



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ELC CASE No. 26 OF 2013

CAROLINE CHERONO KIRUI.....PLAINTIFF

VERSUS

LINER CHERONO TOWETT.....DEFENDANT

JUDGMENT

Introduction

1. This case concerns a sale agreement dated 20th March 2012, pursuant to which the defendant agreed to sell to the plaintiff a portion of land measuring 0.404 hectares to be carved out of the defendant's parcel of land known as **Njoro/Ngata Block 2/2807 (Kirobon)** at a consideration of Kshs.1, 200, 000/= out of which the plaintiff paid Kshs.1, 150, 000/= leaving a balance of Kshs.50, 000/= which was to be paid on completion date. The transaction has not been completed. It is averred by the plaintiff that the defendant wilfully refused to procure consent of the Land Control Board for the transaction. A dispute arose between the parties leading to the plaintiff filing this suit on 15th January 2013. Subsequently, the plaintiff filed an amended plaint on 19th February 2013 in which she seeks judgment against the defendant for:

a) An order of specific performance to compel the defendant to perform her obligation as set out in the Agreement dated 20th March 2012 and to specifically exercise and transfer a portion of 0.404 Ha from her parcel No. Njoro/Ngata Block 2/2807 within the agreed area, within 14 days from the date of service of the decree.

The time within which to apply for the Land Control Board Consent by the parties herein be extended.

The defendant be compelled to execute the necessary Land Control Board consent application forms within 7 days from the date of service of the order and in default the deputy registrar to execute such forms.

b) Costs and interests.

2. In her defence the defendant states that the transaction is null and void owing to the fact that the transaction involved sale of Agricultural land and no consent of the Land Control Board was obtained and that the plaintiff is only entitled to a refund of the deposit paid. The defendant further denied that the court has jurisdiction to extend time within which to seek and obtain consent of the Land Control Board.

Evidence tendered by the Plaintiff

3. The plaintiff testified as PW1. She told the court that on 20th March 2012 the defendant agreed to sell to her 0.404 hectares out of Njoro/Ngata Block 2/2807. They both went to view the land then proceed to an advocate known as Mr Ndumia who prepared an agreement. The purchase price was agreed Ksh.1.2 million out of which she paid Ksh.1, 150,000/= as a deposit. It was agreed that she would clear the balance of Ksh.50, 000/= on completion. The plaintiff and the defendant both signed the sale agreement dated 20th March 2012. Annexed to the agreement was a sketch showing the location of the land. The portion PW1 was buying is the area marked "A" in the sketch. Earlier on before signing the agreement PW1 conducted a search on 9th March 2012. The search results showed that the registered proprietor of the land was the defendant. There was no encumbrance on the property.

4. The plaintiff further told the court that she has not taken possession because the defendant later showed her a different portion from the one that they had agreed on. The defendant showed her a hilly and uninhabitable area. As a result, the plaintiff instructed an advocate who issued a demand letter dated 8th October 2012. She produced a copy of the letter as an exhibit. The defendant did not give a positive response but insisted that the plaintiff takes the hilly portion or that she accepts a refund of the deposit paid. The plaintiff did not agree to this.

5. Under cross examination the plaintiff stated that the land she was buying was agricultural land and that she has not yet paid the balance of

the purchase price. She added that the consent of the Land Control Board was not obtained and that she never changed her mind about where she wanted to buy. She further stated that she lodged a caution against the whole title.

6. PW2 was Mr. Boniface Githinji Ndumia, an advocate of this court. He told the court that he drafted and witnessed the execution of a sale agreement dated 20th March 2012. The parties to the agreement were Liner Cherono Towett as vendor and Caroline Cherono Kirui as purchaser. The sale was in respect of 0.404 hectares or an eighth of an acre to be excised from Njoro/Ngata Block 2/2807(Kirobon). The parties presented to him a sketch map which demarcated and identified the portion. The agreement was executed by the parties in his presence and he attested to their signatures. He produced the sale agreement as an exhibit.

7. Under cross examination, PW2 told the court that after the sale agreement had been concluded and deposit of purchase price paid, there arose a dispute between the parties as regards identification of the exact location of the portion sold. The purchaser wanted to cancel the agreement and to get her money back. PW2 called the vendor and asked her to bring back the purchase price and to have the transaction cancelled. He did so at the instruction of the purchaser. The purchaser followed up severally with PW2's office for the refund of the purchase price. The subject land was agricultural land and clause 3.2 (f) of the agreement provides that the vendor was to procure the necessary consents. He added that his brief was only limited to the contractual aspects and not the conveyancing aspect of the transaction. The parties did not sign any application for Land control Board consent before him. The land was first to be subdivided in terms of the map which the parties had. As between the parties, there was an agreement on the portion sold as per the map.

8. The plaintiff's case was closed at the conclusion of the PW2's testimony.

Evidence Tendered by the Defendant

9. The defendant testified as DW1. She did not call any other witness. She told the court that she is the owner of the parcel of land known as Njoro/Ngata Block 2/2807 (Kirobon) and that she was selling 1 acre of the plot to the plaintiff at Kshs.1.2 million. The entire plot is 18 acres. They were to do a subdivision. On 20th March 2012 the plaintiff's husband and 3 children went to DW1 and she showed them the plot. The place they wanted to buy has a hill. Upon agreeing, the plaintiff issued a cheque for Kshs.1, 150,000/= leaving a balance of Kshs.50, 000/=. As at the date of the agreement they had not done the subdivision and they could not therefore exactly identify the portion in the agreement though it had been agreed on the ground. Later after signing the sale agreement Mr Ndumia the advocate who drafted the agreement called her and told her that the plaintiff had changed her mind and wanted her money back. She agreed to refund but shortly afterwards this case was filed. She added that the parties never went to Land Control Board and that she never signed any Land Control Board forms. DW1 further stated that she is ready to refund the deposit and that she has already deposited the full amount with her advocate. She urged the court to dismiss the case and that the caution be removed.

10. Under cross examination, DW1 stated that there was no sketch showing the portion sold in the agreement and that it may have been added to the agreement later without her consent. She added that she was intending to apply for Land Control Board consent after the subdivision had been done by the surveyor in the year 2014. She is now not willing to sell the plot to the plaintiff because her children have said no.

Submissions

11. Parties filed written submissions. The plaintiff's submissions were filed on 2nd March 2018. It is argued therein that the defendant violated clause 3 (2) of the Sale Agreement which placed the obligation of obtaining all necessary consents upon her. According to counsel for the plaintiff, the transaction can only become void if a consent is denied and not for failure to apply. Citing **Section 8 (1) of the Land Control Act** and the cases of **David Kinisu Sifuna –vs- Marriane Eyaase Kisanji & 2 others [2015] eKLR** and **Joyce Mukami –vs- Cypriano Kimathi Mwongo [2016] eKLR**, counsel submitted that the plaintiff had proven her case on a balance of probabilities. He urged the court to grant the prayers sought in the plaint.

12. The defendant's submissions were filed on 12th March 2018. Counsel for the defendant argued that since no consent of the Land Control Board was obtained within the period prescribed by **Section 6 of the Land Control Act**, the whole transaction became null and void and that the court cannot issue orders from a nullity. Citing the Court of Appeal decision in **David Sironga Ole Tukai –vs- Francis Arap Muge & 2 others Nairobi Civil Appeal No. 76 of 2014**, counsel submitted that principles of equity and natural justice are not applicable in the circumstances. He urged the court to decline to extend time for seeking consent of the Land Control Board and to dismiss the suit with costs to the defendant.

Analysis and Determination

13. I have anxiously considered the pleadings, the evidence, the submissions and the authorities cited by both parties.

14. From the pleadings filed and the evidence tendered by the parties, there is no dispute that the parties entered into the sale agreement dated 20th March 2012 pursuant to which the defendant sold to the plaintiff a portion of land measuring 0.404 hectares which was to be excised from parcel number Njoro/Ngata Block 2/2807 (Kirobon). The portion sold is stated in the said agreement as being marked 'A' on a map attached to the agreement. There is further no dispute that the agreed purchase price was Kshs.1, 200, 000/= out of which the plaintiff paid Kshs.1, 150, 000/= leaving balance of Kshs.50, 000/=.

15. Pursuant to the agreement, the balance was to be paid on or before the completion date. Completion date is defined in the agreement to mean "sixty (60) days from the date the subdivided title is ready." It is also not in dispute that completion has so far not taken place. Title in respect of the property sold has not been issued and the plaintiff has also not yet paid the balance of Kshs.50, 000/=. Equally, there is also no dispute that the suit property is agricultural land and that consent of the Land Control Board has neither been sought nor obtained.

16. In view of the foregoing, only three issues emerge for determination. Firstly, whether the transaction is null and void. Secondly, whether this court can and ought to extend the time for seeking and obtaining consent of the Land Control Board. Lastly, whether the reliefs sought are available.

17. The requirement of a consent in respect of a transaction on agricultural land is found at **Section 6** of the **Land Control Act**. The Section provides:

6. Transactions affecting agricultural land

(1) Each of the following transactions that is to say—

(a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;

(b) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 (L.N. 516/1961) for the time being apply;

(c) the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area,

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

18. Pursuant to **Section 8** of the Act, the application for consent is to be made within six months of the making of the agreement. The High Court is given power to extend the six months period even where the period has expired, if sufficient reasons are given.

19. It is important to note that one of the orders sought by the plaintiff in the amended plaint herein is that time within which to apply for the consent of the Land Control Board by the parties herein be extended. There have been varying schools of thought on whether time within which to apply for consent of the Land Control Board can be extended and the fate of an agreement in respect of which no such consent has been obtained within the prescribed period.

20. The Court of Appeal stated recently in the case of **Willy Kimutai Kitilit v Michael Kibet [2018] eKLR** as follows:

A contract for the sale of land to which the Land Control Act applies is not void from inception nor is it an illegal contract. It becomes void when no application for consent of the Land Control Board is made or if made, it is refused and the appeal from the refusal, if any, has been dismissed (see Section 9 (2)). The Land Control Act prescribes the time within which the application for consent should be made to the Land Control Board but does not prescribe the time within which the Land Control Board should reach a decision or the time within which any appeal should be determined. The process from the time of the making the application to the time of the determination of the appeal, if any, may obviously take time. However, the requirement that an application for the consent should be made within six months of the making of the agreement and the provisions of Section 7 of the Land Control Act for recovery of the consideration is an indication that Parliament intended that controlled land transactions should be concluded within a reasonable time.

[23] 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.

21. The above decision of the Court of Appeal was made on 17th May 2018 and as far as I know, it constitutes the latest position taken by the Court of Appeal on this issue. I am alive to the fact that counsel for the defendant placed reliance on an earlier decision of the Court of Appeal in **David Sironga Ole Tukai v Francis Arap Muge & 2 others Nairobi Civil Appeal No. 76 of 2014** and submitted that in the absence of consent, such a contract is void and that principles of equity and natural justice are not applicable. Suffice it to say that the Court of Appeal discussed the **David Sironga Ole Tukai** decision at length and came to a conclusion that an extension can be granted and that principles of equity and natural justice are applicable.

22. 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. That disposes of issue number 1.

23. Issue number 2 is whether the court can or ought to extend time for seeking consent of the land control board in respect to the transaction that is the subject matter of this case. **Section 8 (1)** of the **Land Control Act** provides:

8. Application for consent

(1) An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto:

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.

24. This court is established pursuant to **Section 4** of the **Environment and Land Court Act** and **Article 162 2(b)** of the **Constitution of Kenya, 2010**. The court has the same status as the High Court. It follows therefore that this court can extend time for seeking consent of the land control board. That however is not the end of the matter. The other part of the question is whether the Court ought to extend time in the circumstances of this case.

25. Pursuant to clause 3.2 (f) of the sale agreement, the defendant was under an obligation to procure all the necessary consents to sub-divide and eventually transfer the property to the plaintiff. One of the necessary consents is the consent of the Land Control Board. In her testimony, the defendant stated that she never signed any application forms for purposes of obtaining consent of Land Control Board. In such a scenario, the plaintiff was helpless. She could not apply for or obtain the consent alone without the participation and cooperation of the defendant.

26. Having received the deposit as agreed, the defendant had no valid reason for failing or refusing to apply for consent. In such circumstances, the plaintiff cannot be left unaided. Equity and natural justice must come to her aid. In the case of **Willy Kimutai Kitilit** (supra), the court affirmed the applicability of principles of equity and natural justice in such a scenario as the present one. The defendant's failure to sign application forms for purposes of obtaining consent of the land control board constitute sufficient reason for this court to intervene and extend time. In the circumstances, issue number two is answered in the affirmative. I will extend time and give specific orders in that regard in the final part of this judgment.

27. The last issue for determination is whether the reliefs sought are available. I have already found that an order for extension of time to apply for consent of the land control board is merited in the circumstances of this case. It follows therefore that relief sought as regards extension of time as well as orders compelling the defendant to execute necessary application forms in that regard are available. I will give specific orders in that regard at the conclusion of this judgment.

28. The plaintiff has also sought an order of specific performance. An important consideration in determining whether or not order specific performance as opposed to damages is whether the former will do more justice than the latter. The Court of Appeal stated as much in **Gharib Suleman Gharib v Abdulrahman Mohamed Agil LLR No. 750 (CAK) Civil Appeal No. 112 of 1998**:

The jurisdiction to order specific performance is based on the existence of a valid and enforceable contract and being an equitable relief, such relief is more often than not granted where the party seeking it cannot obtain sufficient remedy by an award of damages the focus being whether or not specific performance will do more perfect and complete justice than an award of damages.

29. The defendant does not deny signing the sale agreement or even receiving Kshs.1, 150, 000/= out of the purchase price. The only part of the purchase price yet to be paid is Kshs.50, 000/=. This balance is to be paid at completion in terms of clause 1.1 (c) (ii) of the agreement. The parties fixed completion at 60 (sixty) days from the date the sub-divided title would be ready. The only stumbling block standing in the way of completion is the defendant's failure to perform her part of the transaction such as signing the application forms for the consent of the land control board as well as doing the actual sub-division. Though the plaintiff had indicated willingness to accept a refund and have the transaction cancelled at the early stages of the dispute prior to the case being filed in court, there is evidence that the defendant did not cooperate in that regard. This is corroborated by the testimony of PW2 who stated that the plaintiff followed up severally with him to see if the defendant had refunded. The plaintiff having had to file this case to force completion, it would not be just to now expect her to accept a refund.

30. Though the defendant suggested that there was a dispute as to the identity of the portion sold, I find no basis in that. The sale agreement clearly defines the property sold at clause 1.1 (b) thereof. The description includes a sketch plan annexed to the sale agreement and marked 'A'. It is this portion that the plaintiff now claims in this suit. The parties having reduced their agreement into writing, the defendant cannot orally seek to change the terms of the agreement.

31. The law relating to construction of written contracts is that no oral evidence is admissible to contradict, vary or alter the terms of such an instrument. The Court of Appeal stated as follows in **Fidelity Commercial Bank Limited v Kenya Grange Vehicle Industries Limited [2017] eKLR**:

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....

The supporting rationale for this rule is that, since the contracting parties have reduced their agreement to a single and final writing, extrinsic evidence of past agreements or terms should not be considered when interpreting that written contract agreement, as the parties had consciously decided to ultimately leave them out of the contract. In other words, one may not use evidence made prior to the written contract to contradict the ultimate contract that has been reduced into writing.

32. In the circumstances, I will construe the sale agreement herein as constituting the full terms of the agreement between the parties. The identity of the portion sold is clearly defined in the agreement. Having signed it, the defendant cannot be permitted to escape from it by

disowning a part of it. Further, since the transaction involved sale to the plaintiff of a specific parcel of land with all its qualities, equity and justice demand that she gets the particular portion and not a refund of the purchase price which she paid. I am therefore satisfied that the plaintiff has made out a case for granting the relief of specific performance.

33. In the end, I enter judgment against the defendant as follows:

- a) I grant an order of specific performance compelling the defendant to perform her obligations as set out in the Agreement for Sale dated 20th March 2012.
- b) I order the defendant to specifically excise and transfer to the plaintiff a portion measuring 0.404 Hectares, in the area marked 'A' in the sketch annexed to the aforesaid Agreement for Sale, from her parcel No. **Njoro/Ngata Block 2/2807(Kirobon)**.
- b) Time within which to apply for the consent of the Land Control Board in respect of the transaction comprised in the Agreement for Sale dated 20th March 2012 is hereby extended by a period of 6 (six) months. The extended period to run from the date of delivery of this judgment.
- c) The defendant is hereby compelled to execute all the necessary documents and take all necessary steps to ensure completion of the transaction comprised in the Agreement for Sale dated 20th March 2012. Such execution and such steps to be done within 30 (thirty) days from the date of delivery of this judgment. In default, the Deputy Registrar of this court to execute such documents and take such steps in the place of the defendant.
- d) Upon certificate of title in respect of the portion measuring 0.404 Hectares being issued to the plaintiff, the plaintiff to immediately pay to the defendant KShs 50,000 being the balance of the purchase price.
- e) I award the plaintiff costs of the suit and interest thereon.

34. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 13th day of July 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Ms Mathenge holding brief for Mr Morintat for the plaintiff

Mr Karanja for the defendant

Court Assistants: Gichaba & Lotkomoi