



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT ELDORET**

**ELC NO. 370 OF 2012**

**PETER ABIUD MUKONYI.....PLAINTIFF**

**VERSUS**

**KIPTABUT ARAP KEMEL.....1<sup>ST</sup> DEFENDANT**

**DAVID BARASA.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

By a plaint dated 16<sup>th</sup> July 2007 and amended pursuant to a court order on 25<sup>th</sup> February 2009, the Plaintiff herein sued the defendants jointly and severally for the following reliefs:-

- a) A declaration that the purported sale of the suit parcel of land by the 1<sup>st</sup> to 2<sup>nd</sup> Defendant is illegal, null and void in view of the already existing agreement between the Plaintiff and the 1<sup>st</sup> Defendant and for a further declaration that the 1<sup>st</sup> Defendant cannot enter into any other agreement relating to the suit land while the agreement between him and the Plaintiff is still subsisting.
- b) The 2<sup>nd</sup> Defendant is a trespasser on the suit land and that the 2<sup>nd</sup> Defendant's actions as set out in paragraphs 9 and 11 above are illegal. Prayer for general damages and mesne profits arising from the 2<sup>nd</sup> Defendant's unlawful acts.
- c) The sum of Kshs.4, 500.00 per month with effect from 10<sup>th</sup> December 2006 until January 2008. this suit.
- d) The sum of Kshs. 5,000/ per month with effect from February 2008 to date
- e) Costs of this suit
- f) Interest on (b) and (c) above at court rates.
- g) Any other or further relief as the court may grant.

On 9<sup>th</sup> February 2017 Counsel for the defendant informed the court that the 1<sup>st</sup> defendant was deceased and that he had not gotten in touch with the family. On 1<sup>st</sup> February 2018 Counsel for the defendant further informed the court that they had discussed with Mr. Aseso Counsel for the plaintiff for a possibility of a refund of the purchase price. That the 1<sup>st</sup> defendant had deposited the refund in their offices for collection by Mr. Aseso.

On 23<sup>rd</sup> October 2018 Counsel for the defendant Miss Tum indicated that the suit has abated against the 1<sup>st</sup> defendant as he died on 17<sup>th</sup> April 2014 as per the death certificate which she produced in court. No substitution was done within one year as stipulated by the law and rules.

The matter therefore proceeded against the 2<sup>nd</sup> defendant.

**Plaintiff's Case**

The plaintiff adopted his statement as part of his evidence and stated that he entered into a land sale agreement dated 26<sup>th</sup> September 2005 with the 1<sup>st</sup> defendant who is now deceased.

It was the plaintiff's evidence that he took possession of the suit land in 2006 and continued to pay by instalments totaling kshs. 102,000/ for ¼ acre. The plaintiff stated that the 2<sup>nd</sup> defendant came with some goons who fenced off the plot and demolished the structures that he had put up in the suit plot. That he later reported the matter to the police and were later summoned by a Senior Assistant Chief Huruma location.

The plaintiff also testified that he left the suit land and went and rented a house at Mwanzo. He produced a bundle of receipts as exhibits before the court. He therefore urged the court to grant him the prayers as per the plaint plus costs of the suit.

On cross examination by Counsel for the defendant, the plaintiff stated that it is the wife of the 1<sup>st</sup> defendant who signed the agreement. It was further his testimony that the 1<sup>st</sup> defendant did not sign the agreement but his Identity card number was indicated in the agreement. The plaintiff also confirmed that he has never completed payment of the purchase price as was stipulated in the agreement as Kshs. 320,000/ He admitted that he had only paid kshs. 102.000/ leaving a balance of kshs. 218, 000/. He also confirmed that he could not obtain the consent of Land Control Board because he was still paying the instalments.

The plaintiff further stated that the 2<sup>nd</sup> defendant has been in occupation since 2006 and that he is not in occupation. The plaintiff therefore closed his case.

### **Defence Case**

The 2<sup>nd</sup> defendant adopted his statement and stated that he bought the suit land vide an agreement dated 16<sup>th</sup> October 2006 from one Martha Kemei the 1<sup>st</sup> defendant's wife, fenced the plot went to the land Control Board, got a consent and processed a title deed in his name. He produced the title as an exhibit before the court.

The 2<sup>nd</sup> defendant further stated that he has been staying on the suit land since 2006, further that he neither chased away the plaintiff nor trespassed on the suit land. He also stated that he has never been charged with any criminal offence or an order of eviction. He prayed that the plaintiff's suit be dismissed with costs.

On cross examination the defendant stated that he had bought 1/8 acre and that he had not produced a sale agreement. The defendant therefore closed his case.

### **Plaintiff's Submissions**

Counsel for the plaintiff filed written submissions and reiterated the evidence of the plaintiff. Counsel listed 3 issues for determination by the court as:

- (a) Whether the sale of land agreement entered into on 26/9/2005 was valid.
- (b) Whether the occupation of the suit land was rightful
- (c) Whether the 2nd Defendant's actions amounted to trespass

On the 1<sup>st</sup> issue Counsel cited Section 3(3) of the Law of Contract Act that came into force on 1st June,2003 which provides that;

"No suit shall be brought upon a contract for the disposition of an interest in land unless

The contract upon which the suit is found:

- i. Is in writing.
- ii. Is signed by all parties thereto; and
- iii. The signature of each party signing has been attested by a witness who is present when the contract was signed by such party."

Counsel submitted that the sale agreement between the 1<sup>st</sup> defendant and the plaintiff was written and signed by Martha Kemei with the authority of the Vendor. That their signatures were attested to by Teresa Kosgei and Mash Akoyo Masakhwe respectively. Counsel therefore submitted that the agreement had satisfied the mandatory requirements as stipulated in the provisions above.

On the 2<sup>nd</sup> issue as to whether the occupation of the suit land was rightful, Counsel submitted that the 1<sup>st</sup> Defendant together with the wife, one Martha Kemei allowed the Plaintiff to take immediate occupation of the suit land upon payment of the deposit of eighty Thousand Kenya Shillings (Kshs.80,000/). This is a clear illustration that there was a common intention by the 1st Defendant, the owner of the suit land to grant possession of the suit land, to the Plaintiff.

Miss Kuiyaki submitted that under the said contract, the transaction created a constructive trust in favour of the Plaintiff upon payment of the said deposit and the continued payment of monthly installments without any default on his part. She further submitted that the principle of "constructive trust" is an equitable remedy embraced by the Kenyan Constitution, 2010 under Article 10(2) (b) where equity has been elevated as a principle of justice. She further submitted that many courts have anchored their pronouncements on the doctrine of constructive trust in condemning acts that are tantamount to unjust enrichment by a party to a suit.

Miss Kuyaki also submitted that the acts of the 1<sup>st</sup> Defendant of receiving the consideration to the suit property and then proceeding to sell the same suit land to the 2<sup>nd</sup> Defendant is an apt manifestation of unjust enrichment on his part.

Counsel cited the case of *Hussey -vs- Palmer* [1972] 3 ALL ER 744 where Lord Denning defined the doctrine of constructive trust as follows:

*"Is a trust imposed by law whenever justice and good conscience requires it. It is an equitable remedy by which the court can enable an aggrieved party to obtain restitution.*

That from the above definition, it was Counsel's submission that the 1<sup>st</sup> Defendant having allowed the Plaintiff occupation of the suit land, he held the parcel of land in trust for the Plaintiff awaiting transfer of the same to the Plaintiff upon conclusion of payment of the consideration.

On the issues as to whether the 2<sup>nd</sup> Defendant's actions amounted to trespass, Counsel submitted that from the definition of trespass the 2<sup>nd</sup> defendant's actions amounted to trespass which entailed the following:-

- a) Fencing off the Plaintiff's toilet.
- b) Uprooting the Plaintiff's maize and cutting them down.
- c) Divided and fenced the Plaintiff's plot without his consent.
- d) Uprooted the Plaintiff's vegetables.
- e) Fenced off the Plaintiff's bathroom.
- f) Took away 20 tonnes of stones bought by the Plaintiff.
- g) Slashed the Plaintiff's dog
- h) Destroyed the visitor's house valued at Kshs.5, 000.00.

Counsel submitted that the tort of trespass to land is actionable per se without any proof of damage and relied on the case of *DUNCAN NDEGWA —VS KENYA PIPELINE HCC NO.2577* of 1990 which discussed the general principles as regards the measure of damages to be awarded in case of trespass to land. The court held that; "the overriding principle is to put the Claimant in the position he was prior to the infliction of the harm. She therefore prayed that the plaintiff's claim be allowed as prayed.

## **2<sup>ND</sup> DEFENDANT'S SUBMISSIONS**

Counsel for the defendants submitted that the 1<sup>st</sup> Defendant denied having entered into an agreement with the Plaintiff and further that the Plaintiff ever took possession of the land purported to have been sold to him. The 2<sup>nd</sup> defendant also denied ever trespassing on the suit land.

Miss Tum also submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants stated in their defence that if there was any sale agreement, the same was void as it involved agricultural land as the consent of the Land Control Board was not obtained and the only recourse for the Plaintiff is for refund of the money.

Counsel also stated that when the matter came up for hearing the court was notified that the 1<sup>st</sup> Defendant was deceased who died on 17<sup>th</sup> April 2014 and a copy of the Certificate of Death No. 0024013 was supplied to the court. The deceased 1<sup>st</sup> Defendant was not substituted and so by operation of Law, the suit against the 1<sup>st</sup> Defendant has abated under the Provisions of Order 24 Rule 4(3) of the Civil Procedure Rules.

Counsel listed two issues to be determined by the court as to whether the Plaintiff's claim against the 2<sup>nd</sup> Defendant can be sustained as the suit against the 1<sup>st</sup> Defendant has abated; whether the Plaintiff has proved that the 2<sup>nd</sup> Defendant committed the tort of trespass.

On the 1<sup>st</sup> issue as to whether the plaintiff's claim against the 2<sup>nd</sup> defendant can be sustained while the suit against the 1<sup>st</sup> defendant has abated, Counsel submitted that when a suit has abated, the effect is that it has no force of law, it is no longer legally tenable as the suit cannot be enforced against the deceased.

Miss Tum submitted that from cross examination, the plaintiff admitted that the deceased neither signed the agreement nor did he pay the money to the deceased of which he stated that he had paid to Martha Kemei, the wife of the deceased, and who is not a party to the suit.

It was Counsel's submission that there are issues that arise from the agreement among them, the illegality of the agreement and the transaction, the parcel of land being purchased was not specified. That from the evidence DW1 DAVID BARASA it was clear that he bought 1/8 of an acre from the deceased which was then registered as ELDORET MUNICIPALITY BLOCK 21 (KING'ONG'O)43, of which he took possession, subdivided and the portion transferred and registered as ELDORET MUNICIPALITY BLOCK 21 (KING'ONG'O)/4323 in his

name.

Miss Tum also took issue with the fact that the 1<sup>st</sup> Defendant has never been substituted therefore the failure to substitute is fatal to the Plaintiff's claim as the suit cannot be sustained against the 2<sup>nd</sup> Defendant. To buttress this position Counsel cited the case of **Environment and Land Case No. 677 of 2014 (O.S) Gathoni Wahome V Kabuchi Rwario & 3 Others (2017) Eklr** where the court dismissed the case because it could not be sustained against the Defendants. Counsel therefore urged the court to dismiss the plaintiff's case.

On the 2<sup>nd</sup> issue as to whether the Plaintiff has proved that the 2<sup>nd</sup> Defendant committed the tort of trespass, Counsel cited Clerk & Lindsell on Torts, Sweet & Maxwell, 18<sup>th</sup> Edition at pg 923 where trespass to land is defined as follows:-

*“Trespass to land consists of any unjustifiable intrusion by one person upon land in the possession of another”.*

Counsel submitted that there was no privity of contract between plaintiff and the 2<sup>nd</sup> Defendant. Further, since the suit against the 1<sup>st</sup> Defendant had abated, then whatever that was between the Plaintiff and the 1<sup>st</sup> Defendant cannot be determined by the court. From the plaintiff's evidence he failed to prove that he was in possession and ownership of the suit land. Counsel therefore urged the court to dismiss the plaintiff's suit.

### **Analysis and determination**

The plaintiff's case is a claim for trespass, general damages, mesne profits and costs of the suit. From the onset it should be noted that the suit against the 1<sup>st</sup> defendant was marked as abated as there was no substitution within the stipulated one year period.

The suit therefore proceeded against the 2<sup>nd</sup> defendant. It was the plaintiff's case that he entered into a land sale agreement with the 1<sup>st</sup> defendant for the sale of ¼ acre for a consideration of Kshs. 320,000/ of which he paid Kshs. 102,000/ leaving an unpaid balance of Kshs. 218,000/

The plaintiff also testified that the agreement was signed by the wife of the 1<sup>st</sup> defendant one Martha Kemei and not the 1<sup>st</sup> defendant. He stated that he took possession but was later chased away by the 2<sup>nd</sup> defendant who is in possession forcing him to rent alternative premises.

The issues for determination in this case are as to whether the plaintiff has a claim against the 2<sup>nd</sup> defendant as the suit against the 1<sup>st</sup> defendant had abated and whether the plaintiff has proved that the 2<sup>nd</sup> defendant is a trespasser.

This suit was hinged on an agreement with the wife of the 1<sup>st</sup> defendant who was not the registered owner of the suit land. The 1<sup>st</sup> defendant never signed the agreement that the plaintiff is relying on. Was there any power of attorney granted to the wife to transact on behalf of the 1<sup>st</sup> defendant? The answer is no. The plaintiff also never joined one Martha Kemei whom he entered into an agreement with. The plaintiff admitted that the money was paid to the said Martha Kemei.

After the demise of the 1<sup>st</sup> defendant the plaintiff should have taken this opportunity to substitute the 1<sup>st</sup> defendant with the wife one Martha Kemei who signed the agreement and received the money. The abatement of a suit complicates this matter as there was no substitution.

Further the plaintiff admitted that he did not complete the payment of the purchase price as per the agreement and that he could not get a Land Control Board consent as he had not finished paying for the plot. It is also on record that the plaintiff is not in possession of the suit land. He admitted that he left and went to rent alternative premises elsewhere.

There is no privity of contract between the plaintiff and the 2<sup>nd</sup> defendant so to speak and that his claim only lies with the 1<sup>st</sup> defendant whom he purportedly entered into a sale agreement. Some of the acts complained of against the 2<sup>nd</sup> defendant are criminal in nature of which the plaintiff could have used the criminal justice system to pursue his claim and later for compensation in another forum. If the plaintiff had proved that he had rightfully purchased the suit land by payment of the whole purchase price then we would be dealing with the principles of equity to enable him get what is legally his. The law is very clear that sale of agricultural land requires the consent of the Land Control Board of which failure to obtain the same makes the transaction null and void.

I note that the parties are in agreement that no consent of the Land Control Board was sought or obtained. There is also no dispute the transaction was in respect of agricultural land. Consequently, a consent was necessary pursuant to Section 6 of the Land Control Act. The Section provides:

#### *6. Transactions affecting agricultural land*

*(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) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 (L.N. 516/1961) for the time being apply;*

*(c) the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land 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 he was not able to get the land Control board consent as he had not paid the full purchase price. He had a balance of Kshs. 218,000/ as he had only paid a paltry 102,000/. Would the court invoke the principle of constructive trust where a party has not completed the payment of purchase price? This would not be justice for both parties.

The Court of Appeal recently stated 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.*

This decision is the latest Court of Appeal decision which applied constructive trust where Land Control Board consent was not sought and obtained. I am aware of an earlier decision of the Court of Appeal in **David Sironga Ole Tukai v Francis Arap Muge & 2 others Nairobi Civil Appeal No. 76 of 2014** which states that such a contract is void and that principles of equity and natural justice are not applicable.

I have in the past relied on the latest decision of the Court of Appeal in the application of equitable principles to ensure justice is done. It is not in dispute that the plaintiff paid some money to the 1<sup>st</sup> defendant's wife one Martha Kemei.

It is on record that Counsel for the defendant had indicated to the court that the 1<sup>st</sup> defendant had deposited the refund in their offices for onward transmission to the plaintiff. At one point a mention dated was granted to enable Counsel for the plaintiff to pick the refund from the defendant's advocates' offices which they never did.

The plaintiff's case is an unfortunate one because of the legal technicalities on privity of contract, abatement of suit, entering into a sale agreement with a person who does not have a power of attorney to do so, lack of signature of the registered owner and failure to indicate the land that was being purchased. The plaintiff therefore has not proved the case against the 2<sup>nd</sup> defendant for trespass as he is the registered owner of the suit land and cannot trespass on his own land and therefore the same is dismissed with no orders as to costs.

I will therefore exercise my discretion to order that the earlier offer by Counsel for the defendant to the plaintiff to pick his refund of the purchase price which was deposited by the 1<sup>st</sup> defendant at the advocates' office be released to the plaintiff within 21 days.

**Dated and delivered at Eldoret on this 5<sup>th</sup> day of April, 2019.**

**M.A ODENY**

**JUDGE**

**JUDGMENT READ IN OPEN COURT** in the presence of Miss.Tum for 2<sup>nd</sup> defendant and Mr.Asesso for the Plaintiff.

Mr.Koech – Court Clerk