Appellants entered the suit land todate, an element of trust was created, which became an overriding interest over the said land. Insofar as the Appellants failed to obtain the necessary Consent from the Land Control Board within the required period of six (6) months, to enable them obtain the transfer of the suit land into his names; I hold that the transaction is not void as held by the trial Magistrate but enforceable by virtue of the doctrine of constructive trust. Further, that the Appellants are hence entitled to have the said sixteen (16) acres registered in their respective names. In the circumstances, I find that the Learned Magistrate erred in Law and Fact in failing to find and to enforce the Agreements between the parties and holding that limitation period for actions for contract for land matters is 6 years instead of 12 years and time only begun to run in 1998 upon issuance of title deed to the Respondent. I further find that the Learned Magistrate erred in law and in fact in failing to find that it is actually the Respondent who took the Appellants and pointed out to them land measuring 16 acres within land title Kajiado/ Kaputiei Central/ 677. The Learned Magistrate further erred in law and in fact in failing to hold and find that the Respondent could not raise an issue of Land Control Board Consent to defeat the Agreement if he never applied for the same. I suffice to say that the Learned Magistrate by disregarding the set precedents from the Court of Appeal on constructive trust which is an equitable remedy erred in law and in fact in failing to uphold the Appellants’ rights to occupy the suit land.

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 make the following final orders:

- i. That Judgement and Decree by Honourable Mr. E A. Mbicha Resident Magistrate delivered on 15<sup>th</sup> of January, 2016 in Kajiado Principal Magistrates Court Civil Case No. 282 of 2010 be and is hereby set aside.
- ii. The Respondent be and is hereby directed to effect transfer of the sixteen (16) acres of land out of land parcel number Kajiado/ Kaputiei Central/ 677 to the Appellants, within the next 90 days from the date hereof, failure of which the Deputy Registrar, Environment and Land Court Kajiado will execute the said Transfer Forms.
- iii. The costs of the Appeal are awarded to the Appellant.

**Dated Signed and Delivered in Kajiado this 25<sup>th</sup> Day of November, 2020.**

**CHRISTINE OCHIENG**

**JUDGE**