



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 383 OF 2017

(Formerly Machakos ELC Case No. 225 of 2014)

HENRY MUTISO.....PLAINTIFF

VERSUS

JOHN KORINKO SAIBATO.....DEFENDANT

JUDGEMENT

By an Amended Complaint dated the 15th May, 2015, the Plaintiff prays for judgement against the Defendant for:

- a) A Temporary order against the Defendant/ Respondent or any other person acting on his instructions from selling or disposing Plot No. KAJIADO/ KAPUTIEI CENTRAL/ 2781 where parcel B is located pending the hearing of the suit.
- b) A Permanent Order directing/ compelling the Defendant to execute the said transfer certificate in favour of the Plaintiff herein or to be compelled to pay the Applicant the purchase price at the current market value, damages, expenses incurred while constructing structures and their respective interests herein.
- c) Damages
- d) Costs of this suit
- e) Any other relief the court deems fit to grant.

The Defendant though duly served did not file a Defence. The matter hence proceeded for formal proof where the Plaintiff only called one witness.

Evidence of the Plaintiff

The Plaintiff contends that he purchased Plot B situated within Kajiado/ Kaputiei Central 510 and later known as Kajiado/ Kaputiei Central/ 2781 from the Defendant and on 12th July, 1987 they executed a Sale Agreement, which the Defendant had prepared. In the said Sale Agreement which was in Swahili, the Defendant had agreed to sell to the Plaintiff 20 acres of land at an agreed purchase price was Kshs. 60,000/=. Ever since the Plaintiff completed the payment of the purchase price, the Defendant has declined to transfer the suit land to him and continues to demand for more money to enable him effect the transfer. From 1987, the Defendant had handed over suit land to the Plaintiff who has enjoyed quiet possession of the same by building a permanent home and undertaking farming as well as livestock keeping thereon. It is the Plaintiff's evidence that prior to filing this suit, he had paid the Defendant a total of Kshs. 310,000/= and incurred expenses in pursuit of the transfer of the suit land to him. The Plaintiff states that failure by the Defendant to effect the transfer of the suit land to him as culminated in losses for him as he has been unable to secure social amenities, water and electricity which the preferred agencies can only supply if the Plaintiff has a proper title. The Plaintiff intended to sink a borehole but this was not possible as he did not have title to the suit land.

The Plaintiff thereafter closed his case and filed submissions that I have considered.

Analysis and Determination

Upon perusal of the materials presented in respect of the suit herein, the following are the issues for determination:

- Whether the Plaintiff is entitled to an order of specific performance in respect of the Sale Agreement between the Plaintiff and the

Defendant relating to the 20 acres out of land parcel number KAJIADO/ KAPUTIEI CENTRAL/ 2781.

- Whether the Plaintiff is entitled to damages.
- Who should bear the costs of the suit.

As to whether the Plaintiff is entitled to an order of specific performance in respect of the Sale Agreement between the Plaintiff and the Defendant relating to the 20 acres out of land parcel number KAJIADO/ KAPUTIEI CENTRAL/ 2781.

The Plaintiff tendered evidence to prove he had purchased 20 acres out of the suit land from the Defendant. He produced several agreements including acknowledgement of payments written in Swahili and signed by the Defendant to confirm there was indeed a transaction between them. It was PW1's testimony that the Defendant despite receiving the full purchase price as agreed upon in 1987 continued to extort money from him by promising to effect the transfer of the 20 acres to him. It was PW1's evidence that on 25th August, 2013, the Defendant varied the terms of the Sale Agreement and demanded to be paid an extra Kshs. 10,000 per acre. He confirmed that he paid Kshs250, 000/= on the 25th August, 2013 but the Defendant still declined to sign the transfer form . He averred that the Defendant informed him that Kajiado/ Kaputiei Central/ 510 had been subdivided to Kajiado/ Kaputiei/ 2781 and they even proceeded to the Land Control Board in pursuit of the transfer where they were issued with a Consent to Transfer. This was evident in the Letter of Consent dated the 4th February, 2009 where the Defendant's land KAJIADO/ KAPUTIEI CENTRAL /510 was subdivided into two portions of 20 acres and a reminder. This in effect confirmed the Plaintiff's averment that the Defendant intended to transfer the 20 acres of land to him and as per the Acknowledgement of payment dated the 20th January, 2009 where the Defendant and the Plaintiff had agreed to share the costs of the surveyor. PW1 further testified that he paid Kshs. 2000 to the County Council of Kajiado in respect of the transfer. He reiterated that the Defendant agreed to transfer the suit land to him but declined to provide for his PIN and Passport size photographs to enable him do so. The Plaintiff produced various documents including the Sale Agreement; copy of title deed; transfer forms; consent of the Land Control Board and application to the County Government of Kajiado to prove his claim. Since the matter proceeded to formal proof, evidence from the Plaintiff was not controverted. From the Court Records, I note on 12th March, 2015, the Defendant appeared in person, brought title deed to Court and confirmed that he had subdivided KAJIADO/ KAPUTIEI CENTRAL /510 and the suit land was now KAJIADO/ KAPUTIEI CENTRAL/2781. The Plaintiff averred that after paying the purchase price in 1987 he took possession of the 20 acres of land he had purchased from the Defendant and commenced development thereon by putting up a three bedroomed permanent house as well as cultivating the land including rearing livestock thereon. These averments were never controverted by the Defendant who despite appearing in court with his title deed failed to file a Defence in this suit. In the case of **GURDEV SINGH BIRDI & NARINDER SINGH GHATORA as Trustees of RAMGHARIA INSTITUTE OF MOMBASA v ABUBAKAR MADHBUTI [1997] eKLR** Court of Appeal Judge Gicheru held that: **'It cannot be gainsaid that the underlying principle in granting the equitable relief of specific performance has always been that under all the obtaining circumstances in the particular case, it is just and equitable so to do with a view to doing more perfect and complete justice. Indeed, as is set out in paragraph 487 of Volume 44 of Halsbury's Laws of England, Fourth Edition, a plaintiff seeking the equitable remedy of specific performance of a contract: "must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action, However, this rule only applies to terms which are essential and considerable. The court does not bar a claim on the ground that the plaintiff has failed in literal performance, or is in default in some non-essential or unimportant term, although in such cases it may grant compensation. Where a condition or essential term ought to have been performed by the plaintiff at the date of the writ, the court does not accept his undertaking to perform in lieu of performance, but dismisses the claim."**

In relying on this Court of Appeal decision as well as the facts as presented, I find that there was indeed an enforceable Sale Agreement between the Plaintiff and the Defendant in respect of 20 acres out of land parcel number KAJIADO/ KAPUTIEI CENTRAL/ 2781 and he was hence entitled to specific performance as against the Defendant.

As to whether the Defendant should effect a transfer to the Plaintiff. PW1 stated that the Defendant had failed to effect the transfer of the said 20 acres to them. He stated that they have been in possession of the suit land from the year 1987 to date. Based on the evidence presented, it is my considered view that the Sale Agreements as well as Acknowledgment of Payments between the Plaintiff and the Defendant are indeed valid as they were reduced into writing and witnessed at any given time. However, I note that in 2014 after paying the last instalment of the purchase price, the Defendant never obtained consent to transfer the suit land to the Plaintiff who had been in occupation of the land since 1987. 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.'

The Plaintiff admitted that the Defendant obtained Consent of the Land Control Board to enable them effect transfer of the 20 acres of land to him. However, from a cursory look at the said consent, which was furnished in court, it is clear that the same was for subdivision and not transfer. In the recent Court of Appeal decision of **Willy Kimutai Kitilit v Michael Kibet [2018] eKLR**, it 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.'

In relying on this Court of Appeal decision, and from analysis of the evidence presented, above which was not controverted, I find that since the Plaintiff has proved through the various agreements confirming receipt of the purchase price of the 20 acres over a period of time, and taking possession of the land, from 1987 to date, I hold that an element of trust was created, which became an overriding interest over it. Insofar as the Plaintiff failed to obtain the necessary Consent from the Land Control Board within the required period of six (6) months, to enable him transfer the suit land into his name; I hold that the transaction is not void but enforceable by virtue of the doctrine of constructive trust and he is entitled to be transferred to the 20 acres of land which he purchased from the Defendant.

As to whether the Plaintiff is entitled to damages.

The Plaintiff had pleaded that he is entitled to damages. He has stated that he suffered damages as a result of the Defendant's action in relation to breach of contract, loss of time, failure to have social amenities installed on the land since he did not have a title; Defendant's unilateral alteration of the Sale Agreement; Wrongful enrichment as well as psychological depression in pursuit of the title deed. He however failed to quantify the said damages he has suffered.

In the case of **Kenya Tourist Development Corporation v Sundowner Lodge Limited [2018] eKLR**, the Court of Appeal held as follows:'

With the greatest respect to the learned Judge, we think that the reasoning is quite flawed. We are not persuaded that the authorities cited by the learned Judge support the proposition that in cases of breach of contract there does exist a large and wide-open discretion to the court to award any amount of damages. The opposite is in fact the case: as a general rule general damages are not recoverable in cases of alleged breach of contract and that has been the settled position of law in our jurisdiction, and with good reason..... Beyond the non-recoverability of general damages for breach of contract, a proper consideration of the nature of the respondent's claim ought to have led to the same conclusion that only such proven loss could be compensated by way of damages.'

Based on the evidence presented on damages by the Plaintiff and relying on this decision, I am unable to award the Plaintiff damages as he failed to prove the same

Who should bear the costs of the suit.

Since the Plaintiff has been inconvenienced with the Defendant's defiance to effect transfer of the 20 acres of land to him, he is entitled to cost of the suit.

It is against the foregoing that I find the Plaintiff has proved his case on a balance of probability and will proceed to make the following orders:

- a) A declaration be and is hereby issued that the Plaintiff is entitled to 20 acres of land out of KAJIADO/ KAPUTIEI CENTRAL/ 2781 which belongs to the Defendant.**
- b) The Defendant be and is hereby ordered to execute the necessary documents as well as obtain consent of Land Control Board and facilitate transfer of 20 acres of land out of parcel number KAJIADO/ KAPUTIEI CENTRAL/2781 in the Plaintiff's name within 60 days from the date hereof, failure to which the Deputy Registrar, Environment and Land Court at Kajiado is directed to execute the said documents.
- c) Upon execution of the necessary transfer documents, the Land Registrar Kajiado, be and is hereby directed to register the Plaintiff on the 20 acres out of KAJIADO/KAPUTIEI CENTRAL/ 2781.
- d) The Costs of the suit is awarded to the Plaintiff

Dated signed and delivered in open court at Kajiado this 9th day of April, 2019

CHRISTINE OCHIENG

JUDGE