REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO.60 OF 2002

JOSEPH MUSAU MWANZIA..PLAINTIFF

VERSUS

RICHARD KASONGO NGOOSA...1ST DEFENDANT

RICHARD MWAU NGOOSA...2ND DEFENDANT

JUDGMENT

1. In the Plaint dated 10th May, 2002 and filed on the same day, the Plaintiff averred that at all material times, the Defendant was registered as the proprietor of a parcel of land known as Machakos/Katheka-Kai Block 5/173 measuring 8.094Ha *(the suit land);* that on 8th August, 1998, the Defendant agreed to sell a portion of the suit land measuring approximately three (3) acres to the Plaintiff for Kshs. 150,000 and that the Plaintiff paid to the Defendant the entire purchase price.

2. The Plaintiff is praying for an order directing the Defendant to survey, transfer and register the portion of the suit land to the Plaintiff and in the alternative, the Defendant to compensate the Plaintiff for the improvements he has made on the land, including the refund of the purchase price that was made.

3. In his Defence, the Defendant averred that it is not true that the Plaintiff paid him Kshs. 150,000 for the suit land as alleged in the Plaint; that the Plaintiff only paid him Kshs. 48,830 as shown in the Agreement of 20th October, 1998; that the Agreement of Sale became null and void for want of the consent of the Land Control Board and that the Agreement of Sale in respect to the suit land is not enforceable.

4. The Plaintiff later on filed an Amended Plaint in which he stated that the Defendant *(deceased)*, in addition to selling to him three (3) acres of the suit land for Kshs. 150,000 sold to him one (1) acre for Kshs. 50,000.

5. In his evidence, the Plaintiff, PW1, informed the court that he bought 3 acres of the suit land from the Defendant vide an Agreement dated 8th August, 1998; that the Defendant *(deceased)* authorized his sons Mutuku Ngoosa and Mwau Ngoosa to receive the purchase price of Kshs. 150,000 and that he initially paid to Mwau Ngoosa Kshs. 75,000 vide a cheque.

6. It was the evidence of PW1 that on 5th March, 1999, he paid a further sum of Kshs. 20,000 vide cheque number 000140 and made further payments of Kshs. 20,000 and 25,000 all totaling to Kshs. 150,000 on 6th May, 1999 and 26th June, 1999 respectively.

7. It was the evidence of PW1 that he made further payments of Kshs. 14,000 to the deceased and Kshs. 48,830 for the treatment of the deceased's ailing son and that the deceased died before he could transfer the four (4) acres to him.

8. According to the evidence of PW1, he agreed with the deceased that he could put up a house on the suit land which he did. It was the evidence of DW1 that he lives on the suit land.

9. In cross-examination, PW1 stated that although the deceased initially instructed him to pay the purchase price to Mutuku Ngoosa, he later on gave instructions that the purchase price be paid to Mwau Ngoosa; that he is currently occupying one (1) acre of the suit land and that he confirmed from Ketheka-Kai Co-operative Society that the entire suit land belongs to the deceased although a Title Deed has not been issued.

10. PW2 informed the court that he was called by Joseph Musau Mwanzia to be his witness in the purchase of a portion of the suit land by him; that it was agreed that the Plaintiff was to pay a deposit of Kshs. 75,000 and pay the balance of Kshs. 75,000 within a period of one (1) year and that the deceased authorized his sons Mutuku Ngoosa and Mwau Ngoosa to collect the purchase price from the Plaintiff.

11. According to PW1, although he witnessed the purchase of three (3) acres, he later on learnt that the Plaintiff had purchased a further one (1) acre of the suit land from the deceased and that the deceased died before transferring the land to the Plaintiff.

12. In cross-examination, PW2 stated that he did not witness the payment of the purchase price and that it was the Plaintiff who informed him about the extra one (1) acre of land that he bought from the deceased.

13. The 1st Defendant, DW1, informed the court that the Plaintiff only purchased one (1) acre of the suit land and paid Kshs. 50,000; that it is not true that he paid more money for three (3) acres and that the money which was deposited in his brother's account was given back to the Plaintiff. According to DW1, the Plaintiff is only entitled to one (1) acre of the suit land.

14. In cross-examination, DW1 stated that he was not aware of the sale of three (3) acres of the suit land and that it was his late father who told him that he had only sold to the Plaintiff one (1) acre of the suit land.

15. The 2nd Defendant, DW2, informed the court that an account was opened in his name on the instruction of his father; that the account was opened for the sole purpose of receiving the purchase price at the agreed price of Kshs. 50,000 per acre and that the Plaintiff intended to purchase three (3) acres. However, according to DW2, the Plaintiff only paid for one (1) acre of land where he resides to date.

16. It was the evidence of DW2 that the extra money that was deposited in his account by the Plaintiff was not for the purchase of the suit property and that he refunded to the Plaintiff the said money.

17. According to DW2, the agreement of one (1) acre was reduced into writing; that the Plaintiff used to deposit cheques in his account and that he could not remember how much was deposited in his account by the Plaintiff. According to DW2, he refunded the Plaintiff Kshs. 50,000.

18. The Plaintiff's advocate submitted that the Plaintiff proved that he had entered into the agreement of 8th August, 1998; that the Defendants have not proved that the said agreement is a forgery and that the burden of proof of fraud lay on the Defendants. Counsel relied on several authorities which I have considered.

19. The Defendants' advocate submitted that the Agreement between the Plaintiff and the deceased was that the Plaintiff pays the deceased Kshs. 50,000 for each acre of land within a period of one (1) year; that the Plaintiff never paid the deceased the agreed sum; that the 2nd Defendant only received Kshs. 48,830 in his account and that in the letter dated 24th August, 2001, the deceased denied having sold the suit land to the Plaintiff.

20. Counsel submitted that it is the Defendants and their families who live on the suit land and that the Plaintiff is in occupation of three (3) acres but has built his house on one (1) acre of land.

21. The Defendants' counsel finally submitted that the Sale Agreement between the Plaintiff and the deceased was null and void for want of the consent of the Land Control Board.

22. It is not in dispute that the late David Ngoosa Mua *(deceased)* is the registered proprietor of a parcel of land known as Machakos/Katheka-Kai Block 5/173 measuring approximately 8.094Ha. What is in dispute is if the deceased sold a portion of the suit land to the Plaintiff.

23. According to the Plaintiff, he purchased three (3) acres of the suit land from the deceased vide an agreement dated 8th August, 1998 for Kshs. 150,000, which he paid in installments. Later on, the deceased agreed to sell to him an extra one (1) acre of the suit land. PW1 informed the court that he developed a portion of the suit land measuring one (1) acre.

24. On the other hand, the Defendants position is that the Plaintiff only purchased one (1) acre of the suit land which he has since developed. It was the evidence of the Defendants that in any event, the Sale Agreement(s) the Plaintiff is relying on are/is not enforceable for want of the consent of the Board.

25. I have perused the Agreement of 8th August, 1998. The said Agreement shows that the same was signed by the deceased and witnessed by his three sons, including the 2nd Defendant, amongst other witnesses. PW2 informed the court that he witnessed the deceased and the Plaintiff sign the Agreement of 8th August, 1998.

26. In his Witness Statement, which was adopted by the court without alteration, the 2nd Defendant, who was one of the witnesses in the Sale Agreement of 8th August, 1998 stated as follows:

> ***"The agreed price was Kshs. 50,000 per acre and Joseph Musau Mwanza (Plaintiff) only paid cash for one (1) acre which is where he resides."***

27. The 2nd Defendant therefore confirmed in his evidence in chief that the Plaintiff indeed bought three (3) acres of land from his late father. The 2nd Defendant did not deny that he signed the Agreement of 8th August, 1998.

28. In the Agreement of 8th August, 1998, the Plaintiff and the deceased agreed that the three (3) acres of the suit land was to be sold for Kshs. 150,000. The Plaintiff was to pay Kshs. 75,000 at once and then pay the balance in installments within one (1) year. The Agreement further shows that the deceased agreed that his son, DW2, should receive *"everything that belongs to me."*

29. DW2 admitted that an account was opened in his name and the Plaintiff made several deposits in that account. DW2 stated that he could

not remember how much was deposited in his account and that he refunded to the Plaintiff the money deposited in his account.

30. DW2 did not explain to this court why he would refund money to the Plaintiff for payments towards the purchase price, and how much he received and the amount he refunded. Having admitted that indeed he received money from the Plaintiff in installments, I am satisfied that the Plaintiff deposited on his account the entire amount of Kshs. 150,000. The said amount was deposited on his account on 20th August, 1998 vide cheque number 297207 (Kshs. 75,000); 5th March, 1999 vide cheque number 000140 (Kshs. 20,000); 6th May, 1999 vide cheque number 000174 (Kshs. 20,000) and on 26th June, 1999 vide cheque 00032 (Kshs. 25,000) as narrated by the Plaintiff.

31. The Plaintiff informed the court that he purchased an extra one (1) acre of the suit land. According to PW1, he advanced to the deceased Kshs. 48,830 for the treatment of his ailing son, Wambua Ngoosa, which was meant to be the purchase price of the land. Indeed the Defendants produced in evidence the Agreement of Sale dated 20th October, 1998 which shows that the Plaintiff purchased an extra one (1) acre and received Kshs. 48,830 for the said land.

32. The totality of the evidence before me shows that the Plaintiff purchased four (4) acres of parcel of land known as Machakos/Katheka-Kai Block 5/173 measuring 8.094Ha *(approximately 20.2 acres)*. The Plaintiff duly paid for the said four (4) acres and is entitled to them.

33. Although the Defendants have sought to defeat the two Sale Agreements on the ground that the consent of the Land Control Board was never obtained, they admitted that the Plaintiff has been in possession of at least one (1) acre of the suit land, and has been living on the said land. It was the evidence of the Plaintiff that indeed he has built a house on the land that he purchased.

34. The question of the applicability of the provisions of Section 6 of the Land Control Act in respect of a purchaser who has taken possession of the land that he has purchased has come under focus by the Court of Appeal. On one hand, the court has held that where a purchaser of land has been put in possession of land, then the doctrine of constructive trust is applicable, meaning that the lack of the consent of the Land Control Board cannot be used to defeat such a purchase. On the other hand, the same court has held that the equitable doctrine of constructive trust cannot be applied to defeat the express provisions of Section 6 of the Land Control Act which provides that in the absence of the consent of the Land Control Board in respect to a controlled transaction, then the sale becomes null and void, and the purchaser is only entitled to a refund of the purchase price, and not the land.

35. Section 6(1) of the Land Control Act provides that any sale, transfer or sub-division of agricultural land 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. Section 8(1) of the same Act provides that the consent of the Board ought to be obtained within six (6) months of the making of the Agreement with a proviso that the High Court may enlarge the time. Section 22 provides that it is an offence to take or remain in possession of land in furtherance of an avoided transaction.

36. In the case of ***Macharia Mwangi Maina & 87 others vs. Davidson Mwangi Kagiri, Nyeri Civil Appeal No. 6 of 2011***, the Court of Appeal departed from its own previous decisions on the finality of the provisions of Section 6 of the Land Control Act which renders controlled transactions void for want of the consent of the Board. The court held as follows:

> ***"It is our considered view that the Respondent created an implied or constructive trust in favour of those persons who had paid the purchase price..."***

37. The court, after quoting the decision of ***Mutsonga vs. Nyati (1984) KLR 425 and Yaxley vs. Gotts & Another (2000) Ch. 162*** stated as follows;

> ***"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. ...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."***

38. The Court of Appeal in ***Peter Mbiri Michuki vs. Samuel Mugo Michuki (2014) eKLR***, followed the ***Macharia Mwangi*** *(supra)* case and held that once the Vendor enters into a Sale Agreement with the purchaser and receives the purchase price, he becomes a trustee holding the property in favour of the purchaser, notwithstanding the lack of the consent of the Board. This was the same position that was taken by the Court of Appeal in the case of ***Gideon Mwangi Chege vs. Joseph Gachanja Gituto (2015) eKLR*** *and* ***Sammy Likuyi Adiema vs. Charles Shamwati Shisikani (2014) eKLR.***

39. However, in the case of ***David Sironga Ole Tukai vs. Francis Arap Muge & others (2014) eKLR***, the Court of Appeal declined to follow the ***Macharia Mwangi*** *(supra)* case. The court held that under the hierarchy of norms, the doctrines of equity are subject to the Constitution and the statutes, and that the doctrines of equity cannot override the provisions of the statute. The court disagreed with the decision in the ***Macharia Mwangi*** *(supra)* on five (5) grounds. Firstly, that there is no room for the courts to import the doctrines of equity into the Act, secondly, that in holding that there was an implied or constructive trust which did not require the consent of the Board, the court not only ignored its previous decisions on the point, but also ignored the express terms of Section 6(2) of the Act, thirdly that for actual possession of land to amount to an overriding interest, the occupation must be legal and lastly, that there can be no estoppel against the provision of a statute.

40. In a more recent decision, the Court of Appeal sitting in Eldoret in ***Willy Kimutai Kitilit vs. Michael Kibet, Civil Appeal No. 51 of 2015 (Eldoret)*** agreed with the ***Macharia Mwangi*** case. The court held as follows:

> ***"The policy behind the Land Control Act, nevertheless, it is clear that some aspects of the policy may not be valid under the***

current Constitution. Some of the principles for granting or refusing consent stipulated in Section 9 may not pass muster under the current Constitution... 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 the Land Control Board will largely depend on the circumstances of each particular case."

41. I would agree with the holdings in the ***Macharia Mwangi*** *(supra)* and ***Willy Kimutai Kitilit*** *(supra)* cases which preferred a sociological, as opposed to a positivist, approach to the interpretation of the provisions of the Land Control Act. By virtue of the provisions of Article 10(2) (b) of the Constitution, equity, as a principle justice, requires courts in exercising judicial authority, to protect and promote that principle, amongst others.

42. As was held by the Court of Appeal in the ***Willy Kimutai Kitilit*** case, it would be unjust and inequitable to allow the Defendants to retain the four (4) acres that their father sold to the Plaintiff, on which he has built a house, just because the consent of the Board was never obtained. In any event, the Defendants will still retain more than sixteen (16) acres of the suit land.

43. It is for the above reasons that I find that the Plaintiff has proved his claim on a balance of probabilities. Consequently, I allow the Amended Plaint dated 24th April, 2017 as follows:

a. The Defendants do appoint a surveyor to survey, transfer and register a portion of land measuring four (4) acres comprised in parcel of land known as Machakos/Katheka-Kai Block 5/173 to the Plaintiff.

b. In default, the Deputy Registrar to sign all relevant documents required, on behalf of the Defendants, for the survey, sub-division and transfer of the four (4) acres of the suit land in favour of the Plaintiff.

c. The Defendants to pay the costs of the suit.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 21ST DAY OF SEPTEMBER, 2018.

O.A. ANGOTE

JUDGE