



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC CASE NO 501 OF 2017

(FORMERLY NYERI ELC NO 102 OF 2014)

JOSEPH MATHENGE KAMUTU.....PLAINTIFF/APPLICANT

VERSUS

1. JOSEPH WAINAINA KARANJA....1st DEFENDANT/RESPONDENT

2. NANCY WANJIRA WAINAINA.....2nd DEFENDANT/RESPONDENT

RULING

1. Coming up for determination is an application dated the 28th May 2018 filed vide a Notice of Motion under Section 8(1) of the Land Control Board, Order 51 Rule 1 of the Civil Procedure Rules, and all other enabling provisions of the Law where the Plaintiff/Applicant seeks orders that:-

i. The period for obtaining the Land Control Board consent be extended for such period as the Court may deem fit, for the sale and transfer of LR Nyandarua/Mbuyu/55 and Nyandarua/Mbuyu 56 from the Defendants to the Plaintiff pursuant to the sale agreement executed on the 6th August 2008 by the parties herein.

ii. That the Defendants be ordered to execute the Application for consent of Land control Board for sale and transfer of LR Nyandarua/Mbuyu/55 and Nyandarua/Mbuyu 56, and to attend the relevant land control Board for purposes of obtaining the consent for sale and transfer of LR Nyandarua/Mbuyu/55 and Nyandarua/Mbuyu 56.

iii. The cost of the application to be provided for.

2. The said application was supported by the grounds on the face of it as well as an Affidavit, sworn on the 28th May 2018 by the Applicant herein.

3. By consent parties agreed to have the said application disposed of by way of written submissions which I have considered herein under as;

Applicant's Case

4. It is the Applicant's submission that on the 16th August 2008 he entered into a sale agreement with the Respondent/Defendants herein for the sale of the suit lands herein stated above, wherein he took immediate possession of the said suit lands upon execution of the agreement.

5. That the Respondent/Defendants were contractually obligated to seek for consent for the sale from the Land Control Board but did not apply for the same with the result that the statutory period of 6 months from the date of the transaction lapsed.

6. The Applicant however is desirous to continue with the sale transaction and thus seeks for an extension of time to apply for the consent from the Land Control Board as is provided for under Section 8(1) of the Land Control Act and as was held in the decided case of **David Sironga Ole Tukai vs Francis Arap Muge & 2 Others [2014] eKLR**. So that he can seek for an order for specific performance of the agreement in the main suit.

Respondents' case

7. The application was opposed by the Respondents herein who submitted that indeed parties entered into an agreement for sale of the parcels of land, herein mentioned above, on the 16th August 2008.

8. That at paragraph 5 of the said agreement the same stipulated that the vendors shall immediately apply to the Ndaragwa Divison Land Control Board for consent and in default the purchaser shall be entitled to rescind the agreement to which the vendor shall then pay to the purchaser an amount equal to double the purchase price within 45 days after the completion date.

9. That unlike what was submitted by the applicant herein, indeed it had been he who had declined signing the application forms presented to him by the Respondents thus making it difficult for them to fulfill their obligations.

10. While relying on the case of **Rosebella Iranmwenya Mirieh vs Mwangi Ngugi [2017] eKLR**, the Respondents submitted that the Applicant herein could not seek for specific performance, which is an equitable remedy, on a contract that that was not valid or enforceable by virtue of it being contrary to the provisions of Section 6 of the Land Control Act.

11. They were in agreement however that indeed section 8(1) of the Land Control Act gave the court power to extend the prescribed time of 6 months for making the application for consent of the and Control Board but that that power was not to be exercised arbitrary but judiciously.

12. That the Applicant had not given reasons why the court should exercise discretion in his favour keeping in mind that the court had no jurisdiction to make contracts for parties and therefore extending time would mean making new terms of the contract.

13. While relying on the provisions of Section 59 of the Interpretation and General Provisions Act, the Respondents submitted that the Applicant was guilty of laches having made the present application nine (9) years and eight (8) months after the execution of the sale agreement thus equity could not come to his aid.

14. The Respondents also relied on the case of **Joseph Boro Ngera vs Wanjiru Kamau Kaime & Another [2010] eKLR** to submit that the possession of the suit lands by the Applicant in this case constituted a criminal offence under Section 22 of the Land Control Act there having been no consent of the Land Control Board.

15. The Respondents further relied on the cases of **David Sironga Ole Tukai (supra) and Macharia Mwangi Maina & 87 others vs Davidson Mwangi Kagari [2014] eKLR** to submit that the sale agreement of 16th August 2008 was void for all purposes for failure to obtain the consent from the Land Control Board and that the provisions of Section 6 and 8 of the Land Control Act were express, unequivocal and comprehensive to the effect that there was no room for courts to import the doctrine of equity in the Act.

16. That the Applicant was not entitled to an extension of the time period of 6 months since he was relying on his own default, an act of illegality and had not come to court with clean hands. They sought for the application dated the 28th May 2018 to be dismissed.

17. Having considered the submissions herein, I find the matters for determination as :

- i. Whether the sale agreement entered into by the parties herein was valid.
- ii. Whether the consent of the Land Control Board was essential for the sale transaction between the parties.

18. *On the first issue, as to whether the sale agreements entered into by the parties herein were valid, the law of contract is application in the instant case where Section 3(3) of the Act is clear to the effect 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:

19. A study of the contract that was entered into by the parties on the 16th August 2008, reveals that the Respondents herein did sell to the Applicant land No. LR Nyandarua/Mbuyu/55 and Nyandarua/Mbuyu 56 respectively, measuring 10 acres, for a consideration of Ksh. 550,000/= .A deposit of Ksh. 400,000/= was paid on the execution of the agreement. Parties had agreed that the balance of Ksh 150,000/= was to be paid after the Land Control Board had given its consent to transfer in favour of the purchaser (the Applicant herein).

20. Paragraph 5 of the agreement was to the effect that;

‘The vendors shall immediately apply for consent to transfer the land to the purchaser.’

21. According to the Applicant’s submission, what followed after the execution of this agreement, which was clear in its terms, was that the Respondents herein breached the terms in paragraph 5 of their agreement to the effect that they never sought consent for transfer from the land Control Board.

22. I do find that there was a valid contract between the parties pursuant to the provisions of Section 3(3) of the law of Contract Act.
23. That pursuant to the signing of the said agreement and part payment of Ksh 400,000/=, the said contract did not fall through because the Respondents failed to secure the consent from the Land Control Board for reason that the Applicant failed to sign the application forms presented to him by the Respondents. The said forms were however not availed in court as annexures.
24. It is worth noting that one of the conditions stipulated in paragraph 5 of the agreement was that the Respondents were to immediately apply for consent to transfer the land to the Applicant.
25. The next issue for consideration is whether the consent of the Land Control Board was essential for the sale transaction between the parties. I note that the suit lands were registered under the *Registered Lands Act (Cap 300 of the Laws of Kenya)*, therefore any dealing with them required consent of the Land Control Board. It was the Applicant's contention that although he took immediate possession of the suit lands, the Respondents made no application for consent to the Land Control Board regarding the agreement entered into on the 16th August 2008.
26. The Respondents' contention on the other hand is that lack of the said consent, which was to be blamed on the Applicant, rendered the said agreement void
27. I find that the terms of the Agreement to sell are clear to the effect that **there was common intention between the Applicant and the Respondents in relation to suit property. The Applicant acquired rights over the suit land under the agreement as the transaction had created a constructive trust in favor of the Applicant when he paid the down payment of Ksh. 400,000/= of the purchase price as per their agreement. This trust was enforceable.**
28. At paragraph 5 of the agreement, the Respondents guaranteed the Applicant that they shall seek for the consent to transfer the land to him immediately.
29. In essence thereof and from the wording of the parties' agreement, the Respondents were to procure the consent from the Land Control Board immediately while the Applicant was to pay them the balance of Ksh. 150,000/= after the Land Control Board had given its consent to transfer in favour of the Applicant.
30. There is therefore no doubt that the Applicant herein expected the Respondents to perform their part of the agreement, which was to secure the consent from the Land Control Board and thereafter transfer the land to the Applicant upon completion of the payment of the whole purchase price. This was not the case, as the Respondents have now turned around stating that the Applicant failed to sign the transfer forms.
31. Indeed a party cannot run away from the terms of its agreement. It has often been stated that the Court's function is to enforce contracts that the parties enter into. The court cannot rewrite the party's agreements.
32. In the case of **Shah -vs- Guilders International Bank Ltd [2003]KLR** the Court in considering the terms of the parties contract stated that;-
- "The parties executed the same willingly and they are therefore bound by it."*
33. In **Aiman vs Muchoki (1984) KLR. 353** the Court of Appeal held;
- "In the field of the civil law, it is of utmost importance that the courts uphold the rights of parties to commercial transaction. It is the firm tradition of common law court to do so and if the tradition is departed from the nation will suffer".*
34. A look at the terms of the party's agreement, the same is clear that the land in issue related to a controlled transaction in agricultural land which transaction is governed under Section 6(1) of the Land Control Act and which stipulates that such a transaction:
- "is void for all purposes unless the Land Control Board for the land control board area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act."*
35. Section 6 (2) of the Land Control Act provides:
- "For avoidance of doubt, it is declared that the declaration of trust of agricultural land situated within a Land Control Board area is a dealing in land for purposes of subsection (1)".*
36. Under Section 7 of the Land Control Act, consideration paid for a transaction which becomes void is recoverable as a debt subject to Section 22 which provides:
- Where a controlled transaction; or an agreement to be a party to a controlled transaction, is avoided by Section 6 and any person*
- (a) pays or receives any money; or*

(b) enters into or remains in possession of the land, in such circumstances as to give rise to a reasonable presumption that the person pays or receives the money or enters into or remains in possession in furtherance of the avoided transaction or agreement, that person shall be guilty of an offence and liable to a fine not exceeding three thousand shillings or to imprisonment for a term not exceeding three months or to both such fine and imprisonment.”

37. Section 8 (1) requires that an application for consent should be made in the prescribed form within six months of the making of the agreement but the proviso thereto gives the High Court power to extend the period if it considers that there are sufficient reasons to do so upon such conditions, if any, as it may think fit.

38. Section 9 (2) stipulates that;

Where an application for the consent of a land control board has been refused, then the agreement for a controlled transaction shall become void—

(a) on the expiry of the time limited for appeal under section 11; or

(b) where an appeal is entered under section 11 and dismissed, on the expiry of the time limited for appeal under section 13; or

(c) where a further appeal is entered under section 13 and dismissed, on that dismissal.

39. Looking at the provisions of Section 9(2) of the Land Control Act, it is not the failure to secure the consent from the Land Control Board that makes an agreement null and void, but rather it is the where an application for the consent of the Land Control Board has been refused, that makes an agreement for a controlled transaction void.

40. I find that there was no evidence adduced to confirm that indeed the Respondents had applied for consent to the Land Control Board pursuant to the terms of their agreement, whereby the application had been rejected, or that they had procured the forms wherein the Applicant had refused to append his signature. It cannot therefore be said that this agreement became void by virtue of there having been no consent obtained, when it is clear that the Respondents never applied for the same.

41. The latest decision of the Court of Appeal on the import of failure to obtain the consent was stated recently in the case of **Willy Kimutai Kitilit v Michael Kibet [2018] eKLR** 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.*

*There is another stronger reason for applying the doctrines of constructive trust and proprietary estoppel to the Land Control Act. By **Article 10(2) (b)** of the Constitution of Kenya, **equity** is one of the national values (**emphasis supplied**) which binds the courts in interpreting any law (Article 10(1) (b)). Further, by **Article 159(2) (e)**, the courts in exercising judicial authority are required to protect and promote the purpose and principles of the Constitution. Moreover, as stated before, by virtue of **clause 7** of the Transitional and Consequential Provisions in the Sixth Schedule to the Constitution, the Land Control Act should be construed with the alterations, adaptations, and exceptions necessary to bring it into conformity with the Constitution.....*

*.....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.*

42. I find and hold that the transaction between the Applicant and the Respondents was not voided for want of consent of the land control

board as the same was not sought for and denied

43. The Respondents having received the deposit as agreed, had no valid reason for failing or refusing to apply for consent. In the case of **Willy Kimutai Kitilit** (supra), the court affirmed the applicability of principles of equity and natural justice in a scenario such as the present one. The Respondents' failure to obtain and sign application forms for purposes of obtaining consent of the Land Control Board constitute sufficient reason for this court to intervene and issue an order for the extension of time to apply for consent of the Land Control Board in the circumstances .

44. That having been said, I find in favour of the Applicant and proceed to allow this Application with the following orders:

- i. Time within which to apply for the consent of the Land Control Board in respect of the transaction comprised in the Agreement for Sale dated 16th August 2008 is hereby extended by a period of 6 (six) months. The extended period to run from the date of delivery of this ruling.
- ii. The Plaint shall in the meantime remain in abeyance.
- iii. I award the applicant costs of the Application.

Dated and delivered at Nyahururu this 5th day of February 2019.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE