



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC. CASE NO. 825 OF 2017**

**RUTH WANJIKU NG'ANG'A.....PLAINTIFF**

**VERSUS**

**TERESIA WANGUI NG'ANG'A.....DEFENDANT**

**AND**

**PETER NJOROGE KAGWIMA &**

**31 OTHERS.....INTERESTED PARTIES**

**JUDGMENT**

**Introduction:**

1. This suit was commenced by way of a Complaint dated 27<sup>th</sup> July, 2007 which was amended on 5<sup>th</sup> August, 2013. In the Amended Complaint, the Plaintiff averred that at all material times, she was the registered owner of land known as Ruiru East/Block 2/127 and 128 (*the suit properties*) and that on 10<sup>th</sup> February, 2004, she agreed to sell to the Defendant the two parcels of land at a consideration of Kshs. 1.5 million.
2. The Plaintiff averred that the Defendant failed to pay the balance of the purchase price; that she issued to the Defendant a completion notice of twenty one (21) days and that the Agreement of Sale remained rescinded on 17<sup>th</sup> April, 2007.
3. The Plaintiff finally averred that despite rescinding the Sale Agreement, the Defendant purportedly sub-divided the suit land and sold the portions thereof to third parties (*Interested Parties*) and that an eviction order should issue to remove the Defendant or any other person from the suit properties.
4. In her Amended Defence, the Defendant averred that she took possession of the suit properties pursuant to the provisions of the Sale Agreement that she entered into with the Plaintiff; that it was the Plaintiff who breached the Sale Agreement by failing to present herself to the Land Control Board for the consent to issue and that the Sale Agreement has never been rescinded.
5. Thirty two (32) Interested Parties who joined the suit filed a Defence and Counter-claim in which they averred that they have been in actual, physical and legal possession of the suit properties since the year 2004 having purchased the same from the Defendant.
6. In the Counter-claim, the Interested Parties have sought for a declaration that they are the *bona fide* purchasers and legal owners of the suit properties. The Interested Parties have also sought for a permanent injunction to restrain the Plaintiff and the Defendant from trespassing on the suit land or from evicting them.

**The Plaintiff's case:**

7. The Plaintiff, PW1, informed the court that she is the registered proprietor of two parcels of land known as Ruiru East/Block 2/127 and 128; that she entered into a Sale Agreement dated 10<sup>th</sup> February, 2004 with the Defendant and that out of the purchase price of Kshs. 1.5 million, the Defendant only paid her Kshs. 1 million. According to PW1, it was agreed that the Defendant would pay the balance of the purchase price on or before obtaining the consent of the Land Control Board.
8. It was the evidence of PW1 that although she informed the Defendant that she was ready to appear before the Land Control Board on 30<sup>th</sup> August, 2005, the Defendant declined to avail herself; that after informing the Defendant to pay the balance of the purchase price, which she declined to do, she issued her with a completion notice and that she thereafter rescinded the Agreement on 17<sup>th</sup> April, 2005.

9. According to PW1, the Defendant deposited on her account a sum of Kshs. 125,000. It was the evidence of PW1 that she visited the suit land on 24<sup>th</sup> July, 2007 and found Surveyors sub-dividing the suit land and that upon inquiry, she was informed that the Defendant had sold the suit land to the Interested Parties herein. The Plaintiff produced in evidence the letter dated 10<sup>th</sup> August, 2007, the Title Deed for parcel number 127, the Application for the consent of the Board, the letter dated 22<sup>nd</sup> August, 2006 addressed to the Defendant and the letter dated 17<sup>th</sup> April, 2007.

10. In cross-examination, PW1 stated that when she signed the Sale Agreement, she was in the company of her husband; that she had a Title Deed in respect of one parcel of land and a ballot card for the other parcel of land and that the Defendant took the ballot card that she had. It was the evidence of PW1 that she paid the fee required for one to attend the Land Control Board and that the Defendant declined to attend the meeting.

11. The Defendant denied having received a further payment of Kshs. 175,000 from the Plaintiff and that she never allowed the Defendant to take possession of the suit land. According to the Plaintiff, the third parties have since developed the suit land.

#### **The Defence case:**

12. The Defendant, DW1, testified that she bought the two suit properties from the Plaintiff vide an Agreement of Sale dated 10<sup>th</sup> February, 2004; that at the time of the purchase, the Plaintiff had no Title Deeds to the suit properties and that the Plaintiff held a Certificate from Nyakinyua Investment Limited.

13. It was the evidence of PW1 that after paying the down payment of Kshs. 1,000,000, she entered the suit land and sub-divided it into several portions; that the Interested Parties have since developed their respective plots and that it is the Plaintiff who failed to obtain the consent of the Board. According to the Defendant, she was required to pay the balance of the purchase price after the Plaintiff obtains the consent of the Board. DW1 stated that in addition to the Kshs. 1,000,000 that she paid to the Plaintiff, she paid the Plaintiff a further sum of Kshs. 125,000 and 175,000.

14. In cross-examination, DW1 stated that at the time the Plaintiff sold the suit properties to her, she only had a Title Deed in respect to one parcel of land; that she appeared before the Board with the Plaintiff's husband but the Plaintiff never showed up and that she never received the letter of 22<sup>nd</sup> August, 2006 from the Plaintiff's advocates.

15. DW1 informed the court that she bought the suit properties with the intention of selling them; that she sub-divided the land into 32 portions which she sold to third parties and that she later on paid to the Plaintiff Kshs. 125,000. According to DW1, she paid a further sum of Kshs. 175,000 on the day she went to the Land Control Board for the consent and that on that day, she had carried cash of Kshs. 200,000 which she was ready and willing to pay the Plaintiff. However, the Plaintiff never turned up.

16. One of the Interested Parties, DW2, informed the court that she bought plot number 10Y on 3<sup>rd</sup> December, 2005 from Wamuki Enterprises Limited, that he was given a share certificate for the land and that he developed the land and settled on it with his family.

17. It was the evidence of DW2 that the Defendant told them that all the 32 plots should be sold before she could get for them the Title Deeds and that they later on learnt that this suit had been filed by the Plaintiff.

18. The Plaintiff's advocate submitted that the Defendant did not acquire any interest in the suit property; that the Defendant admitted that she has never paid the balance of the purchase price and that there is evidence to show that the Plaintiff was always ready and willing to attend the Board and obtain a consent.

19. The Plaintiff's counsel submitted that time became of essence when the Plaintiff issued a completion notice to the Defendant; that the consent of the Board was never obtained thus making the Sale Agreement null and void and that in the circumstances, the Defendant could not pass any interest in the land to the third parties.

20. Counsel submitted that the Interested Parties were not innocent purchasers for value; that if they had conducted a search, they would have realized that the suit land was registered in the name of the Plaintiff and not Wamuki Enterprises Limited and that the Interested Parties were negligent purchasers.

21. The Plaintiff's counsel submitted that under Section 26(1) of the Land Registration Act, a Certificate of Title is prima facie evidence that the person so registered is the absolute and indefensible owner of the land; that no fraud, misrepresentation or illegality was pleaded against the Plaintiff to enable the court cancel the Plaintiff's title and that Section 22 of the Land Control Act creates an offence for any person to remain in possession of land in respect to which an Agreement is voided under Section 6 of the Act. Counsel relied on numerous authorities which I have considered.

22. The Defendant's counsel submitted that the balance of the purchase price was payable upon obtaining the consent to transfer; that the Plaintiff has never obtained the consent from the Land Control Board to date; and that the Plaintiff was not ready to complete the transaction.

23. The Defendant's counsel finally submitted that the Agreement for Sale was silent on the completion period because the Plaintiff did not have titles and that the court has a duty to weigh who between the Plaintiff and the Defendant would have reason to refuse to attend the Land Control Board.

24. The Interested Parties' advocate submitted that they purchased the suit plots on the strength of the Agreement between the Plaintiff and the Defendant; that they have been living on the land for the past fifteen (15) years and that it is the Plaintiff who granted to the Defendant

vacant possession of the land. Counsel submitted that the Interested Parties are purchasers for value without notice.

#### **Analysis and findings:**

25. It is not in dispute that the Plaintiff entered into an Agreement of Sale dated 10<sup>th</sup> February, 2004 with the Defendant. According to the said Agreement, the Plaintiff described herself as the “holder in Nyakinyua Investment Limited vide Share Certificates Number 5044 and 5045 (the said shares entitles her to pieces of parcels of lands known as Ruiru/East Block 2/127 and 128 vide Ballot Number 322).

26. According to the Sale Agreement, the purchase price for the two parcels of land was Kshs. 1,500,000. Kshs. 1,000,000 was paid to the Defendant on the date the Sale Agreement was executed, with an additional amount of Kshs. 125,000 which was deposited on the Plaintiff’s account in the year 2006. Although the Defendant informed the court that she deposited on the Plaintiff’s account a further sum of Kshs. 175,000, the Plaintiff denied having received this amount. Clause 3(b) of the Agreement provided as follows:

**“(b) The balance of Kenya shillings five hundred thousand (Kshs. 500,000) obtaining consent (sic) to transfer the said parcels of lands from the Land Control Board.”**

27. Clause 4 of the Agreement of Sale further provided that the Plaintiff will give to the Defendant vacant possession of the suit properties “immediately on execution of this Agreement.” The Plaintiff’s husband, Andrew Ng’ang’a Mukuria, witnessed the signing of the Agreement.

28. The Plaintiff informed the court that the Defendant declined to attend to the Board on two occasions. To show that she had actually booked for a hearing at the Board, the Plaintiff produced in evidence two receipts dated 30<sup>th</sup> August, 2005. The Plaintiff also produced copies of the Application for the consent of the Board in respect of the two suit properties dated 30<sup>th</sup> August, 2005.

29. In his letter of 22<sup>nd</sup> August, 2006, the Plaintiff’s advocate addressed the Defendant as follows:

**“That on 10<sup>th</sup> February, 2004 you entered into a Sale Agreement for the purchase of the above property more particulars whereof are well within your knowledge. That you have failed to complete the sale despite notice to do so. Kindly notice (sic) that you should complete the sale within the next twenty one (21) days from the date hereof. If you fail to complete the sale within the said period, the Vendor will cancel the sale, take possession of the premises and you will lose the deposit in terms of the Law Society Rules.”**

30. On 17<sup>th</sup> April, 2017, the Plaintiff’s Advocate wrote as follows:

**“We refer to our letter dated 22<sup>nd</sup> August, 2006. Kindly note that the Sale Agreement is now rescinded. You are hereby given notice to vacate the suit premises within the next fourteen (14) days from the date hereof failure to which we shall take the appropriate action to have you evicted from the said property.”**

31. It is on the basis of the above two letters that the Plaintiff is seeking for the eviction of the Defendant and the Interested Parties from the suit land. The other ground that the Plaintiff is relying on to evict the Defendant and the Interested Parties from the suit land is that the consent of the Land Control Board was never obtained within the requisite period of six (6) months. Section 6(1) (a) of the Land Control Act provides as follows:

**“(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.”**

32. The Plaintiff has argued that the letter dated 22<sup>nd</sup> August, 2006 is a completion notice, and that the said letter was duly served on the Defendant. Indeed, considering that the Sale Agreement did not have a completion period, time could only be of essence upon serving of a completion notice on the Defendant.

33. Under Section 39 of the Land Act, if a purchaser of land has entered into possession of land, the Vendor may exercise his or her contractual right to rescind the contract by reason of a breach of the contract by the purchaser by resuming possession of the land peaceably; or obtaining an order for possession of the land from the court in accordance with the provisions of Section 41 of the Act. Section 41(1) of the Land Act provides as follows:

**“(1) A vendor who proposes to seek to regain possession of private land under section 39, shall serve a notice on the purchaser which shall inform the purchaser—**

**(a) of the nature and extent of the breach complained of by the vendor;**

**(b) whether the vendor considers that the breach is capable of being remedied by the payment of a stated amount of money owing under the contract;**

**(c) whether the vendor considers that the breach is capable of being remedied by the purchaser doing or desisting from doing anything or paying reasonable compensation or both, and of the thing that the purchaser must do or desist from doing or the amount of compensation that shall be paid or both to remedy the breach and the time, being not less than thirty days, within which the actions referred to in this paragraph must be completed;**

**(d) of the period within which the purchaser must remedy the breach, if the vendor considers that the breach is capable of being remedied; and**

**(e) of the consequence where the purchaser fails to remedy the breach or if the vendor does not consider that the breach can be remedied, the vendor may seek an order from the court to possess the land and rescind the contract.”**

34. The Defendant in this matter took possession of the suit land and sold portions thereof to the Interested Parties. Although the Plaintiff purported to issue to the Defendant a Completion Notice of 22<sup>nd</sup> August, 2006, there is no evidence to show that the same was ever served upon the Defendant. Indeed, the said Completion Notice was not sent to the Defendant by way of registered post, which is a much secure way of sending documents by mail, as compared to ordinary mail.

35. Furthermore, the purported Completion Notice dated 22<sup>nd</sup> August, 2006 did not enumerate the nature and extent of the breach complained of by the Plaintiff, neither did it state if indeed the breach is capable of being remedied by the Defendant, contrary to the provisions of Section 41 of the Land Act.

36. If it was true, as alleged by the Plaintiff, that it is the Defendant who had declined to attend the Board for the purpose of the consent being issued, nothing would have been difficult than the Plaintiff stating so in writing. Having not informed the Defendant in writing that the transaction could not be completed due to her unavailability to attend the Board meetings, I am convinced that it is the Plaintiff who declined to attend the Board with a view of obtaining the consent to transfer the suit land to the Defendant.

37. Considering that the Defendant was only required to pay the balance of the purchase price after obtaining the consent of the Board, and in the absence of evidence by way of a letter informing the Defendant to avail herself at the Board, I find and hold that it is the Plaintiff who is in breach of the Sale Agreement. Having sub-divided the suit land into 32 portions and informally sold them to third parties, it was not in the interest of the Defendant to frustrate the finalization of the transaction.

38. The Plaintiff has argued that in any event, the Sale Agreement of 10<sup>th</sup> February, 2004 between herself and the Defendant is null and void for want of the consent of the Board. That may be true. However, the Defendant having taken possession of the suit land pursuant to the Sale Agreement, and the Interested Parties, relying on the said Sale Agreement, having taken possession of the suit land from the Defendant and developed the same, the doctrine of Constructive Trust comes into play.

39. In recent decisions, the Court of Appeal has held that where the Vendor has received the full purchase price, he creates an implied or Constructive Trust in favour of those persons who had paid the purchase price (*See Willy Kimutai Kitilit vs. Michael Kibet [2018] eKLR, and Macharia Mwangi Maina & 87 others vs. Davidson Mwangi Kagiri (2014) eKLR*). Of course, this position does not sit well with some Judges of the Court of Appeal who have held that the principles of equity cannot be imported to oust the provisions of statutory law (*See David Sirona Ole Tukai vs. Francis Arap Muge & others (2014) eKLR*).

40. While importing the equitable doctrine of Constructive Trust to defeat the stringent provisions of Section 6 of the Land Control Act, the Court of Appeal in the *Willy Kimutai case* (*supra*) held as follows:

**“Since the doctrines of Constructive Trust and proprietary estoppel apply to oral contracts which are void and unenforceable, 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 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.”**

41. The circumstances of this case shows that it is the Plaintiff who put the Defendant in possession of the suit land. The same Plaintiff allowed the Defendant to sell the 32 plots to the Interested Parties without raising any objection. Indeed, the said Interested Parties have since put up permanent houses on the entire suit land. That being the case, and considering that it is the Plaintiff who has failed to obtain the consent of the Board, the doctrine of Constructive Trust comes into play, which has been defined as a doctrine of equity imposed by courts to benefit a person who has been wrongfully deprived and ask a person who would be justly enriched to transfer the property to the intended party (*See Simon Gardner, An introduction to the Law of Trusts.*)

42. In the circumstances, the Plaintiff upon being paid the balance of the purchase price, being Kshs. 375,000, should transfer the two titles to the Defendant.

43. The issue of the Interested Parties' Counter-claim cannot be raised in this claim. I say so because there was no privity of contract between the Plaintiff and the Interested Parties. The Interested Parties can only file a claim as against the Defendant, and Wamuki Enterprises Limited. Indeed, having not joined Wamuki Enterprises Limited, the company that sold to them the 32 plots, the Counter-claim herein is a non-starter.

44. For the reasons I have given above, I dismiss the Plaintiff's Amended Plaint dated 5<sup>th</sup> August, 2013 with costs. The Interested Parties' Counter-claim dated 5<sup>th</sup> May, 2017 is also dismissed but with no order as to costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 21<sup>ST</sup> DAY OF JUNE, 2019.**

**O.A. ANGOTE**

**JUDGE**