



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**E & L CASE NO. 178 OF 2015**

**SAMWEL KIPROTICH CHEMASE.....1<sup>ST</sup> PLAINTIFF**

**JAMES KIBET CHIRCHIR.....2<sup>ND</sup> PLAINTIFF**

**PAUL KIMALEL KIPRUTO.....3<sup>RD</sup> PLAINTIFF**

**SAMWEL SUMUKWO.....4<sup>TH</sup> PLAINTIFF**

**VERSUS**

**LUDIA JEMALIT SAMOEI.....1<sup>ST</sup> DEFENDANT**

**STANELY CHEPKOK MOSIL.....2<sup>ND</sup> DEFENDANT**

**RUTH JEPKOECH KOIMET.....3<sup>RD</sup> DEFENDANT**

**ROBERT GAMBA.....4<sup>TH</sup> DEFENDANT**

**KAPYEMIT TEACHERS SELF HELP GROUP.....5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

Samwel Kiprotich Chemase, James Kibet Chirchir, Paul Kimalel Kipruto and Samwel Sumukwo, hereinafter referred to as defendants have come to court against Ludia Jemalit Samoei, Stanely Chepkoech Koimet, Robert Gamba and Kapyemit Teachers Self Help Group claiming:

That vide a written sale agreement-dated 13<sup>th</sup> July, 2006 they and others purchased of 82½ acres of land from line 1<sup>st</sup> defendant through the 5<sup>th</sup> defendant out of that property known as L. R. No. 35659 measuring 600 acres.

That that they are entitled to 16 acres out of the 82½ acres purchased wherein they jointly paid the entire amount of over Kshs.1,400,000 in consideration.

That they were shown their respective portions being 4, 4, 3 and 5 acres respectively upon subdivision and demarcation being done and the subdivision exercise created provisional Plots No. 4B, 4C, 3B and 5B respectively.

That they immediately assumed possession of their respective portions upon demarcation and fenced their respective portions in 2006.

That the 1<sup>st</sup> defendant, without any colour of right whatsoever has unlawfully, illegally and forcefully invaded, encroached and trespassed in the plaintiff's parcel with an attempt to dislodge and evict them from their portions.

That the actions of the 1<sup>st</sup> defendant are malicious and amount to breach of the agreement dated 13<sup>th</sup> July, 2006.

That the plaintiffs have tried in vain to seek audience with the 2<sup>nd</sup>, 5<sup>th</sup> defendants but have refused, neglected and/or fail to give the plaintiffs peaceful and quiet enjoyment of the suitlands herein.

That the actions of the defendants have exposed them to loss and damages.

There are no previous or pending proceedings in any other court over this subject matter.

The cause of action across within the jurisdiction of this Honourable Court.

The plaintiffs pray that:

- (a) An order of specific performance compelling the 1<sup>st</sup> defendant to execute transfer, application to Land Control Board and surrender completion documents being KRA PIN, copy of Identity Card and Passport photographs for registration to effect transfer.
- (b) In the alternative, a vesting order directing the Deputy Registrar to execute the transfer whereof the same be deemed to effect transfer of L. R. 35659 in favour of the plaintiffs.
- (c) A permanent injunction restraining the defendants, their agents, employers or servants from trespassing encroaching or dealing in any way with the suitlands herein.
- (d) General damages for breach of contract.
- (e) Costs of this suit.

The defendants were served with the Complaint and summons to enter appearance but failed to do so.

The evidence on record which is not controverted is that on the 13.7.2006, the plaintiffs through the 5<sup>th</sup> defendant entered into written agreement with the 1<sup>st</sup> defendant purchasing 82.5 acres carried out of L. R. No. 35659 at a consideration of Kshs. 6,600,000 from which Kshs. 1,400,000 was paid by the plaintiffs' members to the 5<sup>th</sup> defendant. The amount paid was equivalent to 16 acres. Upon subdivision of the land, the plaintiffs were given provisional plot numbers being numbers 4B, 4C, 3B and 5B. the plaintiffs took immediate possession of the land and have been utilizing the same.

The plaintiffs have demonstrated that the 1<sup>st</sup> defendant is holding 16 acres in trust for the said plaintiffs as they have paid the 1<sup>st</sup> defendant Kshs.1,400,000. The 1<sup>st</sup> defendant cannot be allowed to retain the money and the land.

The Court of Appeal in *Nyeri Civil Appeal No. 6 of 2011 consolidated with Civil Appeal No. 26 and 27 of 2011 – Macharia Mwangi Maina & 87 Others Vs Davidson Mwangi Kagiri (2014) eKLR*, held that where a party pays for a parcel of land and is put in possession even without obtaining the consent of the Land Control Board to equitable doctrines of constructive trusts can be invoked. The court relied on the decision of *Yaxley Vs Gotts & Another (2000) 162*, where it was held that an oral agreement for sale of property created an interest in the property even though void and unenforceable as a contract; but the oral agreement was still enforceable on the basis of a constructive trust or proprietary estoppel. In the instant case, it was the respondent who put the appellants in possession of the suit property not as licensees but with the intention that he was to transfer individual plots purchased by them. The respondent went ahead and received the purchase price. They are of the considered view that the doctrines of proprietary estoppel and constructive trust are applicable and the respondent cannot renege.

As Lord Bridge observed in *Llyods Bank Plc Vs Rosset, (1991) 1 AC 107, 132*, a constructive trust is based on “common intention” which is an agreement, arrangement or understanding actually reached between the parties and relied on and acted on by the claimant.

Constructive trust is an equitable concept which acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner by defeating the common intention.

I do find that the plaintiffs have proved their case on balance of probability and I do grant the following prayers:

- (a) An order of specific performance compelling the 1<sup>st</sup> defendant to execute transfer, application to Land Control Board and surrender completion documents being KRA PIN, copy of Identity Card and Passport photographs for registration to effect transfer.
- (b) In the alternative, a vesting order directing the Deputy Registrar to execute the transfer whereof the same be deemed to effect transfer of L. R. 35659 in favour of the plaintiffs.
- (c) A permanent injunction restraining the defendants, their agents, employers or servants from trespassing encroaching or dealing in any way with the suit lands herein.

Costs to the plaintiffs. Orders accordingly.

**Dated and delivered at Eldoret this 18<sup>th</sup> day of July, 2019.**

**A. OMBWAYO**

**JUDGE**