



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 245 OF 2015

WINFRED WAMBUGU NYAMU.....1ST PLAINTIFF

GEORGE WAMBUGU.....2ND PLAINTIFF

-VERSUS-

ELIZABETH WAMBUI WANYOIKE.....DEFENDANT

JUDGMENT

1. The 2nd plaintiff herein, George Wambugu, who is the registered proprietor of the parcel of land known as L.R **Kabaru/Block 2/Mathina /820** (hereinafter referred to as “the suit property”) entered into an agreement for sale of the suit property with Elizabeth Wambui Wanyoike, the defendant herein, and later with Winfred Wambugu Nyamu, the 2nd plaintiff herein.

2. According to the agreement executed between the 2nd plaintiff and the defendant, dated 1st October, 2010, the 1st plaintiff sold the suit property to the defendant at a cost of Kshs. 250,000/-. Through that agreement, the 1st plaintiff undertook to obtain the consent of the land control board to transfer the suit property to the defendant. The defendant was to take possession of the suit property upon execution of the agreement. The agreement had a default clause to the effect that: -

“7. ...if there is breach of the agreement and the breach is on the part of the seller (read the 2nd plaintiff), the seller shall refund the entire purchase price paid at the time of breach plus an extra 30% of the same and if the breach is on the part of the buyer (read the defendant), he shall be refunded the purchase price paid less 30% of the same.”

3. Apparently, the 2nd plaintiff breached his obligations under the agreement executed between the defendant and him by refusing to obtain the consent of the land control board to transfer the suit property to the defendant and failing to refund the purchase price to the defendant as provided for in the agreement.

4. On 23rd December, 2013 the 2nd defendant entered into an agreement for sale of the suit property to the 1st plaintiff. According to that agreement, the 2nd plaintiff sold the suit property to the 1st plaintiff at a cost of Kshs.170, 000/- .

5. Just like in the agreement executed between the 2nd plaintiff and the defendant, the 2nd plaintiff undertook to facilitate the transfer of the suit property to the 1st plaintiff and in default to refund the purchase price plus 30% of the purchase price and any other expenses the purchaser might have incurred as a result of the agreement.

6. In fulfillment of his obligations under the agreement executed between him and the 1st plaintiff, the 2nd plaintiff executed the necessary documents required to transfer the suit property to the 1st plaintiff. However, because the defendant had filed a caution to restrict dealings with the suit property, the 2nd plaintiff was unable to transfer the suit property to the 1st plaintiff.

7. Contending that the defendant has without any colour of right illegally taken possession of the suit property and began erecting permanent structures thereon, the plaintiffs instituted this suit seeking judgment against the defendant for: -

(a) An order compelling the defendant to vacate the suit property, L.R No. L.R No. Kabaru 2/Mathina/820, and in default an order for her forcible eviction therefrom;

(b) An order for removal of the caution registered by the defendant to restrict dealings with the suit property;

(c) General damages;

(d) Costs and interest.

8. The defendant filed a statement of defence and counter-claim denying the allegations of wrongdoing leveled against her and explained that she entered into the suit property and began effecting developments thereon on account of the agreement executed between herself and the 2nd plaintiff. She averred that her occupation has been by consent of the 2nd plaintiff.

9. In her counter-claim, the defendant explains that she bought the suit property from the 2nd plaintiff at a cost of Kshs. 260,000/-. She paid the purchase price in full to the 2nd plaintiff; that the purchase price was not refunded to her and that the 1st plaintiff was aware of her interest in the suit property when she entered into an agreement of sale of the suit property with the 2nd plaintiff.

10. Terming the actions of the plaintiffs concerning the suit property illegal and oppressive, the defendant prays for judgment against the plaintiffs jointly and severally for:-

(i) Dismissal of plaintiffs' suit with costs to her;

(ii) Judgment on the counter-claim for Kshs. 260,000/= or parcel of land be transferred to her;

(iii) Compensation for development she carried out in the suit land;

(iv) Interest on (ii) above at 30%.

(v) Cost of the counter-claim.

(vi) Any other or better relief.

11. In reply, the plaintiffs filed the reply to defense and counter-claim dated **3rd August, 2016** in which they contend that the agreement entered into between the 2nd plaintiff and the defendant became void for all purposes after 6 months lapsed without the consent of the land control board being obtained by the parties thereto; that the defendant's occupation of the suit property is a criminal offence under **Section 22** of the Land Control Act, Cap 302 Laws of Kenya and **Section 91** of the Penal Code.

12. Through the reply and defence, the plaintiffs also deny the allegations of illegality leveled against them and contend that the defendant is not entitled to the default interest of 30% and the costs of the developments effected on the suit property.

13. When the matter came up for hearing, parties relied on the filed pleadings. They also filed submissions which I have read and considered.

Plaintiffs' submissions

14. On behalf of the plaintiffs', reference is made to the pleadings filed in this suit and submitted that it is common ground that the agreement executed between the 2nd plaintiff and defendant has to date not been blessed with the requisite land control board consent. Based on the provisions of **Sections 6** as read with the provisions of **Section 8** of the Land Control Act (hereinafter referred to as the Act),

it is submitted that the agreement executed between the 2nd plaintiff and the defendant became void for all purposes after 6 months lapsed without the requisite consent being obtained.

15. Based on the provisions of **Section 22** of the Act, it is submitted that the defendant's continued occupation of the suit property on the basis of the voided agreement is unlawful.

16. According to the plaintiffs, the defendant's remedy on account of the voided contract is to sue for recovery of the consideration that passed between them.

17. As to whether the defendant can claim the penalty payable for breach of the contract, it is submitted that **Section 7** of the Act ousts the provisions of the agreement so that the defendant can only recover the purchase price.

18. Maintaining that based on the provisions of **Section 22** of the Act the defendant's occupation of the suit property is illegal, the plaintiffs' contend that they are entitled to an order of vacant possession against the defendant, general damages amounting to Kshs. 500,000/= on account of the defendant's illegal occupation of the suit property and an order for removal of the caution lodged by the defendant to restrain dealings with the suit property.

19. According to the plaintiffs, the defendant is only entitled to Kshs.120,000/= being the deposit paid in respect of the agreement which became void as the balance of the suit property was paid outside the legal life of the sale agreement hence not recoverable.

20. In support of their case, the plaintiffs relied on the following authorities: -**Stephen Maina Muriithi vs. Wangu Ngari & Another** (2016) e KLR; **Paul Wagiita Theuri vs. Lydia Wangui Buuri** (2009) e KLR; **Samuel Bosire vs. Gladys Monyangi & Another** (2010) e KLR among others.

Defendant's submissions

21. On behalf of the defendant, it is pointed out that the 2nd plaintiff entered into two sale agreements in respect of the suit property and because the consent of the land control board was not obtained in respect of the agreement entered into between the 2nd plaintiff and the defendant, it is submitted that the 2nd plaintiff cannot be forced to complete the transaction.

22. According to the defendant's counsel, the remedy available to the defendant is refund of the purchase price as per the agreement between the parties.

23. Concerning the caution lodged by the defendant to restrain dealings with the suit property, it is submitted that the defendant was justified in lodging the caution. The plaintiffs are faulted for not invoking the process provided for under the Land Registration Act, 2012 if aggrieved by the caution lodged by the defendant.

24. Because the defendant took possession of the suit property with the consent of the 2nd plaintiff (the owner), it is submitted that the defendant can only be said to be in illegal occupation of the suit property if the defendant satisfied the provisions of clause 7 of the agreement which required him to refund the purchase price with default interest to the buyer.

25. It is reiterated that the 1st plaintiff knew about the defendant's interest in the suit property when she entered into an agreement for sale of the suit property to her by the 2nd plaintiff hence not an innocent purchaser of the suit property.

26. Pointing out that no demand was made to him to vacate the suit property, the defendant explains that the suit herein was prompted by the development she is effecting in the suit property.

Analysis and determination

27. It is not in dispute that the 2nd plaintiff and the defendant entered into a sale agreement for sale of the suit property. It is also not in dispute that following execution of the agreement, the defendant was given possession of the suit property pending completion of the transaction.

28. It is also not in dispute that the agreement executed between the defendant and the 2nd plaintiff imposed an obligation on the 2nd plaintiff to obtain the consent of the relevant Land Control Board to facilitate the transfer of the suit property to the defendant. The agreement provided for what would happen in case any of the parties to it breached it.

29. It is not in dispute that the 2nd plaintiff breached his obligation under the agreement thus bringing into action the default clause. The evidence adduced in this case to wit the uncontroverted or undisputed case of the defendant is to the effect that the 2nd plaintiff neither met his contractual obligation under the agreement. Instead he opted to sell the suit property to the 1st plaintiff.

30. The action of the 2nd plaintiff of selling the suit property to the 1st plaintiff prompted the defendant to file a caution to restrict dealings with the suit property.

31. According to the evidence in the court record, in accordance with the terms of the agreement executed between him and her (clause 6 thereof), the defendant took possession of the suit property and began effecting developments thereon.

32. From the pleadings and submissions filed in this matter, I find the issues for the court's determination to be;

- (i) Whether the defendant's activities in the suit property are illegal?
- (ii) Subject to the outcome of (i) above what are the rights and liabilities of the parties in this suit pursuant to the agreements hereto?
- (iii) What orders should the court make?

33. On whether the defendant's activities on the suit property are illegal, I will adopt my decision in the case of Nyeri ELC No. 102 of 2014 where I observed as follows concerning the failure to obtain consent within the time stipulated under **Section 8** of the Land Control Act.

“Concerning this issue, it is submitted that the sale agreement executed between the parties to this suit became void for all purposes after expiry of 6 months from the date of the agreement without the requisite Land Control Board being obtained.

25. That contention by the defendants appears to be premised on Section 8(1) of the Land Control Act which obligates parties to a controlled dealing under the Act to apply for consent in respect of a controlled transaction in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction. The contention is also supported by many cases of both the High Court and the Court of Appeal where it has been asserted that failure to obtain the Land Control Board with the six months stipulated in Section 8(1) renders a controlled dealing void for all purposes under the Act. In that regard see the cases of Jack Kaguu and Katana Mranja (supra).

26. The question to answer concerning the contention by the defendants is-whether it is the lapse of the six months within which the parties ought to have obtained consent or the refusal of the consent by the relevant Land Control Board which

renders the transaction void. This question is vital because, if it is not the lapse of time which renders the transaction void, then the argument by the defendant will have no basis in law. The agreement executed between them will continue being governed by the terms agreed between them until voided in the manner contemplated under the Act.

27. In determining what renders a dealing void under the Land Control Act, I begin by pointing out that the proviso to Section 8(1) gives parties to a controlled dealing a window to apply for extension of the time within which they ought to apply for consent under the Act. It is noteworthy that the section allows parties to apply for extension of time within which they ought to have applied for the consent **notwithstanding that the period of six months may have expired**. Section 9 (2), on the other hand, makes it clear when a controlled transaction shall become void. In this regard the section Provides:-

“Where an application for the consent of a land control board has been refused, then the agreement for a controlled transaction shall become void –

(a) On the expiry of the time limited for appeal under section 11; or

(b) Where an appeal is entered under Section 11 and dismissed, on the expiry of the time limited for appeal under section 13; or

(c) Where a further appeal is entered under Section 13 and dismissed, on that dismissal.”

28. A plain reading of the above provisions of the Law makes it clear that it is the not failure to apply for consent within the time stipulated in Section 8(1) which renders a controlled dealing void, but refusal by the Land Control Board to grant the consent.

29. Despite there being many decisions to the effect that lapse of the six months contemplated in Section 8(1) without an application for consent having being applied for renders a controlled dealing under the Act void for all purposes; being of the view that if it was lapse of the period of six months which makes a controlled dealing void, parliament would not have provided for a window to apply for the consent after the lapse of the six months, I decline to follow those authorities and instead follow the decision in the case of Gatere Njamunyu vs. Joseck Njue; Nairobi Civil Appeal No. 20 of 1992 where the Court of Appeal held:-

“The agreement does not become binding because consent is given, and there is no appeal against it. The agreement is binding 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. Specific performance cannot be claimed in respect of a dealing which becomes void, only recovery of the consideration paid under the agreement is allowed under section 7.”

31. Has the transaction which is the subject of this suit become void? My answer to this question is negative. It remains binding between the parties to it until avoided by any of the parties, either as contemplated in the agreement executed between them. Although this court cannot enforce it until the consent required under Section 6 of the Land Control Act is obtained, it nevertheless, cannot relieve parties from the obligations they have imposed on themselves under the agreement that is, the subject matter of the current proceedings, until and unless there is evidence that the parties have no intention of fulfilling their legal obligation under the unenforceable contract.

32. The plaintiff in this suit has indicated that he is still ready and willing to conclude the transaction, although the plaintiff cannot obtain orders of specific performance at this stage of the proceedings, holding that the plaintiff may not obtain the consent through the window contemplated in Section 8(1) would be speculative, and shirking from my obligation to do justice to the parties to this dispute.

33. Is the plaintiff’s continued occupation of the suit premises illegal? Having found that under Section 9(2) of the Land Act, it is the refusal of an application for consent which renders a controlled dealing void as opposed to lapse of time and that, in view of the foregoing, the current transaction has not become void, I return a negative answer to this question.”

34. In applying my reasoning in the above mentioned case to the circumstances of this case, where no consent of the relevant control board was obtained and the defendant has not indicated any intention of taking advantage of the avenue provided for under **Section 8(1)** of the Act to breathe life to the agreement entered between herself and the 2nd plaintiff, I find the agreement to be incapable of forming the basis for an order of transfer of the suit property to the defendant. (An order of specific Performance). See the case of Reliable Electrical Engineers Ltd(supra), where it was held:-

“The Jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or unenforceable. In this respect, damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source.

35. According to the decision in the case of Gatere Njamumu supra, the defendant’s remedy is **recovery of the consideration paid** which according to the evidence adduced in this case was Kshs. 260,000/=.

36. As to whether the default clause is enforceable, based on the persuasive authority of Eric Wamai Karuri & 2 Others v. Kinyua Nyaga Kinyua (2018) e KLR where it was held: -

“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 18th 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;”, I am of the considered view as in this court's decision in the case of Joseph Mathenge Kamutu vs Joseph Wainaina & another, (supra) the only circumstance upon which the clause would be unenforceable is if the consent of the board had been sought and refused. Where the agreement becomes unenforceable on account of breach of the terms of the agreements thereof by the parties, as is the case herein, the innocent party is entitled to enforcement of any protective clauses in the agreement. I therefore, find and hold that the defendant is also entitled to recover from the 2nd plaintiff 30% of the purchase price in accordance with clause 7 of the agreement executed between him and the 2nd plaintiff.

37. Concerning the caution lodged by the defendant to restrict dealings with the suit property, having determined that on account of the agreement entered into between the 2nd plaintiff and herself, the defendant's occupation of the suit property is not illegal, I am of the considered view that the defendant was justified in lodging a caution to restrain any dealings with the suit property adverse to her interest in the suit property on account of that agreement.

38. With regard to the agreement entered into between the 1st plaintiff and the 2nd plaintiff, I note that the 1st plaintiff has not denied and/or controverted the defendant's contention that he knew of the defendant's interest in the suit property hence was not an innocent purchaser of the suit property. Based on the special circumstances of this case, where the 2nd plaintiff entered into two sale agreements in respect of the suit property, I am of the considered view that it would be inequitable to compel the defendant to remove the caution she lodged to restrict dealings with the suit property before the 2nd plaintiff fulfills his contractual obligations to her.

39. The upshot of the foregoing is that the plaintiffs' suit is found to be without merit and is dismissed with costs to the defendant. The defendant's counter-claim is found to be merited and is allowed in the following terms:-

(i) Dismissal of the plaintiff's suit with costs;

(ii) Judgment for recovery of the purchase price being Kshs.250,000/=;

(iii) Interest on (b) above at 30%;

(iv) Costs of the counter-claim.

Orders accordingly.

Dated, Signed and Delivered in open court at Nyeri this 2nd day of August, 2018.

L N WAITHAKA

JUDGE

Coram:

N/A for the plaintiff

Ms Mwangi h/b for Mr. Kiminda for the defendant

Court assistant - Esther