



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT NYAHURURU**

**ELC CASE NO 210 OF 2017**

**ERIC WAMAI KARURI**

**TOM MAINA KABAU**

**RAMSON KIIRU MWANGI (suing as the registered officials of**

**KAHURU MURUAKI WELFARE GROUP.....PLAINTIFFS**

**VERSUS**

**KINYUA NYAGA KINYUA.....DEFENDANT**

**JUDGEMENT**

1. Before me for determination is a matter that was originally filed in the High Court at Nakuru as Civil Suit No. 199 of 2015 on the 10<sup>th</sup> July 2015 before the same was transferred to this court, after its establishment, and registered with the present number.

2. In his plaint, the Plaintiff prays for orders of;

i. Specific performance directing the Defendant to perform within 30 days of judgment or such other time as the court may appoint, the agreement for sale dated 18<sup>th</sup> October 2010 between the Plaintiffs and the Defendant in respect of that property known as Nyandarua/Muruaki/4051 by taking the following steps;

a. Procuring subdivision of the land and excising therefrom 1 ½ acres and in this regard the Defendant do sign and deliver to the Plaintiffs the relevant documents comprising the Mutation form, Application for Land Control Board Consent, title deed and such other necessary documents.

b. The Defendant do execute in favour of the Plaintiffs the instruments of transfer in respect of the sub-division of the land and take all necessary actions for transfer of the sub division to the Plaintiffs.

ii. That in default of the Defendant complying with (i) above, the Registrar of this court do undertake the actions required on part of the Defendant.

iii. The Defendant ordered to give vacant possession of 1 ½ acres excised from Nyandarua/Muruaki/4051 to the Plaintiffs and in default the Plaintiffs be at liberty to evict the Defendant

iv. Costs of the suit plus interest thereon from the date of judgment until settlement thereof in full.

3. The pleadings as well as summons to Enter Appearance were served upon the Defendant on the 14<sup>th</sup> August 2015 who despite service, neither entered appearance nor filed his statement of defence within the stipulated time of 15 days from the date of service. To this effect therein, the Plaintiffs wrote to the Deputy Registrar, Environment and Land Court –Nakuru, vide theirs dated the 8<sup>th</sup> March 2016, to have the matter listed for hearing of formal proof.

4. On the 8<sup>th</sup> December 2016, the Plaintiffs again wrote to the Deputy Registrar requesting to have the matter set down for mention before the honorable judge, so as to seek directions. They later appeared at the registry and fixed the matter for directions for the 19<sup>th</sup> July 2017. However this file was subsequently transferred to this court on the 27<sup>th</sup> January 2017 wherein it was placed before me on the 11<sup>th</sup> May 2017.

5. On the day in question, the court was informed that despite service, the Defendant had not entered an appearance, but the Plaintiffs on the

other hand, had complied with the provisions of Order 11 of the Civil Procedure Rules and would be calling only one witness to testify.

6. The court having noted that the provisions of Order 11 of the Civil Procedure Rules had not been fully complied with, directed the parties to fully comply within 30 days before setting the matter down for hearing.

7. On the 14<sup>th</sup> June 2017 when the matter was set down for mention, the court was informed that the Defendant was out of the country and as such service could not be effected. Another date was fixed for mention wherein service was effected upon the Defendant, in person, on the 7<sup>th</sup> July 2017 for the mention on the 27<sup>th</sup> September 2017.

8. On the 27<sup>th</sup> September 2017, when the matter was called out, the Defendant was absent wherein the court entered interlocutory judgment against him pursuant to Order 10 Rule 4(1) of the Civil Procedure Rules, and slated the matter for formal proof for the 30<sup>th</sup> November 2017. On the said date, the court was not sitting wherein the Plaintiffs were given a mention date for the 7<sup>th</sup> February 2018.

9. The Defendant had still not filed his papers by the time the matter was coming up for mention wherein it was set down for hearing of the formal proof for the 19<sup>th</sup> April 2018. The matter proceeded for hearing with the Plaintiff's case ex-parte pursuant to Order 12 Rule 2 of the Civil Procedure Rules.

### **The Plaintiffs case**

10. It was the Plaintiff's case, through their witness Tom Maina Kabau, and while relying on the bundle of documents filed on the 10<sup>th</sup> July 2015, which he produced as exhibit 1, that on the 18<sup>th</sup> October 2010, they had entered into an agreement with the Defendant herein for the sale of 1<sup>1/2</sup> acres of land for a consideration of Ksh. 375,000/=, which land was to be excised from the Defendant's larger parcel of land No. Nyandarua/Muruaki/4051. That it had been agreed that upon payment of the first installment, the Defendant would execute all documents necessary for the transfer of the land to the Plaintiff.

11. That upon the payment of Ksh. 284,500/=, which was paid in instalments, as per their agreement, the Defendant however refused to execute the documents to effect the transfer of the parcel of land to the Plaintiff.

12. Consequently, the Plaintiffs summoned the Defendant to a meeting wherein he undertook vide an undertaking dated the 8<sup>th</sup> September 2013, to provide them with the necessary documents so as to enable them transfer the land.

13. That when the said undertaking was not fulfilled, the Plaintiff, through their lawyer, and vide a letter dated the 23<sup>rd</sup> October 2013, resorted to write to the Defendant to execute the consent forms which he had enclosed therein.

14. When there was still no response forthcoming from the Defendant, the Plaintiffs wrote to him a demand letter dated the 23<sup>rd</sup> January 2015 which letter was delivered and received by his wife by the name of Hannah Njeri but elucidated no response from the Defendant.

15. By minutes of the 12<sup>th</sup> April 2015, a resolution was passed that the Plaintiffs should file suit against the Defendant and subsequently vide a document dated the 30<sup>th</sup> June 2015 entitled 'Authority to plead and Act,' the witness herein was given the authority to plead and act on behalf of the Plaintiff wherein they filed the present case.

16. The witness relied on the following documents;

- i. An agreement dated the dated 18<sup>th</sup> October 2010.
- ii. The said receipts of payments for;
  - Ksh. 30,000/- paid on the 15<sup>th</sup> October 2010.
  - Ksh. 130,000/- paid on the 18<sup>th</sup> October 2010.
  - Ksh. 121,000/- paid on the 26<sup>th</sup> October 2010.
  - Ksh 3,000- paid on the 26<sup>th</sup> October 2010.
- iii. Defendant's undertaking dated the 8<sup>th</sup> September 2013.
- iv. Advocate's letter dated the 23<sup>rd</sup> October 2013.
- v. Demand letter dated the 23<sup>rd</sup> January 2015.
- vi. Minutes of the 12<sup>th</sup> April 2015.

vii. 'Authority to plead and Act' dated the 30<sup>th</sup> June 2015.

17. The witness then closed the Plaintiffs' case and sought for the orders as prayed in their plaint.

18. The Plaintiffs then filed their written submissions on the 10<sup>th</sup> May 2018 wherein they submitted that they had proved their case, and further relied on the exhibits they had produced as well as on the witness statement sworn by Tom Maina Kabau and dated the 18<sup>th</sup> June 2015.

19. The Plaintiffs' counsel had reiterated what their witness had testified in court adding that indeed it had been the Defendant who had approached his clients and had offered to sell to them 1<sup>1</sup>/<sub>2</sub> acres of land for a consideration of Ksh 375,000/=, to be excised from the his larger piece of land being No. Nyandarua/Muruaki/4051 so that he could offset an outstanding debt owing to the Agricultural Finance Corporation who had instructed auctioneers to sell the land to recover the monies advanced to him. (Defendant).

20. That parties had then deduced their discussion into an agreement herein dated the 18<sup>th</sup> October 2010

21. That the Plaintiff paid directly to the Agricultural Finance Corporation a sum total of Ksh. 284,500/= which the Defendant was owing with a balance to be paid upon the Defendant availing all the necessary documents, consents and/or approvals to execute the transfer of the land so purchased.

22. That despite the Plaintiff having salvaged the Defendant's land from being auctioned, the Defendant had now refused to fulfill his end of bargain to subdivide the land and transfer it to the Plaintiffs.

23. That although the Plaintiffs had not filed their issues for determination because the suit was undefended, yet they framed their issue for determination as being: 'whether the Plaintiff had made out a case that deserved the grant of the orders of specific performance'.

24. The Plaintiff's submission, while relying on the decided case of **Grace Wachuka Miano vs Francis Kamau Gatiba (2016) eKLR**, was to the effect that an order for specific performance was an equitable remedy which was based on existence of a valid and enforceable contract, that the party seeking this remedy must show that he/she is ready, willing and able to perform his/her part of the agreement.

25. The Plaintiff further submitted that the parties herein entered into a sale agreement dated 18<sup>th</sup> October, 2010 wherein the validity and/or enforceability of this agreement had not been questioned. Further, that they had adduced evidence, through the production of receipts as exhibits, to show that indeed they had made payments to the tune of Kshs 284,500/= confirming that indeed they were ready, willing and able to settle the balance of the purchase price once the documents were executed.

26. That it was also evident enough that the Defendant had refused to apply for consent from the Land Control Board notwithstanding that he had already received more than three quarter of the purchase price therein. This conduct, Plaintiff submitted, was clearly inequitable if not outrightly fraudulent.

27. The Plaintiff also relied on the case of **Christopher M. Machimbo vs George Riogi Mochama(2016) eKLR** where Hon. Justice Obaga found, where a vendor had unfairly sought shelter in his own refusal to procure the Land Control Board consent in order to defeat a sale agreement that:

*"In appropriate cases like in this one, courts should not act mechanically and hang on to provisions of statutes which have outlived their usefulness. It is unfair to kick out a person who bought land, paid for it, settled on it just because the seller had realized that he can exploit certain provisions of an Act to make a killing by selling the land again at a higher price or re-claim what he had already sold."*

28. Consequently, the court in granting orders of specific performance had concluded as follows:

*"I therefore find that this is a proper case where an order of specific performance should issue. An order of specific performance is hereby issued directing the Plaintiff to transfer 11 acres to the Defendant as per the agreement between the two failing which the Deputy Registry of this court to sign all necessary documents to effect transfer of the 11 acres in favour of the Defendant. A permanent injunction is also issued restraining the Plaintiff or any other person acting on his behalf from interfering with the 11 acres which the Defendant bought"*

29. The Plaintiff also relied on the case of **John Simiyu Ndalila vs Francis Soita (2014) eKLR** where the Honourable Justice A. Omollo(sic) opined as follows:-

*"...from the Defendant's attitude, I find that he wants to rely on the provisions of the Land Control Act to perpetuate fraud by denying the Plaintiff access to the land he sold to him. In light of the case cited Supra, I find the Plaintiff has established his rights over the portion of land he was sold and which he is claiming under the equitable doctrines."*

30. Further that in the case of **Chase International Investment Corporation and another vs Laxman Keshra & Others (1978) KLR 143** Madam JA (as he then was) observed that:

*"...if the circumstances are such as to raise equity in favour of the Plaintiff and the extent of the equity is known, and in what way it*

*should be satisfied, the Plaintiff is entitled to succeed.’*

31. That consistent with the above cases, the Court of Appeal in **Macharia Mwangi Maina & 87 others vs Davidson Mwangi Kagiri (2014) eKLR** had held that :-

*‘The transaction between the parties is to the effect that the respondent created a constructive trust in favour of all persons who paid the purchase price. We are of the considered view that a constructive trust relating to land subject to the Land Control Act is enforceable. Our view on this aspect is guided by the overriding objectives of this court and the need to dispense substantive and not technical justice.....’*

*.....the totality of our re-evaluation of the facts and applicable law in this case leads us to conclude that the Honourable Judge erred in failing to consider that the appellants were in possession of the suit property, that the respondent had created a constructive trust in favour of all individuals who had paid the purchase price for respective plots and the trial court erred in failing to note that consent of the Land Control board is not required where a trust is created over agricultural land.....”*

32. The Plaintiff then submitted that the requirement for Land Control board consent was never intended to perpetuate fraud and it was on that basis that the courts of equity had always and inevitably granted specific performance in similar situations. That this was a clear case where the orders of specific performance, as sought, were most deserving as demonstrated hereinabove. They then urged the court to grant them the prayers as sought in their plaint dated 30<sup>th</sup> June, 2015.

33. From the evidence adduced, it is clear that the prayers sought by the Plaintiff were for a declaration to issue that since the Defendant had breached their agreement dated 18<sup>th</sup> October 2010, he should be ordered to procure, within 30 days, the subdivision of the land parcel No. Nyandarua/Muruaki/4051 and excises from therefrom 1½ acres and thereafter to execute, in favor of the Plaintiffs, all the instruments of transfer in respect of the sub-divided land so as to transfer the same to the Plaintiffs and thereafter to give vacant possession of the 1½ acres to them.

34. The Plaintiff had also prayed for costs of the suit and interest thereon from the date of judgment until settlement in full.

35. Considering the evidence adduced in court, the documents produced as exhibits, the recorded statements thereto as well as the authorities cited herewith, I find that indeed there is no dispute that;

i. On the 18<sup>th</sup> October 2010 the Plaintiff entered into an agreement with the Defendant herein to buy from him 1½ acres of land, at a consideration of Ksh. 375,000/= land that was to be excised from the Defendant’s larger parcel of land being Nyandarua/Muruaki/4051.

ii. Parties had agreed that since the Defendant had secured loan with Messrs. Agricultural Finance Corporation, that the Plaintiff was to pay Ksh. 125,000/- to the financier and also pay the auctioneers fee of Ksh. 30,000/=, wherein the balance would be paid upon the release of the documents to the advocate by the financier.

iii. The vendor would then execute all the relevant transfer documents to ensure that the transfer is effected in favour of the Plaintiff.

iv. Later the Defendant had infringed their agreement when he refused to execute the documents so as to effect transfer in favour of the Plaintiff.

36. The issues for determination can be framed as follows:

i. Whether the defendant herein breached the terms of their agreement.

ii. Whether the Plaintiff is entitled to the remedies sought.

iii. Which party shall pay the costs of the suit.

37. The law of contract is application in the instant case. Section 3(3) of the Act is clear to the effect that:

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

*(a) the contract upon which the suit is founded—*

*(i) is in writing;*

*(ii) is signed by all the parties thereto; and*

*(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:*

38. A look at the party’s agreement, the same is clear at clause 6 to the effect that;

*'The vendor shall execute all the relevant transfer documents to ensure that the transfer is effected in favour of the purchaser'.*

39. Clause 7 was to the effect that'

*The vendor shall provide to the purchaser copies of the following*

- i. National Identity card*
- ii. 3 passport size photographs*
- iii. PIN certificate*

40. While clause 8 was to the effect that

*The vendor undertakes that they will attend the land control Board when required to do so.*

41. Clause 10 stipulated a penalty for any party that failed to perform their part of the agreement to the effect that such party was to pay to the innocent party 30% of the purchase price being the agreed liquidated damages.

**42. Did the Defendant herein therefor breach the terms of their Agreement:**

It was the Plaintiff's evidence that the Defendant had breached their terms of the agreement by failing to execute the documents to effect transfer of 1½ acres in favour of the Plaintiff despite the Plaintiff having salvaged the Defendant's land from being auctioned when they deposited a sum total of Ksh. 284,500/=, into the Agricultural Finance Corporation's account who were his creditors.

43. That parties had further agreed that the balance of the purchase price was to be paid to the Defendant upon availing all the necessary documents. That despite the Plaintiff's fulfillment of its end of bargain, the Defendant had refused to fulfill his part.

44. These facts were uncontroverted by the Defendant who despite service, did not file his defence and/or appear in court to defend the suit.

45. The terms of the Agreement to sale are clear to the effect that **there was common intention between the Plaintiff and the Defendant in relation to suit property. The transaction thereof created a constructive trust in favor of the Plaintiffs herein when they paid part of the purchase price as per their agreement. This trust was enforceable.** I therefore find that the Defendant herein breached their agreement when he refused to execute all the relevant transfer documents to ensure that the transfer of the suit land was effected in favour of the Plaintiffs.

46. A party cannot run away from the terms of its agreement. It has often been stated that the Court's function is to enforce contracts that the parties enter into. The court cannot rewrite the party's agreements.

47. In the case of **Shah -vs- Guilders International Bank Ltd [2003]KLR** the Court in considering the terms of the parties contract stated that:-

*"The parties executed the same willingly and they are therefore bound by it."*

48. In **Aiman vs Muchoki (1984) KLR. 353** the Court of Appeal held;

*"In the field of the civil law, it is of utmost importance that the courts uphold the rights of parties to commercial transaction. It is the firm tradition of common law court to do so and if the tradition is departed from the nation will suffer".*

49. A look at the terms of the party's agreement, the same is clear that the land in issue related to a controlled transaction in agricultural land which transaction is governed under Section **6(1)** of the Land Control Act and which stipulates that such a transaction:

***"is void for all purposes unless the Land Control Board for the land control board area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act."***

50. **Section 6 (2)** of the Land Control Act provides:

***"For avoidance of doubt, it is declared that the declaration of trust of agricultural land situated within a Land Control Board area is a dealing in land for purposes of subsection (1)".***

51. **Section 8 (1)** requires that an application for consent should be made in the prescribed form within six months of the making of the agreement but the proviso thereto gives the High Court power to extend the period if it considers that there are sufficient reasons to do so upon such conditions, if any, as it may think fit.

52. Under **Section 7** of the Land Control Act, consideration paid for a transaction which becomes void is recoverable as a debt subject to

Section 22 which provides:

**Where a controlled transaction; or an agreement to be a party to a controlled transaction, is avoided by Section 6 and any person**

**(a) pays or receives any money; or**

**(b) enters into or remains in possession of the land, in such circumstances as to give rise to a reasonable presumption that the person pays or receives the money or enters into or remains in possession in furtherance of the avoided transaction or agreement, that person shall be guilty of an offence and liable to a fine not exceeding three thousand shillings or to imprisonment for a term not exceeding three months or to both such fine and imprisonment.”**

53. Although in the case of David **Ole Tukai vs Francis Arap Muge & 2 Others [2014] eKLR** the court of Appeal Court sitting at Nairobi differed with the decision of the same Court (differently constituted) in the case of **Macharia Mwangi Maina & 87 Others v. Davidson Mwangi Kagiri [2014] eKLR** on the application of the equitable principles to the Land Control Act, yet the same court (again differently constituted) in its latest pronouncement in the case of **Willy Kimutai vs Michael Kibet [2018] eKLR** held as follows:

*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.*

*There is another stronger reason for applying the doctrines of constructive trust and proprietary estoppel to the Land Control Act. By **Article 10(2) (b)** of the Constitution of Kenya, **equity** is one of the national values (**emphasis supplied**) which binds the courts in interpreting any law (**Article 10(1) (b)**). Further, by **Article 159(2) (e)**, the courts in exercising judicial authority are required to protect and promote the purpose and principles of the Constitution. Moreover, as stated before, by virtue of **clause 7** of the Transitional and Consequential Provisions in the Sixth Schedule to the Constitution, the Land Control Act should be construed with the alterations, adaptations, and exceptions necessary to bring it into conformity with the Constitution.....*

*.....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.*

54. I find that once the Agreement for sale was executed on the 18<sup>th</sup> October 2010 and part payment of the purchase price of Ksh 284,500/= paid, the Plaintiff acquired a constructive trust in the suit property. That Under clause 8 of the agreement of the sale, it was the vendor's (Defendant) duty to ensure that the consent was obtained. The Defendant herein is clearly trying to run away from his obligations, by not executing the documents for the transfer.

55. In the case of **Willy Kimutai vs Michael Kibet**, (supra) the court finally held that the lack of the consent of Land Control Board did not preclude the court from giving effect to equitable principles, in particular the doctrine of constructive trust.

56. For reasons stated hereinabove, I find that the Plaintiff is entitled to the remedies sought and Judgment is entered for the Plaintiff in the following terms.

i. The Defendant is herein directed to perform within 30 days of this judgment, the agreement for sale dated 18<sup>th</sup> October 2010 between the Plaintiffs and the Defendants in respect of that property known as Nyandarua/Muruaki/4051 by taking the following steps;

a. That the defendant do procuring subdivision of the land and excising therefrom 1 ½ acres and to sign and deliver to the Plaintiff's the relevant documents comprising the Mutation form, Application for Land Control Board Consent, title deed and such other necessary documents.

b. The Defendant to execute in favour of the Plaintiffs the instruments of transfer in respect of the sub-division of the land and take all necessary actions for transfer of the sub division to the Plaintiffs.

ii. That in default of the Defendant complying with (i) above orders, the registrar of this court to undertake the actions required on part of the Defendant.

iii. The Defendant is hereby ordered to give vacant possession of 1 ½ acres excised from Nyandarua/Muruaki/4051 to the Plaintiffs and in default the Plaintiffs be at liberty to evict the Defendant.

57. The Plaintiff is also awarded costs for the suit plus interest thereon from the date of judgment until settlement thereof in full.

58. It is so ordered.

**Dated and delivered at Nyahururu this 19<sup>th</sup> day of June 2018.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**