



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 35 OF 2016

PETER KAGUNZA ADAJI.....PLAINTIFF

VERSUS

SIKUKUU MARTIN MAIYO.....1ST DEFENDANT

MARGARET CHESANG MAIYO.....2ND DEFENDANT

JUDGMENT

1. The plaintiff in this matter seeks the following reliefs:-

(a) A declaration that actions of the 1st defendant for not transferring the suitland title number Kaisagat/Chepkoilel Block 5/Amuka/13 into the plaintiff's name as agreed and the actions by the 2nd defendant for placing a caution over the said land are illegal and unjustified hence an order be made lifting the said caution.

(b) An order compelling the 1st defendant to transfer the suitland being Kaisagat/Chepkoilel Block 5/Amuka/13 measuring 9.3 acres into the plaintiff's name within the timeline to be set at the court.

(c) Costs and interest of the suit.

2. According to the plaint the plaintiff purchased 1.5 acres from the defendant for Kshs.319,500/= vide a sale agreement dated 24/3/2008 and paid for the said land in full. He later on purchased additional 0.5 acres from defendant for Kshs.140,000/= vide an agreement dated 15/4/2009. Lastly, vide an agreement dated 18/1/2010, purchased the remaining portion of the defendant's land with all the developments thereon at a consideration of Kshs.3,500,000/- which was also paid in full.

3. Subsequently the plaintiff took possession of the 9.3 acres upon payment of the purchase price and the defendants undertook to take all steps to ensure that the title to the suit land is transferred into the plaintiff's name. Despite **clause 4** of the agreement dated 15/1/2010, the 1st defendant's outstanding loan with the Agricultural Finance Corporation as well as the discharge fee of Kshs.3000/= were paid by the plaintiff to facilitate transfer of the land to him.

4. The plaintiff avers that the 1st defendant has since declined to sign all the relevant documents to effect the transfer of the suit land into the plaintiff's name as required by the agreement. On 28/8/2012, the plaintiff states, the parties met at the Amuka Sub-location Chief's office where it was mutually resolved

that the plaintiff surrender 2.25 acres to the defendants on condition that the defendants pay plaintiff Kshs.540,000/= being the value of the surrendered land; the said amount was to be paid within 2 years from the date 28/8/2012. The plaintiff complied with this surrender agreement but the defendants declined to pay Kshs.540,000/= to the plaintiff. It is on these grounds that the plaintiff claims that the defendants are guilty of breach.

5. Further, the plaintiff claims that the 1st defendant has through his wife the 2nd defendant unjustifiably and wrongfully caused a caution to be registered over the suit land to prevent its transfer to the plaintiff. The defendants refused to remove the caution and demanded surrender of more land by the plaintiff to them. It is on the basis of those facts that the remedies referred to hereinabove were sought.

6. The 2nd defendant filed a defence and counterclaim dated 2/3/2016. In the defence the 2nd defendant averred that she is the one in possession of the suit land; that she is the 1st defendant's wife; that she was not aware or party to the agreements for sale; that the suit property is matrimonial property and the agreements are void and unenforceable in law as her consent to the sale transactions was not sought. The 2nd defendant admits to having registered a caution over the suit land on her own behalf in order to safeguard her interest. She denied having demanded for surrender of land by the plaintiff, saying that she has never parted with the land in the first place. In her counterclaim, she reiterates the contents of her defence and adds that the relevant Land Control Board Consents have never been sought and that if they were ever sought, they are now expired and ineffective. She prays for a declaration that the sale agreements entered into between the plaintiff and the 1st defendant on 24/3/2008, 15/4/2009 and 15/1/2010 are void and unenforceable in law. She also seeks an order of permanent injunction to restrain the plaintiff, his agents and/or servants from trespassing, entering, interfering with her quiet possession and enjoyment of or in any way dealing with the suit property. In addition she seeks an order of eviction against the plaintiff from portions of the suit land they have encroach on and costs of the suit.

7. The plaintiff filed a reply to defence and defence to the counterclaim. He emphasized that he is in "actual" possession of 7.05 acres of the suit land having been placed there by the 1st defendant. He also, avers that the 2nd defendant has always known of the agreements of sale and she issued her consent and never protested against them. It is the plaintiff's case that even the conduct of the 2nd defendant signified her consent, and that in any event "most" of the agreements were made at her home.

8. In the alternative, the plaintiff states that the agreements were executed before spousal consent was introduced into land law which law cannot act retrospectively. Further the plaintiff alleges that the 1st defendant admitted to utilizing the proceeds of the sale to buy other matrimonial land at Ziwa. He accuses the 2nd defendant of taking vengeance on him of his refusal to part with 3 more acres to her out of the land he had purchased.

9. In his defence to counterclaim the plaintiff states that he has been in possession of the suit land for six years and thus his rights over the said land have accrued and are legally and fully enforceable. He pleads the doctrines of proprietary estoppel and constructive trust against the defendants and states that nothing in the Land Control Act prevents his reliance on those doctrines.

10. The hearing of this suit took place on 31/8/2016 and on 4/10/2017 the plaintiff subsequently filed his submissions on 31/10/2017 and the 2nd defendant on 8/11/2017. The 1st defendant never filed any memorandum of appearance/defence or submissions. He also never appeared in court to give evidence in the matter.

11. Upon an examination of the pleadings the issue that arise for determination in this suit are as follows:-

(1) Was the consent of the 2nd defendant required in respect of the transactions between the plaintiff and the 1st defendant?

(2) Was consent of the Land Control Board necessary and was it obtained?

(3) Was the registration of the caution over the suit land proper?

(4) What orders should issue on the plaint and counterclaim?

(1) Whether the Consent of the 2nd defendant was required in respect of the transactions between the plaintiff and the 1st Defendant?

12. It is common ground that the 1st and 2nd defendants are a married couple who had lived on the suit land prior to the transaction as such. Though the 2nd defendant produced a copy of a clearance certificate from Amuka Farm Ltd showing that she had paid all the necessary dues to facilitate issuance of a title deed in her name for what was said to be her share, the search certificate listed as document No. 3 in the 2nd defendant's list (which incidentally was not produced) corroborates evidence on the copy of the title produced as "**P. Exhibit 5**" that the 1st defendant was the sole registered proprietor of the land in question.

13. The 2nd defendant testified that she and her family had lived on that land for 30 years and that the suit land was matrimonial property on which their matrimonial home stands, and has stood, for 30 years. It is also evident from "**D. Exhibit 3**", a copy of a marriage certificate, that the 1st and 2nd defendants are husband and wife. Photographic evidence of houses built on the homestead on the suit land was produced. **PW2** had no hesitation in stating that there were houses on the shamba where the 2nd defendant lived.

14. In his pleadings the plaintiff does not deny that the defendants were husband and wife or that the suit property was matrimonial property or that there was a matrimonial home of the defendants on the suit property. What the plaintiff maintains is that the suit land was sold with the knowledge and consent of both defendants, that he was given possession, that the consent of the 2nd defendant was granted, and that in any event the conduct of the 2nd defendant precludes her from stating that she was not aware of the sale.

15. Central to the plaintiff's argument is that the 2nd defendant's consent was not required on 15/1/2010 when the land was sold for the reason that the requirement of spousal consent was introduced by the **Land Act 2012** and the **Land Registration 2012** and those Acts cannot operate retrospectively.

16. On the other hand the 2nd defendant avers in her submissions that spousal consent was required. She cites **Section 12** of the **Matrimonial Property Act**. She says a constructive trust was established as a result of their marital relations whereby the 2nd defendant became a beneficial owner to the suit land. Therefore, argues the 2nd defendant, her husband was estopped from selling the suit land without her knowledge. It is claimed that the 2nd defendant had contributed to the acquisition and maintenance of the suit property and as such she was entitled to an equal share in the suit property. The 2nd defendant avers that the court ought to infer a common intention on the part of the parties that the property was to be owned jointly and if at all there was to be any transaction over the same, both parties ought to have knowledge of it and should consent to the same.

17. Regarding the first argument as to whether consent was required or not, this court notes that the **Matrimonial Property Act** was enacted in 2013, was assented to on 24/12/2013 and commenced on 16th January, 2014.

In the case of **Peninah Wambui Mugo -vs- NMK and MMN-Nakuru HCCC No. 238 of 2004** the court observed that a trust may have been express or come into existence through one of two ways under the old land law regime that incorporated **Cap 300, the Registered Land Act**: firstly, by express noting against the title, proof of which would have simply been production of title or secondly, by implication, proof of which would have been by tendering evidence to that effect. The court noted in that case that other than establishing that the property was bought during the marriage, the wife of the 1st defendant in

the case did not expressly prove any trust by way of monetary contribution or otherwise. The court stated as follows:

“30. The onus of proof of a trust lies with the 2nd defendant.

Other than her testimony that the property was bought during the marriage she did not expressly prove any trust by way of monetary contribution or otherwise.- Echaria -vs- Echaria (Supra)

Under the now repealed Registered Land Act Cap 300, spousal consent was not a requirement. Such consent became a requirement with the enactment of the Land Registration Act, 2012 as stated in the case C.A No. 278 of 2006 by Nambuye, Okwengu & Kiage, JJA sitting at Nakuru in Fredrick Chege Ndogo -vs- Bernard Njoroge Mbugua & 2 Others in their judgment on the 16th June 2016.

31. Spousal consent is a recent development in Kenya under Land Act 2012, and that it had no application whatsoever to the sale of land which predated the statute. That in my considered view, and having analysed both Defendants evidence concludes the issues of whether there was fraud in the sale of the suit land by the 1st defendant to the plaintiff without consent of the 2nd defendant separated wife to the registered owner of the suit land”.

The same court also stated as follows:

“36. In Echaria -vs- Echaria, (Supra) the court interpreted what constitutes a matrimonial property and the rights of each spouse. Status of a marriage in itself does not create or result in common ownership of property in the old order, under the 1882 Act. Jurisprudence in Pettit -vs- Pettit (Supra) is that Section 17 did not grant the court substantive powers to vary property rights but to declare what rights accrue to each spouse, upon proof of financial contribution....”

37. In her pleadings by way of defence and counter-claim the 2nd Defendant did not plead for a declaration of property rights or trust in the suit property and no such prayer was stated. She pleaded for cancellation of title and rectification of the register. To counter the above, the 2nd Defendant citing ODD JOBS -VS- MUBIA (1970) EA 476 urged that:

“A court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision.”

38. Further cited was the case Chumo Arap Songok -vs- David Kibiero Rotich (2006) eKLR where the Court of Appeal rendered that:

“The law is now settled, that parties to a suit are bound by the pleadings in their suit and the court has to pronounce judgment only on the issues arising from the pleadings unless a matter has been canvassed before it by parties to the suit and made an issue in that suit through evidence adduced and submissions of parties.”

39. I fully associate myself with the Learned Judges holdings in the above cases. However if that is the case, and by evidence a trust is demonstrated and proved, the reliefs to a party whose rights under the trust have been breached is stated clearly in the Registered Land Act Section 39(2)

18. In this case the 2nd defendant never called the Land Registrar to disprove the fact that the 1st defendant is the sole registered proprietor of the land. No evidence was also produced to show that the 2nd defendant had contributed to the acquisition of the suit property in any way. No connection was drawn between “D. Exhibit 5”, which is a clearance certificate issued to one Margaret C. Maiyo, and

the title to the suit land. The 2nd defendant did not go beyond its production at the hearing, to explain how it was obtained. The defendant also did not call any director or official of Amuka Company Limited to produce the copy of area list marked “**D MFI 4**”.

19. I therefore find that no proof of express trust or implied trust was brought to court by the 2nd defendant and that such trusts do not therefore exist. The suit property was therefore not matrimonial property. Further even if it were matrimonial property at the time of the transactions, the provisions of the Matrimonial Property Act 2013 could not apply as the Act has not been shown to have retrospective effect. The applicable law in that case was only the Married Women Property Act and the Registered Lands Act. The upshot of the above is that no consent of the 2nd defendant was required at the time of the sale agreements between the plaintiff and the 1st defendant.

(2) Was Consent to Transfer from the Land Control Board required in respect of the sale of the suit land and if so, was it obtained?

20. The 2nd defendant raised the issue of want of Land Control Board Consent to transfer in her statement of defence. In his reply to defence and counterclaim the plaintiff stated that it was not mandatory. Further, he pleaded as follows:-

“The plaintiff states that nothing in the Land Control Act prevents the plaintiff from relying upon the doctrine of constructive trust by the fact of this case”.

21. It is the plaintiff’s case that “*having remained* “ on the suit land for six years since the year 2010, his rights over the said land “*accrued and are binding on that land and those rights are legally and fully enforceable*”. The plaintiff states as follows in his submissions on the issue:-

“Those rights are legally and lawfully enforceable. The plaintiff cannot be evicted from the suit land. He has acquired an interest by constructive trust therein recognized by virtue of Section 25 and 28 of the Land Registration Act 2012”.

22. The suit land in this case is agricultural land. It has been admitted by the 2nd defendant that the plaintiff was in occupation of some of the land. Indeed evidence shows that the plaintiff has been in possession of the entire parcel but at the meeting evidenced by “**P. Exhibit 7**” and “**P. Exhibited 8**”, he was required, by consent of parties to give up 2 acres thereof back to the defendants. What the plaintiff is saying, if the court understands his submissions clearly is that the 1st defendant holds the land in trust for him. For the second time in this suit a party is claiming a trust that is not noted on the register hence reliance on **Section 28** of the **Land Registration Act**.

23. In the case of ***Macharia Mwangi Maina & 87 Others -vs- Davidson Mwangi Kagiri, eKLR***, the Court of Appeal faced a similar argument that a constructive trust had been created in favour of the appellants who had paid the entire purchase price and were in possession of the land sold to them by the respondent. The court found that the appellants’ rights fell under the provisions of **Section 30(g) of the Registered Land Act Cap 300**.

In that appeal, the court, citing **Lloyds Bank PLC -vs- Rosset 1991 1 AC 107 132**, stated that a constructive trust is based on common intention between the parties. In this case I find that there was a common intention between the plaintiff and the 1st defendant.

The court in the **Macharia Mwangi Maina** case (supra) also stated that a constructive trust is an equitable concept and the court is a court of law and a court of equity.

24. The Court of Appeal in that case found that respondent had created a constructive trust in favour of all individuals who had paid the purchase price for their respective plots and the trial court erred in failing to note that consent of the Land Control Board is not required where a trust is created over agricultural land. In the case of ***John Simiyu Ndalila -vs- Francis Soita 2014 eKLR*** this Court stated as follows:-

“It is without a doubt that the defendant having received the purchase price in full is estopped from relying on the defence that their agreement is void for non-compliance with section 6 of Land Control Act”.

25. In view of the decisions mentioned above, this court finds that the 1st defendant created a constructive trust in favour of the plaintiff by his conduct of receiving the full purchase price and placing the plaintiff into possession. Consequently I find that in such circumstances the want of a Land Control Board Consent would not operate to negate the plaintiff his accrued rights. The defendants are estopped from claiming so.

(3) Was the registration of a caution by the 2nd defendant over the suit land proper?

26. Going by the findings in answer to the first and second issues discussed hereinabove it follows that the registration of the caution by the 2nd defendant was improper and the said caution ought to be removed forthwith.

(4) What orders should issue on the Plaintiff and the Counterclaim?

27. I have found that the plaintiff has proved his case on a balance of probabilities against the defendants. I therefore grant prayers Nos. **(a)** **(b)** and **(c)** of the plaint as prayed subject only to a requirement that the 1st defendant shall transfer the suit land as required in **prayer (b)** to the plaintiff within 30 days failure to which the Deputy Registrar of the court shall execute all necessary documents to effect the transfer to the plaintiff.

28. The upshot of the above is that the 2nd defendant’s counterclaim dated 2nd March, 2016 is hereby dismissed with costs to the defendant in the counterclaim.

Dated, signed and delivered at Kitale on this 20th day of **December, 2017.**

MWANGI NJOROGE

JUDGE

20/12/2017

Before - Mwangi Njoroge -Judge

Court Assistant - Isabellah

Mr. Teti for 2nd defendant

N/A for the 1st defendant

COURT

Judgment read in open court.

MWANGI NJOROGE

JUDGE

20/12/2017