



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE NO. 291 OF 2013

SAMUEL MWEHIA GITAU..... PLAINTIFF

VERSUS

JOHN MUTURI NG'ANG'A1ST DEFENDANT

BENSON M. KANGETHE2ND DEFENDANT

JAMES NJIRAIRNI KARANJA 3RD DEFENDANT

JUDGMENT

1. Through plaint dated 5th April 2013 and filed in court on the same date, the plaintiff averred that he is the proprietor of all the parcel of land known as Nakuru/Rotharini/3 (the suit property) and that on 13th July 2007 pursuant to a sale agreement with the defendants, he sold 2.7 acres of the suit property to the defendants at an agreed purchase price of KShs 630,000. The defendants paid KShs 550,000 leaving a balance of KShs 80,000 which was to be paid on or before 13th October 2007. He added that as at the date of filing the plaint the balance had not been paid and that the contract could not be enforced as it was void for having contravened the provisions of the Land Control Act. He therefore sought judgment against the defendants jointly and severally for:

a. A declaration that the land transaction was void ab initio and the same cannot be completed as it contravenes the provisions of the Land Control Act Cap 302 Laws of Kenya.

b. An order for permanent injunction restraining the defendants by themselves their agents and/or legal representatives from trespassing into, occupying, cultivation, remaining on and/or in any way whatsoever from interfering with 2.7 acres of that parcel of land known as Nakuru/Rotharini/3.

c. Costs and interest.

d. Any other relief the honourable court may deem fit and just to grant.

2. By Statement of Defence dated 15th April 2013 and filed in court on 16th April 2013, the defendants denied the plaintiff's averments and urged the court to dismiss the plaintiff's case with costs. They further averred that they are the owners of the suit property, that clause 5 of the sale agreement stated that the plaintiff would not be entitled to any further benefit in respect of the suit property and that the plaintiff had failed to obtain consent to subdivide the suit property and to transfer it to the defendants.

3. At the hearing of the suit, the plaintiff testified as the sole witness in support of his case. He told the court that he served in the military and retired at the rank of major. He further stated that on 16th July 2007 a sale agreement dated 13th July 2007 presented to him by John Muturi Ng'ang'a, the first defendant. The agreement was in regard to sale of a parcel of land measuring 2.7 acres which was to be hived from Nakuru/Rotharini/3 which measured 2.3 hectares and which the plaintiff owned pursuant to a title deed dated 25th January 2011. He signed the agreement on 16th July 2007 inside a banking hall but not in the presence of an advocate. The purchase price was KShs 630,000 out of which he received KShs 500,000 on 16th July 2007 leaving a balance of KShs 130,000. Though he had reservations about the agreement, he signed it as proof that he had received the KShs 500,000. There was further payment of KShs 50,000 on 7th August 2007 leaving a balance of KShs 80,000 which was to be paid on or before 13th October 2007 as agreed in the agreement.

4. The plaintiff further testified that besides the 1st defendant, none of the other parties to the agreement were present when he signed it. Upon the plaintiff signing it, the 1st defendant took it to the others to sign. He later sent it to the plaintiff. The parties to the agreement were the 1st defendant, the 2nd defendant and the 3rd defendant. The plaintiff never met the 2nd and 3rd defendants. He received the money for part payment of the purchase price from the 1st defendant. The 1st and 2nd defendants signed as legal agents of 3rd defendant. Paragraph 5 of the

agreement stated that the vendor would not be entitled to any further benefits from the land. The plaintiff had planted some crops on the land but having been paid, he could not therefore harvest them. Under paragraph 7, the plaintiff was to obtain Land Control Board consent. He added that he could not obtain the consent before he was paid the balance of the purchase price.

5. The plaintiff further stated that the purchasers did not comply with the agreement and that the balance of the purchase price remained unpaid even as at the date of his testimony. Nevertheless, he handed over possession to the purchasers and they have been cultivating the land. He added that he was to commence subdivision process and obtain consent after full payment of the purchase price. He further testified that as at the date of his testimony, the land was valued at over KShs 2 million and that the defendants were planting maize on it and sometimes renting it to Maasai herdsmen to graze their cattle.

6. Under cross examination, he stated that the purchase price was fixed on willing buyer willing seller basis and that the 1st defendant was a land agent. He stated that the 1st defendant approached him and the purchase price was agreed with him before 16th July 2007. However, the other contents of the sale agreement had not been agreed upon. The plaintiff signed on all pages of the sale agreement and later received KShs 50, 000 as further payment on 7th August 2007. He stated that he received the amount because he had agreed to sell the land to the defendants and he did not want to go back on his word. He added that prior to the date of his testimony, he had not indicated anywhere in writing that the sale agreement was void or that he did not accept it. As at the time of his testimony, he had not done any formal subdivision of the land in terms of the agreement.

7. The plaintiff's case was thus closed.

8. The 1st and 2nd defendants testified in support of their case. The 1st defendant testified as DW1 and told the court that the plaintiff was his friend, relative and neighbour. He added that in June 2006 the plaintiff called him and asked him to get him a buyer for his plot. He was to sell either the whole plot or a portion, depending on the needs of the buyer. The plaintiff duly issued to DW1 a letter of authority enabling him to market the plot. Upon receiving the letter, DW1 spoke to the 2nd defendant and asked the 2nd defendant to ask his brother the 3rd defendant who lives in the USA to buy the plot. The 3rd defendant was interested in a portion measuring 2.7 acres and he authorized DW1 to negotiate purchase price. Ultimately, the parties agreed on a purchase price of KShs 630,000 for the 2.7 acres. The plaintiff then asked DW1 to prepare a sale agreement. DW1 was in Nakuru at that time while the plaintiff was in Nairobi.

9. DW1 further testified that the agreement was to be prepared in Nakuru. It was drawn on 13th July 2007 and was signed by DW1 and the 2nd defendant in Nakuru in the presence of an advocate. Only plaintiff's signature remained. DW1 was to take it to the plaintiff in Nairobi. DW1 called the plaintiff and they agreed to meet on Monday 16th July 2007 at a bank. On 16th July 2007 DW1 left for Nairobi very early in the morning. He called the plaintiff and they agreed to meet at a Family Bank branch on Tom Mboya Street. They duly met and DW1 gave him the agreement. He read and signed all 3 copies. DW1 then withdrew the money and gave it to him. The defendants went to the plot and started farming on it since it was bought for that purpose.

10. DW1 added that he later gave the plaintiff KShs 50,000 towards balance of purchase price on 7th August 2007. Together with the agreement, the plaintiff also signed transfer form and application for consent. Though the parties had identified the boundaries and size of the plot, the proper survey was to be done by the plaintiff as per paragraph 7 of the agreement. Despite being reminded, the plaintiff did not complete the survey. The defendants therefore decided not to pay the balance of the purchase price until the plaintiff does survey and obtains title. DW1 further stated that the defendants fenced the plot and farmed on it and that besides signing the documents which he did in the bank, the plaintiff never did anything on the ground to facilitate subdivision and issuance of title.

11. Under cross examination, DW1 stated that in the agreement, the 1st and 2nd defendants were legal agents of the 3rd defendant since he was and still is in the USA.

12. The 2nd defendant thereafter testified as DW2 and generally rehashed the evidence tendered by DW1.

13. The defence case was closed at that point. Parties thereafter filed written submissions.

14. In submissions filed on behalf of the plaintiff it was argued by plaintiff's counsel that the transaction between the parties is void for want of consent of the Land Control Board. Counsel cited the provisions of Section 6(1) (a) (b) and 8 of the Land Control Act as well as the cases of **Hirani Ngaithe Githire –vs- Wanjiku Munge [1979] KLR 50** and **Onyango & Another –vs- Luwayi [1986] KLR 513**. Unfortunately, counsel did not annex copies of those decisions. Counsel submitted that the 1st defendant had admitted in his testimony that at that time the sale agreement was signed, the plaintiff also signed transfer forms and application for consent and handed them to the defendants. As such, the defendants had failed to do anything to obtain the consent.

15. Counsel further submitted that the defendants were in breach of the sale agreement by failing to pay the balance of KShs 80,000 which remained outstanding as at the date of the hearing and by failing to obtain consent of the Land Control Board despite being in possession of the signed forms. Counsel cited the case of **Purple Rose Trading Company Limited –v- Bhanoo Shashikant Jai [2014] eKLR**, again without annexing a copy thereof.

16. Finally, counsel submitted that the 1st and 2nd defendants had no capacity to transact on behalf of the 3rd defendant since they were referred to in the agreement as legal agents of the 3rd defendant and since they signed the agreement without the authority of the 3rd defendant and in the absence of a duly registered power of attorney. In that regard, counsel cited the provisions of **Section 48 of the Land Registration Act**.

17. On his part, counsel for the defendants argued in the written submissions that it was the plaintiff's obligation under the afferent to obtain consent of the Land Control Board and he should therefore not be allowed to benefit from his own transgression. Citing the case of **Lagoon**

Development Limited –v- Beijing Industrial Designing & Research Institute [2015] eKLR, counsel submitted that the plaintiff had approached the court with unclean hands and is therefore ineligible for equitable relief. Counsel also relied on **David Kinisu Sifuna –v- Marriane Eyaase Kisanji & 2 Others [2015] eKLR** as well as **Section 8** of the **Land Control Act** and urged the court to extend period within which consent ought to be obtained. Ultimately, counsel urged the court to dismiss the plaintiff’s case with costs.

18. I have carefully considered the pleadings, the evidence and the submissions in this matter. There is no dispute that the plaintiff and the defendants executed a document titled “Land Sale Agreement”. The agreement was dated 13th July 2007 and was signed on the said date by the 1st and 2nd defendants as “legal agents” of the 3rd defendant who was the purchaser. The plaintiff later signed the agreement on 16th July 2007. He signed as vendor. Pursuant to the agreement, the plaintiff sold to the 3rd defendant a parcel of land measuring 2.7 acres, to be excised from Nakuru/Rotharini/3. The agreed consideration was KShs 630,000 out of which the plaintiff received a total of KShs 550,000 before the completion date of 13th October 2007. There is further no dispute that the balance of KShs 80,000 has so far not been paid.

19. The agreement was signed by the plaintiff and the 1st and 2nd defendants on all its pages. Some of the terms of the agreement were that the plaintiff was to bear the cost of survey; that the 3rd defendant was to take possession of the suit land immediately upon the agreement being signed; that the plaintiff would not be entitled to any benefit whatsoever in respect of the land; that the plaintiff would obtain all relevant consents to subdivide and transfer the land to the 3rd defendant; and that in the event of non-completion of the agreement owing to wilful default, the party in default would pay to the other party KShs 63,000 as damages. Although the plaintiff sought to distance himself from all the terms of the agreement save for those to do with the purchase price, I find that since execution of the agreement is not disputed and since the agreement is signed by the parties on all its pages, its terms are those clearly stated in it, some of which I have highlighted above.

20. The issues that emerge for determination are firstly whether the agreement is void for want of consent of the land control board; secondly, whether the defendants were in breach of the agreement; thirdly, whether the 1st and 2nd defendants had capacity to transact on behalf of the 3rd defendant; and lastly what reliefs should issue.

21. The parties are in agreement that the suit property is agricultural land and that consent of the land control board was not obtained. Under clause 7 of the agreement, the plaintiff was to obtain all relevant consents to subdivide and transfer the land to the 3rd defendant. One such consent that was necessary is consent of the land control board. Though the agreement could have been drafted in a more elegant manner, it is clear to me that the parties intended that completion be on 13th October 2007. As between themselves therefore, consent of the land control board ought to have been obtained by the plaintiff on or before 13th October 2007.

22. 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.

23. 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 said provisions give the High Court power to extend the six months period even where the period has expired, if sufficient reasons are given. 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.

24. Recently, Court of Appeal stated on 17th May 2018 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.

25. In the present case, the plaintiff admits receiving over 87% of the purchase price. The plaintiff further admits that the defendants took possession of the suit property immediately upon execution of the sale agreement and that they remain in such possession, in terms of the agreement. The plaintiff had an obligation under the agreement to obtain the consent among other consents. He cannot fault the defendants for not paying the balance of KShs 80,000 prior to him availing the consent of the land control board. Though he remains registered proprietor of the suit land, he does so as a trustee of the 3rd defendant. He is estopped from denying the 3rd defendant's claim to the land. I therefore find that though the agreement between the parties is void for want of consent of the land control board, it is still enforceable on the basis of constructive trust and proprietary estoppel. That resolves issue number one. Pursuant to prayer (d) of the plaint, the plaintiff invited the court to grant any other relief that the court may deem fit and just. I will return to the invitation later.

26. The second issue for determination is whether the defendants were in breach of the agreement. The only matter in respect of which the plaintiff is accusing the defendants of breach is the failure to pay the balance of the purchase price. I have discussed above that the parties intended that completion be on 13th October 2007 and that the plaintiff cannot fault the defendants for not paying the balance of KShs 80,000 prior to him availing the consent of the land control board. In these circumstances, the defendants cannot be said to be in breach. I therefore hold that the defendants are not in breach.

27. The third issue is whether the 1st and 2nd defendants had capacity to transact on behalf of the 3rd defendant. The agreement itself provides an answer to this. The agreement plainly states that it was signed by the 1st and 2nd defendants as "legal agents" of the 3rd defendant who was described therein as the purchaser. At clause (c) the parties once again acknowledged that the 1st and 2nd defendants were the "legal agents" of the 3rd defendant. Parties are bound by the terms of their contract. I therefore find that the 1st and 2nd defendants had capacity to transact on behalf of the 3rd defendant.

28. The final issue for determination is what reliefs should issue. In view of the foregoing discussion, it is clear that the plaintiff is not entitled to a declaration that the transaction cannot be completed or for an injunction as is sought. The plaintiff's claim must fail. That however will not be the end of the matter. Though there was no counterclaim, the defendants urged the court both in their testimony and in submissions to award them the suit land. Once again, the defendants' pleadings could have benefitted from proactive drafting. I have agonised over how to bring the matter to a conclusion that addresses all aspects of the dispute notwithstanding the absence of a counterclaim. Parties essentially addressed all aspects of the dispute in their evidence and submissions.

29. The Court of Appeal had occasion to address a somewhat similar dilemma in **Chevron (K) Ltd v Harrison Charo Wa Shutu [2016] eKLR** where it stated:

The last matter for us relates to the final orders. We alluded at the beginning of this judgment to a statement in the trial court's judgment to the effect that the respondent was not entitled to an order directing that he be registered as the proprietor of the suit premises for the reason that the claim was not brought by suit pursuant to section 38 (1) of the Act. We reiterate that section 38 provides that whenever an adverse possessor claims to have become entitled to land he "may apply to the High Court for an order that he be registered as the proprietor...."

In the case of Gulam Mariam (supra) in which a similar question arose, this Court resolved it thus;

"When the respondent elected to raise the defence of adverse possession without a counter-claim, he denied himself the opportunity to apply to be registered the proprietor of the suit property. The power of the court to do substantive justice is today wider than before. We see no harm to make appropriate orders flowing from a finding that the respondent's occupation of the suit property was adverse to that of the appellant; and that the latter's was so extinguished."

For all the reasons given above the appeal fails and is dismissed. Like in the above authority, we make the order that the appellant shall transfer to the respondent the property at the latter's expense within 30 days from the date hereof, failing which the Registrar of the High Court at Malindi shall execute, on behalf of the appellant the necessary transfer documents.

30. As I noted earlier, the plaintiff invited the court pursuant to prayer (d) of the plaint to grant any other relief that the court may deem fit and just. The invitation is duly accepted since it is squarely in line with the power of the court to do substantive justice. That power is now much wider. I see no injustice to the plaintiff since the issues have been addressed at length by the parties.

31. I found earlier in this judgment that the plaintiff received over 87% of the purchase price and that the defendants took possession of the suit property immediately upon execution of the sale agreement and that they remain in such possession. I also found that the plaintiff had an obligation under the agreement to obtain the consent among other consents and that he cannot fault the defendants for not paying the balance of KShs 80,000 prior to him availing the consent of the land control board. I further found that although the plaintiff remains registered proprietor of the suit land, he does so as a trustee for the 3rd defendant and that he is estopped from denying the 3rd defendant's claim to the land. In the circumstances, this is a fit and proper case in which to facilitate completion of the transaction by granting extension of time within which to obtain consent of the land control board as well as orders compelling the defendant to execute necessary forms in that regard. I am convinced that that is where the justice of the case lies. The court has a duty to see to it that disputes are resolved expeditiously and

affordably. These are the expectations cast upon the court by **Article 159 (2) (d)** of the **Constitution of Kenya** and **Sections 1A and 1B** of the **Civil Procedure Act**. See also the decision of the Court of Appeal in **Martha Wangari Karua v Independent Electoral & Boundaries Commission & 3 others[2018] eKLR**. It would not make any sense in the circumstances of this case to require the defendants to file a fresh suit to enforce completion of the transaction.

32. In the end, I make the following orders:

- a. The plaintiff's case is dismissed.
- b. Time within which to apply for the consent of the Land Control Board in respect of the transaction comprised in the Land Sale Agreement dated 13th July 2007 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 plaintiff is hereby compelled to execute all the necessary documents and take all necessary steps to ensure completion of the transaction comprised in the Land Sale Agreement dated 13th July 2007. 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 plaintiff.
- d. Upon certificate of title in respect of the portion of Nakuru/Rotharini/3 measuring 2.7 acres being issued to the 3rd defendant, the 3rd defendant to immediately pay to the plaintiff KShs 80,000 being the balance of the purchase price.
- e. I award the defendants costs of the suit and interest thereon.

33. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 20th day of November 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Ngure Mbugua holding brief for Ms Atsieno for the plaintiff

No appearance for the defendants

Court Assistant: Lotkomoi