



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 1252 OF 2016

(FORMERLY HCC NO. 119 OF 2007)

JOSEPH OMOSA OTWENYA.....PLAINTIFF

VERSUS

CHUDE ONTUMBA.....1ST DEFENDANT

BARNABAS OYARO OBIERO.....2ND DEFENDANT

J U D G M E N T

1. The plaintiff instituted the present suit vide a plaint dated 20th November 2007 filed in court on 21st November 2007. The plaintiff's claim was that he had vide an agreement dated 25th September 1982 purchased a portion of 1 hectare out of land parcel **West Kitutu/Mwagichana/1** from the 1st defendant (now deceased) who was the registered owner. The 1st defendant caused the land to be subdivided but instead of transferring the portion of 1 hectare to the plaintiff, he transferred the land which had following the subdivision been numbered as **West Kitutu/Mwagichana/2548** to the 2nd defendant. The plaintiff avers that following the purchase in 1982 he took possession of the portion of 1 hectare and has developed the same and has remained in possession since 1982. The plaintiff claims that he had by virtue of adversely possessing the land for over 25 years acquired title to the land by way of adverse possession and/or prescription. The plaintiff prays for judgment against the defendants for:-

(a) A declaration that the plaintiff is entitled to land parcel West Kitutu/Mwagichana/2548 by way of adverse possession or prescription.

(b) An order of specific performance compelling the 2nd defendant to transfer the whole of land parcel West Kitutu/Mwagichana/2548 to the plaintiff in the event of default the executive officer of the court to be empowered to execute the necessary papers to effect transfer.

(c) Costs of the suit.

(d) Any further relief the honourable court may deem fit and just to grant.

2. The 2nd defendant filed a statement of defence and counterclaim dated 10th December 2007. The 2nd defendant denied the averment contained in the plaintiff's plaint. The 2nd defendant contended that he is the duly registered owner of land parcel **West Kitutu/Mwagichana/2548** and that it was the defendant who in February 2007 started trespassing onto the suit property without any justifiable cause. The 2nd defendant claimed that the plaintiff's acts of trespass had deprived him of the use of the land. The 2nd defendant by the counterclaim seeks orders thus:-

(a) A declaration that he is the absolute owner of all that piece of land known as West Kitutu/Mwagichana/2548 and that the plaintiff is a trespasser therein.

(b) That a permanent injunction do issue restraining the plaintiff, his servants and/or agents from cultivating, entering, trespassing, tilling or doing anything in land parcel West Kitutu/ Mwagichana/2548.

(c) Costs of the suit.

3. Although the record shows that the 1st defendant, Chude Ontumbi filed a Memorandum of Appearance dated 6th December 2007 in person, he did not file a defence to the suit and neither did he participate in the suit in any manner. As per the death certificate on record

dated 29th October 2008 the 1st defendant died on 14th January 2008 and was not substituted. The suit against him thus abated.

4. The suit was part heard by Okong'o J. who took the plaintiff's evidence and that of his witnesses and also the evidence of the 2nd defendant. The hearing of the suit proceeded from where Okong'o J. had left and I took the evidence of the 2nd defendant's witness, Jane Nyachama on 21st September 2017. The 1st defendant died during the pendency of the suit and the suit against him was withdrawn.

Evidence of the Parties;

5. The plaintiff testified as PW1 and called two witnesses in support of his case. The plaintiff testified that on 25th September 1982 he purchased a portion of 1Ha. out of land parcel No. **West Kitutu/Mwagichana/1** from the 1st defendant who is now deceased. He stated the 1st defendant showed him the boundaries of the portion he had purchased and that he took possession of the same and has developed a home thereon and carries on farming activities on the land. The plaintiff stated that consent to subdivide the land was given by the Land Control Board and the land was subdivided into three portions. He however stated that the 1st defendant declined to attend the subsequent land board for consent to transfer and that prompted the plaintiff to file Kisii HCCC No. 12 of 1996 against the 1st defendant and the court referred the dispute to the D.O Mosochi for arbitration by the clan elders. The arbitration was conducted and the elders determined the dispute in favour of the plaintiff. The arbitral proceedings were tendered in evidence as **"PEX.2"**. The plaintiff in his evidence stated that the portion he bought after the subdivision was numbered **West Kitutu/ Mwagichana/2548** and that is where he had his home.

6. The plaintiff stated that he had been in possession of the land since 1982 and that upto 2007 when the 2nd defendant started laying claim to the land no one had interfered with his possession and occupation of the land. He further stated that he sued the defendants in 2007 as the 2nd defendant was laying claim to his land and further he had learnt that the 2nd defendant had unlawfully acquired title to the land that he (the plaintiff) was occupying. The plaintiff explained that when his child died he buried him on the suit property and there was no objection by the 2nd defendant. The plaintiff further stated that he has built a semi-permanent house on the suit property and has all the time since 1982 occupied the land as owner and that he wished the court to declare him as the owner thereof and to order that he be issued title to the land.

7. The plaintiff in cross examination by the 2nd defendant maintained that the portion that he has occupied since 1982 and which he had been cultivating and where his homestead stands is land parcel 2548. He stated that the 1st defendant in seeking consent for subdivision intended that the portion was to be transferred to him (the plaintiff). The plaintiff further in cross-examination was emphatic that the 2nd defendant was always aware that the land the plaintiff occupied belonged to the plaintiff. The plaintiff stated that when his child died, the 2nd defendant was among the persons who collected the body from the mortuary and brought the body for burial at the disputed property. The plaintiff further explained the 1st defendant subdivided the mother title into 3 portions and that the 1st defendant was to remain with one portion, a portion was to be transferred to himself (plaintiff) while the other portion was to go to one Beautah Nyangara. The plaintiff explained that when the D.O Mosochi and the elders visited the disputed property they verified that the plaintiff was in occupation and possession and the D.O drew a sketch map and marked the boundary of the land where the plaintiff's houses were located. The plaintiff stated that the 2nd defendant took advantage during a period when the plaintiff was sick to have land parcel No. 2548 transferred to himself by the 1st defendant and that was the reason he sued both the 1st and 2nd defendants.

8. PW2 Beautah Nyangara stated that he and the plaintiff purchased land from the 1st defendant and that the plaintiff's land was on the upper side while his property (PW2's) was downwards. The witness explained further that the 1st defendant retained the plot in the middle and that the 1st defendant sold a portion of the land he was left with to the 2nd defendant. The witness stated that the plaintiff is in occupation of the portion he purchased and has a house thereon. He further stated the 2nd defendant occupies the portion that belonged to him but was categorical that the 2nd defendant was not entitled to get title for the whole land incorporating the portion sold to the plaintiff.

9. In cross examination by the 2nd defendant, PW2 stated that the plaintiff also has land in the neighbourhood which he inherited from his father. He stated he did not interfere with the boundary of the 2nd defendant's land but was clear that apart from the land the plaintiff inherited from his father, the plaintiff also purchased a portion of land from the 1st defendant. He however said he didn't know if the plaintiff's house was on his father's land or on the portion he purchased from the 1st defendant. PW2 upon being questioned by the court stated as follows:

"The plaintiff was the first one to purchase land from the 1st defendant. The 2nd defendant and I purchased land from the 1st defendant at the same time. My portion was Plot No. 2549. I have since sold it to a 3rd party. When we went to the board for the subdivision, the plaintiff was very sick..."

10. PW3 Joshua Saisi testified that in September 1982 he was requested by the plaintiff to assist in preparing an agreement for sale of land with the 1st defendant. He affirmed he was the one who prepared the agreement (**"PEX.1"**) and that he witnessed the plaintiff pay the 1st defendant the sum of kshs. 22,200/= on account of the purchase price. He confirmed that they went to the land and the boundaries of the portion sold to the plaintiff were marked on the ground. These boundaries he stated remain intact to date. He affirmed the plaintiff took possession and has developed the land and that he remains in possession to date.

11. In cross examination by the 2nd defendant, the witness maintained the plaintiff was in occupation of the portion of land that he purchased from the 1st defendant and nobody else had occupied the land.

12. The 2nd defendant testified as DW1 and called one witness Jane Nyachama (DW2) in support of his defence and counterclaim. The 2nd defendant testified that he purchased a portion of LR No. **West Kitutu/Mwagichana/1** from the deceased which after subdivision was numbered **West Kitutu/Mwagichana/2548**. He stated the land was transferred to him and produced a copy of the mutation form, a copy of

the register and copy of title as “DEx.1”, DEx.2” and “DEx.3” respectively. He stated that after he purchased the property he took possession and built a home and has stayed on the property upto date. DW2 averred that he has grown coffee and planted trees on the suit land and that the plaintiff only came to lay claim to the land several years after he had occupied the land when he (the plaintiff) instituted the instant suit. The 2nd defendant maintained he was the lawful owner of the land and he prayed that the plaintiff be stopped from utilizing the small portion of his (defendant’s) land that he was occupying.

13. In cross examination by Mr. Nyariki advocate for the plaintiff, the 2nd defendant denied being aware the plaintiff had bought the land in 1982. He died the plaintiff took possession of the suit land in 1982. He however acknowledged that the plaintiff had lodged a caution against the title before it was transferred to his (defendant’s) name. The 2nd defendant admitted being aware that the plaintiff had sued the 1st defendant and had an award made in his (plaintiff’s) favour. The 2nd defendant stated that he was not aware under that circumstances the caution that had been registered against the title was removed.

14. DW2 Jane Nyachama testified that she had sold a portion of land out of land parcel **West Kitutu/Mwagichana/1** which was subdivided to create land parcels **2547, 2548 and 2549**. The witness stated in cross examination that she did not know the plaintiff and did not know of any sale agreement with him. She stated her and her husband Chude Ontumbi (deceased) had an agreement with the 2nd defendant. She admitted however the plaintiff resides on the 2nd defendant’s land portion and had resided there for a long time.

Submissions, Analysis and Determination;

15. The plaintiff and the 2nd defendant filed final written submissions after the conclusion of the trial. After reviewing the pleadings, the evidence and after considering the submissions by the parties, the following issues emerge for determination:

(i) Whether or not the plaintiff had entered into a sale agreement with the 1st defendant (now deceased) to purchase a portion of land parcel No. West Kitutu/ Mwagichana/1.

(ii) Whether the plaintiff took possession of the portion of land LR No. West Kitutu/Mwagichana/2548 a resultant subdivision of land parcel West Kitutu/Mwagichana/1.

(iii) Whether the 2nd defendant was lawfully registered as the owner of land parcel West Kitutu/Mwagichana/2548 and/or the plaintiff had acquired title to the land by way of adverse possession and/or prescription.

(iv) What reliefs/orders should the court make or grant?

16. On the evidence adduced by the plaintiff there is credible evidence that indeed the plaintiff and the 1st defendant (now deceased) entered into an agreement whereby the 1st defendant was to sell to the plaintiff a portion of land parcel number **West Kitutu/Mwagichana/1** for a consideration of kshs. 22,500/=. A memorandum of agreement dated 25th September 1982 was produced in evidence as “PEx.1”. PW3 Joshua Saisi prepared the agreement between the plaintiff and the 1st defendant and witnessed the plaintiff pay the initial payment of kshs. 22,200/=. He was present when the parcel boundaries were identified and the plaintiff allowed to take possession. The issue of whether or not there was an agreement between the plaintiff and the 1st defendant was extensively considered during the arbitration before the D.O Mosocho and they made a finding that there was infact an agreement between the plaintiff and the 1st defendant. I have reviewed the proceedings of the arbitration and I am satisfied that on the basis of the evidence before them the elders were justified to find that there was indeed an agreement between the plaintiff and the 1st defendant.

17. On the first issue, I therefore hold and find there was an agreement for sale by the 1st defendant to the plaintiff of a portion of land parcel **West Kitutu/Mwagichana/1** and that the plaintiff had honoured the terms of the agreement by paying the full purchase price of kshs. 22,500/=-.

18. Pursuant to the agreement of sale the plaintiff took possession of the portion of land that he had purchased and started effecting developments thereon. There is abundance of evidence that the plaintiff indeed took possession of the portion he purchased. PW2 who also bought land from the 1st defendant gave evidence that the plaintiff occupies the land that he bought from the 1st defendant which is on the upper side. He stated the 2nd defendant also purchased a portion of land from the 1st defendant’s land which was in the middle between the plaintiff’s land and his (PW2’s) land which was on the lower part of the original land parcel **West Kitutu/Mwagichana/1**. DW2 Jane Nyachama, wife to the 1st defendant in her evidence admitted the plaintiff was residing on what she said was the 2nd defendant’s land and had resided there over a long time. PW2 testified the plaintiff took possession of the land in 1982 and has effected developments on the land.

19. During the arbitration proceedings before the D.O Mosocho the issue of possession was equally canvassed. In particular, the neighbours who gave evidence, one Chrisantus Mose and Bosire Ochwangi were categorical that the plaintiff had purchased the land and was the one who had been using the land for a long time. They stated the developments on the land were effected by the plaintiff.

20. On the evidence presented before the court, I am satisfied the plaintiff took possession of the portion of land he purchased from the 1st defendant in 1982 following payment of the purchase price. This portion of land after subdivision became land parcel **West Kitutu/ Mwagichana/2548**. I would in the premises answer the second issue that the court identified for determination in the affirmative.

21. It is common ground that although the plaintiff avers that the 1st defendant had sought and obtained consent to subdivide land parcel number **West Kitutu/Mwagichana/1** into three portions with the intent to transfer the plaintiff’s portion to him, no consent of the land control board was obtained for the transfer. Effectively therefore the sale transaction became null and void for want of consent of the Land Control Board. Section 6(1) (a) of the Land Control Board, Cap 302 provides:-

6(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;

(b)

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.

22. Thus, even though I have found there was an agreement for sale of land between the plaintiff and the 1st defendant, this agreement did not receive the sanction of the Land Control Board as required under the Land Control Act. The agreement became null and void by operation of the law. The agreement would in the circumstances not be enforceable in law by way of specific performance. The intention however as between the 1st defendant and the plaintiff was that the 1st defendant would sell and the plaintiff would purchase the portion of land from the 1st defendant. The plaintiff honoured his part of the bargain by paying the agreed purchase price of kshs. 22,500/= in full. The 1st defendant on his part allowed the plaintiff to take possession and utilize the sold portion of land. It is evident that initially both parties were committed to the agreement but perhaps owing to passage of time, the 1st defendant became ‘wiser’ and opted to wriggle out of the agreement by selling the same land he had sold to the plaintiff to the 2nd defendant behind the plaintiff’s back.

23. It is my view that once the plaintiff fulfilled his part of the agreement and was let into possession of the portion of land he had purchased from the 1st defendant, the 1st defendant henceforth held the portion of land in trust for the plaintiff. In the circumstances of the present case, a constructive trust was created in favour of the plaintiff. The possession by the plaintiff of the suit land was an overriding interest over the land that required no noting in the land register. Although the Court of Appeal has in two separate decisions in the case of **Macharia Mwangi Maina & 87 Others -vs- Davison Mwangi Kagiri [2014] eKLR** and in the case of **David Ole Tukai -vs- Francis Arap Muge & 2 Others [2014] eKLR** held differing views as to whether the equitable doctrine of constructive trust could be applicable in regard to land that is subject to the provisions of the Land Control Act which are express and unequivocal, the Court of Appeal in a recent judgment in the case of **Willy Kimutai Kitilit-vs- Michael Kibe [2018] eKLR – Eldoret CACA No. 51 of 2015** delivered on 17th May 2018 restated the holding in the **Macharia Mwangi Maina** case (supra).

24. In the **Macharia Maina** case the court had stated thus:-

At paragraph 20 –

“In the instant case, there was common intention between the appellants and the respondent in relation to suit property. Nothing in the Land Control Act prevents the claimants from relying on the doctrine of constructive trust created by the facts of the case.”

At paragraph 25 –

“The transaction between the parties is to the effect that the respondent created a constructive trust in favour of all persons who paid the purchase price. We are of the considered view that a constructive trust relating to land subject to Land Control Act is enforceable.”

25. In the case of **David Ole Tukai** (supra) which was decided later after the **Macharia Maina** case albeit by a different bench, the Court of Appeal was categorical that the doctrine of equity could not be applied to override the express provisions of the Land Control Act. The Court inter alia expressed itself thus:-

“...First and foremost, we have already stated that in our opinion granted the express unequivocal and comprehensive provisions of the Land Control Act, there is no room for the court to import the doctrine of equity to the Act. This is one message of Section 3 of the Judicature Act.

Consequently, the invocation of equitable doctrines of constructive trust and estoppel to override the provisions of the Land Control Act has in our view, no legal foundation. We have noted that this court has previously held in a line of consistent decisions and in very clear terms that there was no room for application of the doctrines of equity in the Land Control Act.”

26. The Court of Appeal Judges in the case of **Willy Kimutai Kitilit** (supra) while departing from the decision of the **David Ole Tukai** case (supra) and upholding the reasoning and holding in the **Macharia Mwangi Maina** case (supra) expressed themselves thus at paragraph 23 and 24 in the judgment:-

23. 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 doctrine 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 doctrine 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 doctrine of constructive trust 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.

24. 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 of the Constitution, the Land Control Act should be construed with the alterations, adaptations and exceptions necessary to bring it into conformity with the Constitution.”

27. It is a truism that the strict application of the provisions of the Land Control Act has at times resulted in occasioning injustice to parties particularly where vendors after receiving the purchase monies refuse to complete the transactions and/or offer for sale the same property to another party who agrees to pay more for the land. In such instances, the vendors usually resort to using the lack of consent of the Land Control Board to avoid the contract and hence back out of a contract that was otherwise perfectly valid. The Land Control Act, at times, has invariably been used as an instrument to perpetrate fraud. The Court of Appeal decision in the **Macharia Mwangi** (supra) case which the Court of Appeal sitting at Eldoret in **Willy Kimutai Kitilit** (supra) case agreed with, comes in handy to temper the adverse effects that the strict application of the provisions of the Land Act otherwise occasions to parties whose contract become void and unenforceable by reason of lack of consent of the Land Control Board.

28. In the instant suit on the evidence and the facts, I am satisfied that the plaintiff was let into possession of the suit land following the agreement of sale and payment of the purchase price. All that remained was for the parties to obtain the consent of the Land Control Board for the subdivision and transfer. Although consent for the subdivision was obtained no consent for transfer was obtained. The plaintiff remained in possession and effected developments on the suit premises. On the facts and evidence, a constructive trust was created in favour of the plaintiff such that the 1st defendant held title to the portion the plaintiff had purchased in trust for the plaintiff. The possession and occupation of the land by the plaintiff constituted an overriding interest within the provisions of Section 28 of the Land Registration Act, Cap 300 Laws of Kenya.

29. Under Section 28 of the Land Registration Act, all registered land is subject to overriding interests without being noted on the register specified therein which includes trusts, including customary trusts, rights acquired or in the process of being acquired by virtue of any written law relating to limitation of actions or by prescription and any other rights provided under any written law. The plaintiff occupied the suit land from 1982 and the evidence establishes that as at the time the 1st defendant effected the transfer of the suit land to the 2nd defendant in 2004, the plaintiff was still in possession. Other than the 1st defendant holding the land in trust for the plaintiff as at 2004, the 1st defendant's title had as that time become extinguished by reason of the Limitation of Actions Act, Cap 22 of the Laws of Kenya. The plaintiff was utilizing the land as the owner thereof and his possession was without any doubt adverse to the interest of the 1st defendant. The 1st defendant's title to the suit land having become extinguished, he had no interest in the land which he could have transferred to the 2nd defendant. The transfer of LR No. **West Kitutu/Mwagichana/2548** that the 1st defendant made to the 2nd defendant was not effectual and passed no interest. The transfer was subject to the plaintiff's overriding interest over the suit property. The plaintiff had acquired title over the suit property by way of adverse possession and/or prescription having been in possession and occupation for about 22 years prior to the transfer being made to the 2nd defendant.

30. In the premises, I find and hold that the plaintiff has proved his case on a balance of probabilities. I accordingly enter judgment in favour of the plaintiff on the following terms:

(a) A declaration be and is hereby issued that the plaintiff is entitled to be registered as the owner of land parcel West Kitutu/Mwagichana/ 2548 having acquired title by way of adverse possession and/or prescription.

(b) The land registrar, Kisii is directed to cancel the title in respect of land parcel West Kitutu/Mwagichana/2548 in the name of Barnaba Oyaro Obiero and to issue a title thereof in the name of the plaintiff, Joseph Omosa Otwenya.

(c) The Deputy Registrar of the court is hereby authorized to execute any necessary and/or appropriate documents to give effect to this judgment.

(d) Each party to bear their own costs of the suit.

JUDGMENT DATED, SIGNED and DELIVERED at KISII this 20TH DAY of MARCH 2019.

J. M. MUTUNGI

JUDGE

In the Presence of:

N/A for the plaintiff

N/A for the 1st and 2nd defendants

Ruth Court Assistant

J. M. MUTUNGI

JUDGE