



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**

**ELC CASE NO. 659 OF 2017**

**(formerly Machakos ELC NO. 164 of 2011)**

**BEATRICE MUTUKU MBEVI.....PLAINTIFF**

**VERSUS**

**AHMED HASHI AHMED.....1<sup>ST</sup> DEFENDANT**

**DISTRICT LAND REGISTRAR KAJIADO.....2<sup>ND</sup> DEFENDANT**

**HON. ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT**

**JUDGEMENT**

By a Plaint dated the 11<sup>h</sup> July, 2011, the Plaintiff prays for judgement against the defendants in the following terms:

- a. An order compelling the 1<sup>st</sup> Defendant to execute the necessary documents to facilitate transfer of the suit premises to the Plaintiff's name failure to which the Registrar of this Honourable Court to execute the said documents.
- b. An order compelling the 2<sup>nd</sup> Defendant to rectify the register to reflect the Plaintiff's name as the lawful owner of the suit premises.
- c. Costs of the suit and interest at court rates
- d. Any other relief that this Honourable Court deems fit and just to grant

The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants filed one joint Defence where they denied the Plaintiff's averments and only admitted the jurisdiction of the court as well as their description. The Plaintiff filed a reply to Defence where she reiterated her claim and prayed that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' joint Defence be struck out with costs and judgment entered in her favour.

The Plaintiff called one witness while the Defendants called none.

**Evidence of the Plaintiff**

PW1 who is the Plaintiff herein adopted her witness statement as evidence in court and produced various documents including the title deed for the suit land; Sale Agreement; her Marriage Certificate; and her husband's Death Certificate as her exhibits. She testified that in the year 2000, together with her late husband, they entered into a Sale Agreement with the 1<sup>st</sup> Defendant to purchase land parcel number NGONG/ NGONG/ 23347, (hereinafter referred to as the 'suit land') and paid the whole purchase price. They took possession of the suit land but were unable to transfer it to their names since the 1<sup>st</sup> Defendant failed to execute the Application for Consent of the Land Control Board as well as the Transfer forms, and the Vendor disappeared immediately he received the purchase price. It was her evidence that before her husband died, they were unable to get the 1<sup>st</sup> Defendant to transfer the suit land to them and to date she has also not been able to find him. She stated that the Land Registrar has declined to register her as the proprietor of the suit land although she has enjoyed quiet and uninterrupted possession of the same from the year 2000 to date.

**Evidence of the Defendants**

None of the Defendants tendered evidence nor produced any exhibits.

## Submissions

It is only the Plaintiff who filed submissions, which I have considered.

## Analysis and Determination

After perusal of the pleadings, witness statement including the documents filed herein and upon hearing the testimony of PW1, I find that the following are the issues for determination:

- Whether the agreement between the Plaintiff and the 1<sup>st</sup> Defendant for the purchase of land parcel number NGONG/ NGONG/ 23347 is valid.
- Whether the Plaintiff should be registered as the proprietor of land parcel number NGONG/ NGONG/ 23347 despite not obtaining Consent of the Land Control Board within the requisite period.
- Who will pay costs of the suit.

It was the Plaintiff's contention that they purchased the suit land from the 1<sup>st</sup> Defendant and paid the full purchase price but the 1<sup>st</sup> Defendant disappeared and failed to effect the transfer of the said land to them. She stated that she has been in possession of the suit land from the year 2000 to date. All these averments were not controverted by any of the Defendants. I note from the Sale Agreement dated the 26<sup>th</sup> January, 2000 that the purchase price was Kshs. 200,000 and as per clause 13 the Vendor was expected to obtain the necessary consent and transfer the suit land to the purchasers who is the Plaintiff and her husband within 30 days from the date of execution of the agreement but this was not to be. Based on the evidence presented, it is my considered view that the Sale Agreement between the Plaintiff including her late husband and the 1<sup>st</sup> Defendant was indeed valid as it was done in accordance with the law.

The Plaintiff insists since paid the full purchase price and has been in occupation of the suit land hence the same should be transferred to her. I note that the transaction herein was a controlled one and required the consent of the local land control board, before the transfer could be effected.

Section 6 (1) (a) of the Land Control Act provides that: '**(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; 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.'**

The Plaintiff admitted that they did not obtain the Consent of the Land Control Board to enable them effect transfer of the suit land to them as the 1<sup>st</sup> Defendant disappeared but they have been in occupation of the same since they purchased it, in 2000. In the recent Court of Appeal decision of **Willy Kimutai Kitilit v Michael Kibet [2018] eKLR**, it held that:

**'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.....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.'**

In relying on this Court of Appeal decision, I find that since the Plaintiff including her husband had paid the full purchase price and were granted possession of the same by the 1<sup>st</sup> Defendant, since the year 2000, to date, an element of trust was created, which became an overriding interest over it. Insofar as the Plaintiff and her husband failed to obtain the necessary Consent from the Land Control Board within the required period of six (6) months, to enable them transfer the suit land into their names; I hold that the transaction is not void but enforceable by virtue of the doctrine of constructive trust and she is entitled to have it registered in her name. From the Plaintiff's evidence, I however do not find the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' responsible for her 'miseries'.

It is against the foregoing that I find that the Plaintiff has established her case on a balance of probabilities and will proceed to enter judgement in the following terms:

**a) A declaration be and is hereby issued that the Plaintiff is the legal owner of Land Parcel Title No. NGONG/ NGONG/ 23347**

**b) The 1<sup>st</sup> Defendant be and is hereby ordered to execute the necessary documents to facilitate transfer of land parcel number**

NGONG/ NGONG/ 23347 to the Plaintiff's name within 60 days from the date hereof, failure to which the Deputy Registrar, Environment and Land Court at Kajiado is directed to execute the said documents.

e. Upon execution of the necessary transfer documents, the Land Registrar Kajiado, North be and is hereby directed to rectify the Land Register to reflect the Plaintiff's name as the lawful owner of land parcel number NGONG/ NGONG/ 23347

f. Costs of the suit are awarded to the Plaintiff to be borne by the 1<sup>st</sup> Defendant only.

**Dated signed and delivered in open court at Kajiado this 11th day of October, 2018**

**CHRISTINE OCHIENG**

**JUDGE**