



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

ENVIRONMENT AND LAND COURT

ELC CASE NO. 286 OF 2017 (formerly HCC. NO.109/12)

IN THE MATTER OF THE REGISTERED LAND ACT (CAP300 L.O.K)

AND

IN THE MATTER OF THE LAND CONTROL ACT (CAP302 L.O.K)

AND

IN THE MATTER OF CONTRACTS OF SALE RELATING TO

TITLE NO. KAJIADO/KISANJU 583 AND TITLE NO.KAJIADO/KISANJU/5061

BETWEEN

OBADIAH NJOROGE KIMANI (suing as the Legal Representative of the Estate of

HELENA WANGECHI NJOROGE.....PLAINTIFF/APPLICANT

AND

RATIA ENE SEMERA MUTEMPERIA.....DEFENDANT/RESPONDENT

JUDGEMENT

By an Originating Summons dated the 11th April, 2012, the Plaintiff seeks for the following orders:

- a) That a determination be made on all questions arising out of or connected with a contract of sale between the Plaintiff/ Applicant and Defendant/ Respondent relating to all those pieces of land known as title number KAJIADO/ KISANJU/583 and Title Number KAJIADO/KISANJU/5061.
- b) This Honourable Court be pleased to order that the Divisional Land Control Board with jurisdiction over the said parcels of land do dispense with the production of the Defendant's/Respondent's National Identity Card and her personal attendance in such Land Control Board meeting as may be scheduled by the Plaintiff/Applicant relating to an Application for consent for the transfer of Title No. KAJIADO/KISANJU/583 and Title No. KAJIADO/KISANJU/5061 in favour of the Plaintiff/Applicant.
- c) This Honourable Court be pleased to order that the Kajiado District Lands Registrar does dispense with the production of the Defendant's/Respondent's passport size photographs in the Application for Registration of Transfer in favour of the Plaintiff/Applicant relating to Title No. KAJIADO/KISANJU/583 and Title No. KAJIADO/KISANJU/5061.
- d) The costs of this suit be borne by the Defendant/Respondent.

WHICH SUMMONS is based on the Supporting Affidavit of HELENA WANGECHI NJOROGE and on the grounds and reasons to be adduced at the hearing hereof and particulars on the grounds that;

1. The Plaintiff/Applicant acquired by way of purchase from the Defendant/Respondent all those pieces of parcels of land known as Title No. KAJIADO/KISANJU/583 and Title No. KAJIADO/KISANJU/5061.

2. The Plaintiff/Applicant duly paid to the Defendant/Respondent the entire Purchase Price.
3. The Defendant/Respondent on her part duly surrendered the original Title Deeds for the said properties and further duly executed the relevant application for Consent Forms and Transfer Forms necessary to vest Title in favour of the Plaintiff/Applicant.
4. The Defendant/Respondent has however wrongfully and unreasonably failed, neglected and/or refused to co-operate with the Plaintiff/Applicant to present herself for the relevant Land Control Board meeting and to hand over other requisite completion documents to wit copy of her National Identity Card and passport size photographs to enable the Plaintiff/Applicant effect registration of the Transfer.
5. The Defendant's/Respondent's intention is to merely stubbornly inconvenience the Plaintiff/Applicant to submit her to an extortionist and blackmail scheme to get more money from the Plaintiff/Applicant due to the perceived appreciation of value of the land.
6. The Defendant/Respondent has absolutely no justification for her said conduct.
7. The suit premises are within the territorial jurisdiction of this Court.
8. It shall hence only be meet and just that this Honourable Court do grant the prayers sought.

The Originating Summons is supported by the affidavit of the Applicant who deposes that he paid the entire purchase price for the suit lands and the Defendant/Respondent on her part duly surrendered to him the original Title Deeds for the suit properties and executed the relevant Application for Consent Forms including Transfer Forms necessary to vest Title in his favour but has declined to present herself for the relevant Land Control Board meeting and hand over other requisite completion documents to wit her copy of the National Identity Card as well as passport size photographs to enable the transfer be completed. He claims that the Respondent's intention is to merely stubbornly inconvenience him so that he can submit to her extortionist and blackmail schemes to get more money from him due to the perceived appreciation of prices of land.

The Defendant did not file a response to the Originating Summons and judgment was entered against her on 24th September, 2012. Since the suit was seeking declaratory orders, the Plaintiff filed their submissions on 26th February 2018. The Plaintiff submitted that the subject matter of this suit is all those pieces or parcels of land known as KAJIADO/KISANJU/583 and KAJIADO/KISANJU/5061 which are both registered in the name of a one RATIA ENE SEMERA MUTEMPERIA, the Defendant herein. The deceased duly paid to the Defendant the entire purchase price as agreed. Upon settlement of the purchase price the Defendant duly surrendered to the deceased the Original Title Deeds for the said parcels of land and further duly executed the relevant Applications to the relevant Land Control Board for Consent to Transfer and the Transfer Forms necessary to vest Title in the deceased Plaintiff's favour. The Plaintiff produced the relevant Application for Consent to transfer and Transfer Forms were produced as Exhibit No. 3 and 4 respectively. It was the Plaintiff's submission that the Defendant has failed, neglected and/or refused to cooperate with her towards presenting herself for the relevant Land Control Board Meeting and to hand over other outstanding requisite completion documents and in particular her copy of the National Identity Card including passport size photographs to enable the Plaintiff effect registration of the transfer. The Plaintiff has averred that the Defendant's intention in refusing to complete the said sale was to merely stubbornly inconvenience deceased estate, so that she could submit her extortionist and blackmail schemes to get more money from the said estate due to the perceived appreciation of value of the land. The Defendant otherwise has absolutely no justification for her said conduct.

The Plaintiff relied on Order 37, Rule 3 of the Civil Procedure Rules, 2010 provides as follows;

3A A vendor or purchaser of immovable property or their representatives respectively may, at any time or times, take out an originating summons returnable before the judge sitting in chambers, for the determination of any question which may arise in respect of any requisitions or objections, or any claim for compensation; or any other question arising out of or connected with the contract of sale (not being a question affecting the existence or validity of the contract).

He submitted that the above cited provisions of the Law confers upon the Court a mandate to make enquiry to a transaction relating to the sale or purchase of land and make appropriate orders thereof.

From the evidence presented by the Plaintiff, it is evidently clear that the parties embarked on a valid and genuine process to confer Title upon the purchaser, the deceased in this matter but for no apparent valid reason, the Defendant failed to fully cooperate to enable the eventual transfers to be effected. I opine that the Defendant, who was the Vendor should not be allowed to benefit from such callous acts. The Plaintiff reiterated that they have met all the tenets for declaration of their rights to the above stated parcels which were acquired pursuant to a purchase and is thus entitled to an Order of the Court to be registered as a proprietor of the said properties known as Title Numbers KAJIADO/KISANJU/583 and KAJIADO/KISANJU/5061.

Analysis and Determination

Upon perusal of the Originating Summons dated the 11th April, 2012 including the supporting affidavit as well as the submissions, the following are the issues for determination:

- Whether the Plaintiff is entitled to the orders sought in the application

From the pleadings including the annexures thereon, it is evident that the deceased purchased the suit lands as this averment is not

controverted by the 1st Respondent. It is also emerging that the 1st Respondent duly surrendered the original Title Deeds of the suit lands to the deceased and duly executed the relevant application for Consent Forms and Transfer Forms necessary to vest Title in favour of the deceased. However, the 1st Respondent failed to provide her national Identity Card as well as appear in the Land Control Board so as to procure consent to transfer the suit lands to the deceased estate, which action is the fulcrum of this suit. From the actions of the 1st Respondent, one can infer an element of bad faith as it is trite law that the consent of the Land Control Board has to be obtained first before agricultural land can be transferred to a third party. However, I also infer an element of breach of trust because no vendor can sign application for consent and transfer forms to a third party if he/ she did not receive any consideration for the same. From the pleadings, it is clear the 1st Respondent failed to enter appearance and controvert the Plaintiff's averments, so as it stands and based on the rules of evidence, the Plaintiff indeed duly purchased the suit lands from the 1st Respondents.

Order 37 rule 3 of the Civil Procedure Rules provides as follows: ' **A vendor or purchaser of immovable property or their representatives respectively may, at any time or times, take out an originating summons returnable before the judge sitting in chambers, for the determination of any question which may arise in respect of any requisitions or objections, or any claim for compensation; or any other question arising out of or connected with the contract of sale (not being a question affecting the existence or validity of the contract).**'

Further, Section 6 of the Land Control Act provides as follows: ' 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.'

Article 10 of the Constitution invites the Court to rely on various principles including equity while determining disputes. In line with the principles of equity enshrined therein, I find that in the current scenario, the Respondent has acted in bad faith by failing to procure consent of the Land Control after signing all the requisite documents to enable the transfer of the suit lands be effected to the deceased's estate.

The Court of Appeal, while quoting in approval the cases of **Mutsonga Vs. Nyati (1984) KLR 425, Kanyi Vs. Muthiora (1984) KLR 712, and Yaxley Vs. Gotts and Another (2000) Ch. 162** described the equitable doctrine of constructive trust in the following terms:

"A constructive trust is based on "common intention" which is an agreement, arrangement or understanding actually reached between the parties and relied on and acted on by the claimant. In the instant case, there was a common intention between the appellants and the respondent in relation to the suit property. Nothing in the Land Control Act prevents the claimants from relying upon the doctrine of constructive trust created by the facts of the case.....constructive trust is an equitable concept which acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner by defeating the common intention."

On the basis of the pleadings filed herein including the submissions, and in relying on the above cited judicial authority, it is safe to adduce that there was an element of constructive trust after the deceased had paid the purchase price and the Respondent had duly signed the relevant documents in preparation for the transfer of the suit lands to the deceased.

It is against the foregoing that I find that the Plaintiff has proved his case on a balance of probability as the Defendant should not be allowed to benefit twice from her actions. I note interlocutory judgement had already been entered against the Defendant. I will proceed to enter the final judgement against the Defendant in the following terms:

1) The time to apply for consent of the Land Control Board be and is hereby enlarged for six (6) months to enable the Plaintiff and Defendant to appear before local Land Control Board.

2) The Defendant be and is hereby directed to hand over her National Identity Card and passport photos and present herself to the relevant Land Control Board meeting within ninety (90) days from the date hereof to obtain the necessary Land Control Board consent and transfer the suit lands KAJIADO/KISANJU/583 and KAJIADO/KISANJU/5061 to the deceased estate, failure of which the Land Control Board will grant consent and the Land Registrar, Kajiado will transfer suit lands to the Plaintiff.

3) The costs of the Originating Summons is awarded to the Plaintiff.

Dated, signed and delivered at Kajiado this 25th day of September, 2018

CHRISTINE OCHIENG

JUDGE