



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MURANG'A

ELC NO. 100 OF 2017

MIRIAM MUGURE WAMITI.....PLAINTIFF

VS

DAVIS NDERI NGANGA.....DEFENDANT

JUDGMENT

1. The Plaintiff filed suit against the Defendant on the 8/11/16 seeking the following orders;

- a. Specific performance on part of the Defendants to deliver title to the Plaintiff of all that parcel of land known as LOC.9/Ichichi/164 as stipulated in the terms of the Sale Agreement entered into on 9th January 1997.
- b. The property known as Land Parcel Loc.9/Ichichi/164 be registered in the name of the Plaintiff herein in Trust of the Estate of Henry Wamiti Ng'ang'a.
- c. The Defendant do execute transfer documents in favour of the Plaintiff in Trust of the Estate of Henry Wamiti Ng'ang'a herein forthwith.
- d. In the alternative, the Deputy Registrar of the High Court do execute the same in favour of the Plaintiff within sixty (60) days of Judgement herein.
- e. Costs of the suit.
- f. Any other or further relief that the Court deems fit and just to grant.

2. The Plaintiff is the wife and the legal representative of the estate of Henry Wamiti deceased who died on 6/10/2004. It is her case that her husband entered into a sale agreement with the Defendant in respect to the suit land measuring 1.7 acres at the consideration of Kshs 161,500/- which payments were in installments until payment in full. The Plaintiffs husband took possession of the suit land. That the Defendant has refused to transfer the suit land to the Plaintiff in disregard to the agreement dated the 9/1/1997 and subsequent agreements.

3. The Defendant denied the Plaintiffs claim and termed the agreement of sale aforesaid unenforceable and void. He stated that the transaction is void for want of consent from the land control board. That the remedy for specific performance is not available in that regard.

4. The Plaintiff gave evidence and relied on the agreement of sale between her husband and the Defendant. That upon execution of the agreement her husband was given vacant possession. That on execution Kshs 75,000/- was paid to the Defendant and the balance was paid by installments on various dated between 1997 and 2007 as follows;

- a. Kshs 86,500/- between 28/1/1997 to 30/3/1997
- b. Kshs 56,400/- by June 1998. This includes the amount paid using the timber from her husband's timber yard and a cow whose values were agreed by the parties. By the year 2002, the balance outstanding was Kshs 21,993/-
- c. Kshs 25,000/- paid in 2007.

5. She stated that in Feb 2007 she received a letter from their joint Advocate Messrs. R K Kimani informing her that her husband had defaulted in paying the purchase price as per the agreement and that she should collect the cheque for the deposit paid in 1997 from his

office. Upon showing the payments made so far to the Advocate, she was advised to complete the payment which she paid Kshs 25,000/- and got a receipt thus completing the full purchase price.

6. She averred that despite completing the payment of the purchase price the Defendant has frustrated the conclusion of the transfer of the land in her name. She stated that despite selling the suit land to them the Defendant in 2006 without any colour of right illegally and unlawfully approached Athi Water Company Limited for payment of compensation of 1 acre of the suit land which they were using as a "spoil area" since the property is still registered in his name. This prompted the Plaintiff to move the Court for orders of preservation of the suit property.

7. The Defendant testified and admitted entering into a sale agreement with the Plaintiff's husband who died in 2004. That by the time of his demise he was yet to complete the payments of the purchase price of the suit land. He averred that though the purchaser took possession in May 1997, his advocate wrote to her in 2007 demanding that she vacates the suit property and collect the refunds of Kshs 75,000/- paid as deposit. He averred that the agreement is null and void for want of land control board consent. Finally, he stated that the agreement was breached in terms of clause 3 which required the Purchaser to pay the balance of the purchase price by the 31/12/97. That the Plaintiff's husband did not pay. He confirmed that the Plaintiffs husband was a timber dealer and run a timber yard.

8. The Defendant stated that the money received in form of timber and the cow had nothing to do with the balance of the purchase price. He admitted that he did not refund Kshs 75,000/- to the Plaintiff. He also denied receipt of Kshs 25,000/- paid into his Advocate's account in 2007.

9. Parties elected to file written submission which I have read and considered.

Determination

10. Upon assessing the pleadings, the evidence and the written submissions in the case, the following issues are for determination by the Court.

A. Whether the Plaintiff is entitled to specific performance.

B. Costs.

11. It is not in dispute that the parties entered into an agreement of sale for the sale and purchase of the suit land at the price of Kshs 161, 500/-. A deposit of Kshs 75,000/- was paid at the signing of the agreement. The balance therefore was payable by the 31/12/2007. Possession was given to the purchaser in May 2007.

12. The Defendant argued that the agreement of sale is void for two reasons; one that the full purchase price was not paid as stipulated under the agreement that is to say 31/12/97 and secondly on account of lack of consent of the land control board. It is on record that the Plaintiff has led evidence to show how the payments were made in installments past the agreed date of 31/12/97 and how those payments were accepted by the Defendant. She has presented documentary evidence to support her averments. I have seen and examined the acknowledgements in the English translation and there is no doubt in my mind that the payments were indeed made. Except offering general denials the Defendant did not rebut the averments. It is believable.

13. In the case of **Combe Vs Combe 1951 2KB 215** the Court stated that;

" the principle, as I understand it, is that, where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave a promise or assurance cannot afterwards be allowed to revert to the previous legal registrations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration but only his word.

14. From the forgoing it is not available for the Defendant to claim that the agreement is void for failure to complete the payment of the purchase price. It is on record that the last payment was paid into his advocates account and a receipt has been rendered. He did not table any documents to the contrary to rebut the averments. It is clear therefore that the parties altered the terms of the agreement by their conduct; acceptance of the late payments.

15. It is commonly agreed that the suit land is agricultural land and therefore subject to consent of the land control board. The parties anticipated this and made provisions under clause 5 of the agreement for sale. The Defendant has argued that since the land control board consent was not obtained the agreement became void and unenforceable. In the case of **Gatere Njamuyu Vs Joseck Njue CA NO. 20 of 1992** the Court held as follows;

" The agreement does not become binding because consent is given, and there is no appeal against it. The agreement between the parties who make it though it is not enforceable until consent has been given. If consent is refused the dealing in agricultural land becomes void for all purposes under section 6 of the Act..... "

16. The Plaintiff has submitted that the Court should grant an extension of time to apply for consent. With respect that should be made in accordance with the relevant provisions of the Land Control Act.

17. It is not disputed that the Plaintiff has been in occupation and possession of the suit land since May 2007 to date. In the case of **Macharia Mwangi Maina & 87 Others v. Davidson Mwangi Kagiri [2014] eKLR** the Court of Appeal held that upon payment of the full purchase price, the vendor holds that land in trust for the purchaser.

18. I am guided by the decision of the Court of Appeal in **Willy Kimutai Kitilit Vs Michael Kibet CA NO. 20 of 2015** where the Court agreeing with the decision in **Macharia Mwangi Maina & 87 Others v. Davidson Mwangi Kagiri [2014] eKLR** that;

“that the equitable doctrines of constructive trust and proprietary estoppel are applicable and enforceable to land subject to the Land Control Act, though this is subject to the circumstances of the particular case. Upon the application of the equitable doctrines, the Court in its discretion may award damages and where damages are an inadequate remedy grant the equitable remedy of specific performance.

19. The said Court further held;

20. “Para [23] that 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.

21. [24] 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.

22. [25] The word equity broadly means a branch of law denoting fundamental principles of justice. It has various meanings according to the context but three definitions from Black’s Law Dictionary, Ninth Edition will suffice for our purpose:

“1. ---

2. The body of principles constituting what is fair and right.

3. The recourse to principles of justice to correct or supplement the law as applied to particular circumstances ---

4. The system of law or body of principles originating in the English Court of Chancery and superseding the common and statute law (together called “Law” in the narrower sense) when the two conflict”

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”.

23. In instant case the Defendant has been holding the suit land under constructive trust in favour of the Plaintiff since 1997 to date. The Defendant put the Plaintiff and her husband in possession in 1997 and notwithstanding the terms of the agreement between parties, he continued to accept payments thus varying by conduct and consent the terms of the said agreement of sale. His key reason for not transferring the land to the Plaintiff is because there is no land control consent obtained. It would be inequitable for this Court to deny the Plaintiff the suit land on this account. Equity must come in to smoothen the harsh effects of section 6 of the Land Control Act.

24. I find that the circumstances of this case are such that the equitable doctrine of constructive trust applies and given the time that the Plaintiff has been in occupation of the land, I find that damages and refund of the purchase price are inadequate.

25. In the end the Plaintiff’s suit succeeds and I make the following orders;

a. The Defendant be and is hereby ordered to deliver title to the Plaintiff of all that parcel of land known as LOC.9/Ichichi/164 measuring 1.7 acres as stipulated in the terms of the Sale Agreement entered into on 9th January 1997.

b. The property known as Land Parcel Loc.9/Ichichi/164 be registered in the name of the Plaintiff herein in Trust of the Estate of Henry Wamiti Ng’ang’a.

c. The Defendant do execute transfer documents in favour of the Plaintiff in Trust of the Estate of Henry Wamiti Ng’ang’a herein forthwith.

d. In the alternative, the Deputy Registrar of the Environment and Land Court do execute the same in favour of the Plaintiff within sixty (60) days of Judgement herein.

e. Costs of the suit shall be in favour of the Plaintiff.

Orders accordingly

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 31ST DAY OF JULY 2018.

J G KEMEI

JUDGE

Ruling read in open Court in the presence of;

Ms Chege for the Plaintiff

Mr Kinuthia HB for Mr Mbue Ndegwa for the Defendant.

Ms.Irene and Ms Njeri, Court Assistants