



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC CASE NO. 37 OF 2017

MERCY CHEPCHIRCHIR.....PLAINTIFF

VERSUS

CHARLES KIPRONO.....DEFENDANT

JUDGMENT

Introduction

1. By a Plaintiff filed on 11th April 2017 the plaintiff instituted a suit against the defendant seeking an order of specific performance and in the alternative a refund of the purchase price in respect of various land sale agreements between the plaintiff and the defendant for the purchase of land parcel number KERICHO/SILIBWET/2188 measuring 0.64 of an acre.
2. In the said plaint the Plaintiff pleads that on various dates between 10th October 2013 and 16th June 2014, the defendant agreed to sell the suit property to the plaintiff at an agreed price of Kshs. 960,000 which the plaintiff paid in full. It was a term of the agreement that the plaintiff would transfer the suit property to the plaintiff once the purchase price was paid in full.
3. The plaintiff pleads that despite receiving the full purchase price, the defendant has refused to transfer the same to the plaintiff.
4. In his defence and counterclaim filed on the 8th May 2017, the defendant denies that he sold the suit property to the defendant and claims that the plaintiff has been unlawfully occupying a portion of the defendant's land which comprises his matrimonial property and cultivating it without paying rent. He prays for orders inter alia that the contracts entered into between him and the plaintiff be declared illegal, and that the plaintiff be evicted from the suit property.
5. The suit was set down for hearing on the 18.10.2017. The plaintiff testified that she purchased a portion of the suit property measuring 0.64 of an acre pursuant to three sale agreements dated 2.8.2013, 10.10.2013 and 26.6.2014. She produced the said sale agreements as exhibits. The agreements were witnessed by two witnesses. She stated that the plaintiff's wife Mary Cherono was present during the signing of the agreements, signifying her consent.
6. After she paid the purchase price, she took possession of the portion she had bought, fenced it off and started cultivating it until 2017 when the defendant became hostile and stopped her worker from harvesting the maize she had planted. In the meantime, she had been requesting the defendant to transfer the suit land to her name but he eventually told her that he could not transfer it to her as there was a caution on the title. The plaintiff then conducted a search and established that the defendant's son had placed a caution on the suit property. The defendant sought the intervention of the Land Registrar but the defendant refused to remove the caution prompting the plaintiff to file this suit.
7. In cross-examination, the plaintiff stated that the defendant's family was aware of the sale and they never raised any objection. She confirmed that the suit property is part of the defendant's matrimonial home though she only bought a small portion thereof.
8. The plaintiff called two witnesses who corroborated her testimony. Patrick Kipnetich Rotich who testified as PW2 stated that he witnessed the plaintiff making the payment to the defendant in three instalments of Kshs. 450,000, Kshs. 75,000 and Kshs. 285,000 respectively. The plaintiff's husband, Daniel Meyoki who testified as PW3 stated that he witnessed the last two payments of Kshs. 150,000 and kshs. 285,000 in June 2014 and December 2016 respectively. He stated that he was the one who made the last payment to the defendant in the presence of the defendant's son.
9. The defendant requested the court to adopt his statement in which he stated that the sale agreements were made without following the due process of the law. He denied having received any money from the plaintiff and stated that plaintiff has trespassed onto his land which comprises his matrimonial property.

10. In cross-examination he stated that he never signed any sale agreement with the plaintiff but claimed he signed a lease agreement whereby he leased the suit property to the defendant for a period of 5 years at a rate of Kshs. 200,000 per year. He testified that pursuant to the alleged agreement, the plaintiff paid him Kshs. 800,000 being the rent for four years. He stated that the lease agreement was not reduced into writing.

11. Vincent Rono, the defendant's son who testified as DW2 said he placed a caution on the suit property because his father wanted to sell it. He claimed he was not aware that his father had sold a portion of the suit property to the defendant.

12. Mary Cheroni Mutai, who testified as DW3 stated that she is the defendant's wife. She testified that the defendant had informed her that he had leased part of their land to several people including the plaintiff. She confirmed that DW2 had placed a caution on the suit property. She stated that the suit property was family land and the defendant could not have sold it without her consent.

13. In his submissions learned counsel for the plaintiff has urged the Court to grant the prayers sought in the plaint. He has submitted that the defendant's wife was a witness to the sale and even signed the sale agreement and was hiding behind the law to invalidate the same.

14. On the other hand, learned counsel for the defendant has submitted that the sale is null and void as no consent of the Land Control Board was obtained within a period of six months as required by section 6(1) of the Land Control Act. He has cited the case of **David Sironga Ole Tukai V Francis Arap Muge & 2 Others (2014) eKLR** which rejected the argument in the case of **Mwangi Maina & 87 Others V Davidson Mwangi Kagiri CA No. 26 & 27 of 2011(Nyeri)** that held that the respondents as persons in occupation of the suit property had acquired equitable rights thereon.

Issues for Determination

15. I have carefully considered the pleadings, evidence and rival submissions and I have distilled the following issues for determination:

- i. Was there a valid sale agreement between the plaintiff and defendant in respect of the land parcel no. KERICHO/SILIBWET/288 measuring 0.64 of an acre?
- ii. Is the plaintiff entitled to the orders sought?
- iii. Is the defendant entitled to the orders sought in the counterclaim?

Analysis and Determination

16. It is common ground that there was an agreement for the sale of the suit property between the plaintiff and the defendant. What is in dispute is whether the said agreement is valid. The defendant maintains that the contract is invalid for two reasons:

17. The first ground is that consent of the Land Control Board was not obtained within the requisite period of 6 months. He relies on the case of **Kariuki V Kariuki (1983) KLR 225** at p.227 Law JA held that when a transaction is stated by the express terms of an Act of Parliament to be void for all purposes for want of necessity of consent, a party to that transaction cannot be guilty of fraud if he relies on the statute to argue that the transaction is void. The court further held that no damages are recoverable in respect of a transaction which is void for all purposes for want of consent and that the only remedy open to a party whose transaction has become void under the Act is recovery of any money or consideration paid in the course of the transaction under section 7 of the Act.

18. The second ground is that no spousal consent was obtained in terms of section 28 of the Land Registration Act, 2012. Counsel cited **Busia ELC case No. 62 of 2013 PM & M.N.J V F.O.G & M.E.N** where Justice Kibunja held:

“i. That land parcel (particulars withheld), registered in the names of M.E.N is subject to spousal rights under section 28 (a) of the Land Registration Act 2012

ii. That the land sale agreement dated 13th October 2011 pursuant to which the 1st defendant took possession of land parcel (particulars withheld) is void and the 1st defendant should vacate and give vacant possession of the suit land to the registered owner within the next 30 days and in default eviction orders to issue”

19. The provisions of section 6 (1) of the Land Control Act have given rise to different interpretations by the Court of Appeal. While in **David Sironga ole Tukai V Francis Arap Muge & 2 Others (2014) eKLR** the Court held that the express provisions of the Land Control Act left no room for the invocation of equitable doctrines of constructive trust and estoppel, in **Willy Kimutai Kitilit V Michael Kibet Civil Appeal No. 51 of 2015 (Eldoret)** the Court of appeal differently constituted held as follows:

“However, whether the Court will apply the equitable doctrines of constructive trust and estoppel to a contract rendered void by lack of consent of the Land Control Board will depend on the particular circumstances of the case. The Court further held as follows:

There is a stronger reason for applying the doctrines of constructive trust and estoppel to the Land Control Act. By Article 10 (2) (b) of the Constitution of Kenya, equity is one of the national values (emphasis added) 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, section 7 of the Transitional and

Consequential Provisions in the sixth Schedule to the Constitution, the Land Control Act should be construed with alterations, adaptations and exceptions necessary to bring it in conformity with the Constitution.... Since the Constitution has 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 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.”

20. Guided by the above case of **Willy Kimutai Kitilit** which is binding on this Court, and applying the court of appeal’s reasoning to the instant case, the defendant having put the plaintiff in possession of the suit property after receiving the full purchase price cannot rely on section 6(1) of the Land Control Act to invalidate the sale. I do not believe the defendant’s evidence that he did not sell the suit property to the plaintiff but merely leased it to her.

21. The plaintiff has not developed the suit property but she has fenced it off and has been carrying on some farming activities. In the circumstances it is my finding that the defendant is estopped from pleading lack of consent of the Land Control Board to invalidate the sale. I therefore dismiss the defendant’s counterclaim with costs.

22. Regarding the reliefs sought by the plaintiff, I note that the prayer of specific performance which would entail the transfer of the suit property which forms part of the defendant’s matrimonial home would present some hardship to the defendant as evidenced by the reaction of his wife and son who have now back-tracked on the sale. I therefore believe that the best way out would be for the defendant to refund the purchase price together with damages for breach of contract.

23. Accordingly, I find and hold that the plaintiff has proved her case on a balance of probabilities and I enter judgment for her as follows:

- a. Kshs. 960,000 being a refund of the purchase price
- b. Kshs. 300,000 being general damages for breach of contract
- c. Costs of this suit
- d. Interest on a) and b) at court rates until payment in full

Dated, signed and delivered at Kericho this 13th day of June 2018

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J.M ONYANGO

JUDGE

In the presence of :

- 1. Mr. Orina for the Plaintiff
- 2. Mr. Mugumya for the defendant
- 3. Court Assistant: Rotich