



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO. 862 OF 2017

(Formerly Machakos ELC No. 360 of 2012)

JOSEPH KUYO LEGEL.....PLAINTIFF

VERSUS

KUNTAI OLE NTUSERO.....DEFENDANT

JUDGEMENT

By a Plaint dated the 25th September 2012, the Plaintiff prays for judgment against the Defendant for orders that:

- a. The period within which to apply for Land Control Board Consent for Sale and transfer pursuant to the said Agreement be extended for a further 6 months from the date of determination of this suit.
- b. A permanent injunction do issue to restrain the Defendant, whether by himself, his agents servants assigns from selling, reselling, charging, transferring disposing or in any other manner offering LR. No. Kajiado/ Kaputiei North/ 44786 and LR No. Kajiado/ Kaputiei/ 44787 (Subdivision of LR. No. Kajiado/ Kaputiei North/ 32422) to any other person except the Plaintiff.
- c. A permanent injunction do issue to restrain the Defendant whether by himself, servants, agents, from ever regaining possession, interfering with the Plaintiff's quiet possession and occupation of the said LR. No. Kajiado/ Kaputiei North/ 44786 and LR. No. Kajiado/ Kaputiei North/ 44787 (Subdivision of LR. No. Kajiado/ Kaputiei North/ 32422).
- d. Specific performance of the said Agreement, by execution of a transfer of LR. No. Kajiado/ Kaputiei North/ 44786 and LR. No. Kajiado/ Kaputiei North/ 44787 (Subdivision of LR. No. Kajiado/ Kaputiei North/ 32422) to the Plaintiff.
- e. The Defendant do execute the transfer and furnish the Plaintiff with all documents necessary to effect the Transfer of LR. No. Kajiado/ Kaputiei North/ 44786 and LR. No. Kajiado/ Kaputiei North/ 44787 (Subdivision of LR. No. Kajiado/ Kaputiei North/ 32422) within 7 days of the determination of this suit.
- f. In default of the Defendant's compliance with order No. (e) above, the Deputy Registrar of the High Court do sign all documents necessary to effect the transfer, in place of the Defendant.
- g. Damages for breach of contract in addition to specific performance.
- h. Special Damages of Kshs. 100,000/=
- i. Costs of suit.
- j. Interest at court rates on; (g), (h) and (i) until payment in full.

By a Statement of Defence dated the 17th October, 2012, the Defendant denies various averments in the Plaint except for the descriptive and jurisdiction of the Court. He admits entering into an agreement with the Plaintiff dated 27th September, 2006 to sell a portion of 10 acres of land to be excised from his parcel known as LR. No. Kajiado/ Kaputiei North/ 15760 at the price of Kshs. 400,000/=. He avers that the Plaintiff only paid him Kshs. 130,000/= on execution date of the Agreement and failed to pay the balance of the purchase price. He explains that when the Plaintiff paid the deposit of Kshs. 130,000/=: he requested the Defendant to allow him fence the said land as he had dairy cows and promised to pay the balance immediately. He contends that the Plaintiff breached the terms of the Agreement by failing to pay the full

purchase as per the Agreement despite even being served with the Notice and refusing to adhere to the terms of the said Agreement.

The matter proceeded to full hearing where each party had one witness.

Evidence of the Plaintiff

Plaintiff as PW1 averred that in 2006 they entered into a Sale Agreement with the Defendant for the purchase of 10 acres of land at a cost of Kshs. 400,000/=. It was his testimony that he paid the Defendant Kshs. 130,000/= at the time of executing the Agreement and settled the balance of Kshs. 270,000/= later on. He contended that after paying the purchase price, it was the responsibility of the Defendant to obtain consent of the Land Control Board and Surveyor to subdivide land parcel number Kajiado/ Kaputiei North/ 15760. He confirmed that after the survey, he took possession of the 10 acres, fenced it off and started farming thereon by keeping dairy cows including sheep. Further, his title was supposed to be Kajiado/ Kaputiei North/ 32422. It was his testimony that he signed transfer forms but to date the land has not been transferred to him as Defendant told him there was a problem at the Land Office. He explained that in 2011, one Anna Ene Kantai who is wife to the Defendant filed a claim at the Kajiado North Land Disputes Tribunal where they were co objectors together with the Defendant. Further, that the wife claimed the Defendant had sold land without her consent with the purchase price being too low and sorted for orders for him to be evicted therefrom. He stated that in October, 2011, the Tribunal made an Award where they ordered that the land was to be subdivided and he was to be given 5 acres therefrom. He applied for the Award to be quashed vide the Machakos Misc. Cause No. 276 of 2011 and a stay of execution of the Tribunal's Award was granted but the Defendant still proceeded to subdivide the 10 acres into 5 acres each. The subdivided portions are Kajiado/ Kaputiei North/ 44786 and Kajiado/ Kaputiei North /44787 respectively. Upon realization, he placed a caveat on the two parcels of land. He insisted he was occupying land legally and has resided thereon since 2006. Further, that both Defendant and the wife confirmed at the Tribunal that he had paid the full purchase price. In cross examination, he confirmed being the Defendant's neighbour and that he entered into an Agreement with him on 27th September, 2006 which was drawn by an advocate called Mayani Sankale. He insisted the Defendant signed the Agreement at the Advocates office and the land he was purchasing was to be exercised from Kajiado/ Kaputiei North/ 15760. He denied knowledge that the said land was given to the Defendant by his father and he was holding the same in trust for the family. He confirmed paying the full purchase price but did not have any receipt in court. Further, that he never went to the Land Control Board to obtain consent to transfer. He confirmed that he was not given any documents allowing him to take possession of the suit land but wanted the land transferred in his name. He clarified that his advocate never told him that they cannot represent two parties in an agreement. In reexamination, he reiterates that Clause 11 in the Agreement indicated that Sankale Mayani was acting for both for them. Further, that Kuntai signed the Agreement before the advocate.

He produced the Sale Agreement; Order dated 9th December, 2011 from Machakos Misc App. No. 276 of 2011; Decree dated 24th July, 2012 from Machakos Misc App. No. 276 of 2011; Certified copies of Green Card for parcels 44786 and 44787; Receipt paid for issuance of Green Card; Two Copies of Statements done By Anne Kuntai and the Kuntai Ole Ntussero at the Kajiado North Land Disputes Tribunal; Receipt for payment of Kshs. 95,000/= to the firm of Tobiko & Njoroge Advocates as his exhibits.

Evidence of the Defendant

The Defendant as DW1 averred that no one read to him the Agreement before he signed it. He stated that the Plaintiff brought to him an Agreement to sign but he did not know who prepared it. He denied selling 10 acres to the Plaintiff and insisted that he was only leased to him land to graze at Kshs. 6,600/= per acre per month, with the total amount being Kshs. 396,000/= but the Plaintiff paid him Kshs. 400,000/= as the final figure. He explained that at the beginning when they entered into the Agreement, the Plaintiff paid him Kshs. 130,000/= in his account at Cooperative Bank. He confirmed that his wife Anne lodged a complaint against the plaintiff and him, at the Kajiado North Land Disputes Tribunal as she was unaware of the lease agreement he had entered into over grazing on the suit land. Further, that when the Plaintiff came to fence the land, she assumed he had sold the land. He denied selling land without the wife's knowledge. Further, he denied informing Sichangi & Company Advocates who were his former advocates that he sold Plaintiff land as indicated in the witness statement. He did not apply for Consent of the Land Control Board to transfer land to the Plaintiff and denied signing the transfer forms. He contended that the Agreement dated 27th September, 2006 for grazing was for 5 years and it expired in 2011. He further confirmed subdividing his land into two but not with an intention to transfer to the Plaintiff. Further, that the land in dispute was given to him by his mother who had got the same from the father. He reiterated that he could not sell land without the consent of the wife. He further averred that he wanted Plaintiff removed from his land and for him to remove his fence therefrom. Further, that if the Plaintiff's money was not utilized in full, he was ready to refund the balance.

In cross examination, he contended that he did not know the advocate who prepared the agreement. He confirmed signing the Agreement as he was leasing land for Kshs. 6,600/= per acre per month for ten acres. He however could not recall the total he should have earned per year. He explained that for the 5 years, they had agreed the cost would be Kshs. 400,000/=. He could further not recall if the Kshs. 6,600/= was supposed to be for an acre or for the whole parcel of land. He denied confirming in his Defense that he sold land to the Plaintiff. He insisted the balance he indicated in his letter dated the 4th May, 2007 was for lease and not sale. Further, that the said letter was written by his sons. He further insisted that it is the Plaintiff who prepared the Agreement and told him it was for lease after which he signed. Further, after the lease expired, he asked the Plaintiff to move out of his land but did not file a suit to evict him. He denied telling the Land Disputes Tribunal that he sold 10 acres at Kshs. 40,000/= per acre. It was DW1's testimony that he did not know what they recorded in the proceedings at the Tribunal but confirmed most members therein spoke Kimaasai and understood what he said. He claimed the Lawyer Lompo and the Tribunal are lying that he sold land to the Plaintiff. He reiterated that the Tribunal awarded Plaintiff 5 acres of land and for him to retain 5 acres and ordered Plaintiff to move out of his land. In reexamination, he clarified that he never told the lawyer who prepared his defense that he sold land to the Plaintiff. He denied that the Tribunal told him to record a statement. He further confirmed, that the Tribunal conducted its proceedings in Kimaasai and Kiswahili.

Both parties thereafter filed their submissions, which I have considered.

Analysis and Determination

Upon consideration of the Plaintiff, Defence, Witnesses' testimonies including exhibits and parties' submissions, the following are the issues

for determination:

- Whether constructive trust was created in favour of the Plaintiff.
- Whether the Plaintiff is entitled to the Orders sought in the Plaintiff.

As to whether constructive trust was created in favour of the Plaintiff.

The Plaintiff submitted that an element of constructive trust had been created between him and the defendant in respect of suit land and relied on the cases of **Kiplangat Kotut – Rose Jebor Kipngok (2019) eKLR**; **Willy Kimutai Kitilit –vs- Micheal Kibet (2018) eKLR** and **John Simiyu Ndalila –vs- Francis Soita (2014) eKLR** to support this argument. The Defendant opposed this averment that there was an element of constructive trust and submitted that the plaintiff's case is premised on the notion that the Defendant reneged on his obligation despite the plaintiff having discharged his. The Defendant insisted the Plaintiff breached the contract by failing to pay the balance and failed to furnish court with this evidence. He relied on the case of **SUSAN MUMBI –VS- KEFELA GREBEDHIN (Nairobi HCCC No. 332 of 1993)** to support this averment.

The Plaintiff claims to have purchased 10 acres of land from the Defendant vide an agreement dated the 27th September, 2006. The Plaintiff produced the said Sale Agreement as an exhibit. The Defendant in his Defence admitted selling land to the Plaintiff but in his testimony as DW1 he claimed the same was a lease agreement for grazing and not a Sale Agreement as claimed by the Plaintiff. He confirmed receiving kshs. 400,000/= from the Plaintiff as consideration for the lease. He denied recording a statement at the Tribunal but admitted that the Tribunal had ordered that the Plaintiff was to be given 5 acres while he retains 5 acres. The Plaintiff as PW1 confirmed that in 2006 after paying the purchase price, he took possession of the 10 acres of land, fenced the same and commenced rearing dairy cows including sheep thereon. Further, in the Sale Agreement, which he disputed, it is indicated that the Defendant was selling land to the Plaintiff. The Plaintiff claimed he had paid the total of Kshs. 400,000 being the purchase price to the Defendant, which the Defendant insists was the consideration for the lease. However, in cross examination, the Defendant was not able to compute the cost of leasing the land per acre. In the proceedings at the Tribunal, which were quashed, the Defendant's wife admitted that the husband had sold land to the Plaintiff without her consent and the purchase price was low. She was even ready to refund the Plaintiff his money and for him to vacate their land since he had fenced it. In DW1's witness statement, he admitted entering into a Sale Agreement and receiving Kshs. 130,000/=. He further admitted receiving Kshs. 45,000/= from the Plaintiff. In his oral testimony, DW1 admitted receiving Kshs. 400,000/= from the Plaintiff. Insofar as the Defendant claims that this was a Lease Agreement, there are too many contradictions in his oral testimony vis a vis the Defense and witness statement. It seems the Defendant sought to deviate from the averments in his pleadings. In the case of **Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR** the Supreme Court held thus: -

“It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.....”

In relying on this decision as well as facts as presented above, I find that the Defendant cannot deviate from the averments in his Defense and Witness Statement and hold that he is bound by his pleadings.

From the witness testimonies, it emerged that the Plaintiff had been on the suit land from 2006 to date and continued to undertake farming thereon. Both parties admitted that no consent of the land control board was obtained before the suit land could be transferred to the Plaintiff. The Defendant further proceeded to subdivide the 10 acres into 5 acres each despite the existence of conservatory order in the Judicial Review Application.

In the 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, I find that since the Plaintiff and the Defendant duly executed the Sale Agreement dated the 26th September, 2006 which culminated in the Plaintiff taking occupation of the 10 acres of land which he purchased, I hold that an element of trust was created, which became an overriding interest over the Defendant's land. Insofar as the Defendant failed to procure the necessary Consent from the Land Control Board within the required period of six (6) months, to enable him transfer the 10 acres into the Plaintiff's names. Further, even though he failed to transfer the land to the Plaintiff's name and proceeded to subdivide the 10 acres of land into 5 acres each, I hold that the transaction he entered into with the Plaintiff in 2006 is not void but enforceable by virtue of the doctrine of constructive trust which is a Constitutional principle. It is against the foregoing that I

find that the Plaintiff is indeed entitled to be transferred to the 10 acres of land which he purchased from the Defendant, which the Defendant had subdivided to land parcel number Kajiado/ Kaputei North/ 44786 and 44787 respectively.

As to whether the Plaintiff is entitled to the orders sought in the Plaintiff. The Plaintiff sought for orders of enlarging time to apply for Land Control Board Consent for sale and transfer pursuant to the sale Agreement dated 27th September 2006; A permanent injunction to restrain the Defendant, whether by himself, servants, agents, servants assigns from selling, reselling, charging, transferring disposing or in any other manner offering LR. NO. KAJIADO/KAPUTEI-NORTH-44786 and LR. NO. KAJIADO/KAPUTEI-NORTH-44787 (Subdivision of LR. NO. KAJIADO/KAPUTEI-NORTH-32422) to any other person except the plaintiff; A permanent injunction to restrain the Defendant whether by himself, servants, agents, from ever regaining possession, interfering with the Plaintiff's quiet possession and occupation of the said LR. NO. KAJIADO/KAPUTEI-NORTH-44786 and LR. NO. KAJIADO/KAPUTEI-NORTH-44787 (Subdivision of LR. NO. KAJIADO/KAPUTEI-NORTH-32422) to the Plaintiff; Specific performance of the said Agreement, by execution of a transfer of LR. NO. KAJIADO/KAPUTEI-NORTH-44786 and LR. NO. KAJIADO/KAPUTEI-NORTH-44787 (Subdivision of LR. NO. KAJIADO/KAPUTEI-NORTH-32422) to the plaintiff; The Defendant to execute and furnish the Plaintiff with all documents necessary to effect the Transfer of LR. NO. KAJIADO/KAPUTEI-NORTH-44786 and LR. NO. KAJIADO/KAPUTEI-NORTH-44787 (Subdivision of LR. NO. KAJIADO/KAPUTEI-NORTH-32422) within 7 days of the determination of this suit; In default of the Defendant's compliance with order to execute transfer documents, the Deputy Registrar of the High Court do sign all documents necessary to effect the transfer, in place of defendant; Damages for breach of contract in addition to specific performance; Special damages of Kshs. 100,000/=; Cost of the suit and Interest at court rates on damages and costs until payment in full. On the issue of enlargement of time to procure consent of the Land Control Board to effect transfer of the suit land to the Plaintiff; the Plaintiff submitted that Section 8 (1) of the Land Control Act provided that the High Court may, notwithstanding that the period of six months may have expired, extend that period where it considers that there is sufficient reason so to do, upon such conditions, if any, as it may think fit. Further, that the ELC Court has equal status with the High Court and it follows that it has jurisdiction to extend time for seeking consent. He insisted that clause 7 of the Agreement for Sale placed the obligation of obtaining the consent on the Defendant. Further, that although the defendant alluded in his oral evidence that he was not selling his land but leasing it, the law relating to construction of contracts is that no oral evidence is admissible to contradict, vary or alter the terms of such an instrument. He relied on the case of **Caroline Cherono Kirui –v-s Liner Cherono Towett (2018) eKLR and Fidelity Commercial Bank Limited –v-s Kenya Grange Vehicle Industries Limited (2017) eKLR** to support these averments. The Defendant opposed the prayer for enlargement of time and submitted that the court could not be invited to exercise its judicial powers to enlarge the time to the benefit of a party who is guilty of fundamental breach of the contract he seeks to enforce. In the case of **Caroline Cherono Kirui –v-s Liner Cherono Towett (2018) eKLR, Justice Ohungo** when faced with an request for enlargement of time to apply for consent of the Land Control Board held as follows: **'As observed earlier, the plaintiff has sought an order that time within which to apply for the consent of the Land Control Board by the parties herein be extended. As such, the process of seeking the consent as well as consideration of the application for consent is still underway. In the circumstances, I find and hold that the transaction between the plaintiff and the defendant as embodied in the sale agreement dated 20th March 2012, is not voided for want of consent of the land control board. This should be obvious since otherwise it would be pointless to give the court power to enlarge time notwithstanding that the period of six months may have expired.'**

Further, in the case of **Fidelity Commercial Bank Limited –v-s Kenya Grange Vehicle Industries Limited (2017)**, the Court of Appeal held that: **'So that where the intention of parties has in fact been reduced to writing, under the so called parol evidence rule, it is generally not permissible to adduce extrinsic evidence, whether oral or written, either to show the intention, or to contradict, vary or add to the terms of the document, including implied terms. Courts adopt the objective theory of contract interpretation, and profess to have the overriding aim of giving effect to the expressed intentions of the parties when construing a contract. This is what sometimes is called the principle of four corners of an instrument, which insists that a document's meaning should be derived from the document itself, without reference to anything outside of the document (extrinsic evidence), such as the circumstances surrounding its writing or the history of the party or parties signing it.'**

Since I have already held that an element of constructive trust had been created when the Plaintiff took possession of the suit land after paying the purchase price. Further from the Sale Agreement, it emerges that the Plaintiff was incapacitated to apply for consent of the Land Control Board as this was the obligation of the Defendant who was the owner of the suit land. In associating myself with the two decisions above, I find that the Defendant is estopped from varying the terms of the Sale Agreement through his oral evidence. Further that the Court has the discretion to order for the enlargement of time to apply for consent of the Land Control Board and will proceed to do so.

As to whether the Plaintiff is entitled to injunctive orders, I hold that since he is in possession of the suit land having paid for it and it is actually the Defendant in breach of the said Agreement, he should be allowed to enjoy quiet possession of the same and will grant him the said injunctive orders.

On the issue of special damages sought, the Plaintiff sought for special damages of Kshs. 100,000 that he had paid to the law firm of Messrs Tobiko Njoroge & Company Advocates to represent him in the Judicial Review application. He produced a receipt to that effect, which was not controverted by the Defendant. In the circumstance, I see no reason why I should deny him this prayer and will proceed to allow it.

The Plaintiff however never provided any evidence on damages he has suffered as a result of the breach of contract and will not award him the same.

On the question of costs, costs generally follow the event and since the Plaintiff is the inconvenienced party, I will award him the same.

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

1. The period within which to apply for Land Control Board Consent for Sale and transfer pursuant to the Sale Agreement dated 27th September, 2006 be and is hereby extended for a further 6 months from the date hereof;
2. A permanent injunction be and is hereby issued restraining the Defendant, whether by himself, his agents servants assigns from

selling, reselling, charging, transferring disposing or in any other manner offering LR. No. Kajiado/ Kaputiei North/ 44786 and LR No. Kajiado/ Kaputiei/ 44787 (Subdivision of LR. No. Kajiado/ Kaputiei North/ 32422) to any other person except the Plaintiff.

3. A permanent injunction be and is hereby issued restraining the Defendant whether by himself, servants, agents, from ever regaining possession, interfering with the Plaintiff's quiet possession and occupation of the said LR. No. Kajiado/ Kaputiei North/ 44786 and LR. No. Kajiado/ Kaputiei North/ 44787 (Subdivision of LR. No. Kajiado/ Kaputiei North/ 32422).

4. The Defendant be and is hereby directed to execute the transfer and furnish the Plaintiff with all documents necessary to effect the Transfer of LR. No. Kajiado/ Kaputiei North/ 44786 and LR. No. Kajiado/ Kaputiei North/ 44787 (Subdivision of LR. No. Kajiado/ Kaputiei North/ 32422) within 7 days of the determination of this suit.

5. In default of the Defendant's compliance with order No. (4) above, the Deputy Registrar of the ELC Court Kajiado do sign all documents necessary to effect the transfer, in place of the Defendant.

6. The Plaintiff is awarded Special Damages of Kshs. 100,000/=

7. Costs of suit.

8. Interest at court rates on; (6), and (7) until payment in full.

Dated signed and delivered in open court at Kajiado this 31st day of October, 2019

CHRISTINE OCHIENG

JUDGE