



**REPUBLIC OF KENYA**

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

**LAND CASE NO. 53 OF 2014 (CONSOLIDATED WITH LAND CASE NO. 52 OF 2014)**

**CHRISTOPHER M. MACHIMBO..... PLAINTIFF**

**VERSUS**

**GEORGE RIOGI MOCHAMA..... DEFENDANT**

**J U D G M E N T**

**INTRODUCTION**

1. The defendant in **Land Case No. 53 of 2014** is the plaintiff in **Land Case No. 52 of 2014** in which the plaintiff was the defendant. On **2/12/2014** the two files were consolidated and **Land Case No. 53 of 2014** became the lead file where proceedings were recorded. In **Land Case No. 53 of 2014**, the defendant had filed his defence to the plaintiff's claim and raised a counter-claim.

2. When this case came up for hearing, the plaintiff who had been duly served did not attend court. The defendant prayed for dismissal of the plaintiff's claim which was dismissed with costs to him and he was allowed to proceed with his counter-claim. In file **No. 52 of 2014**, the defendant who was the plaintiff in that case prayed for the following reliefs:-

**(a) A permanent injunction to restrain the plaintiff who was the defendant in that case from interfering with his occupation of 13 acres which he had bought from him.**

**(b) An order of specific performance ordering the defendant to execute the relevant documents to transfer 13 acres to him failing which the Deputy Registrar of the court do sign the same documents on his behalf.**

**(c) Costs.**

**(d) Interest**

**(e) Any other relief the Honourable Court may deem just to grant.**

3. In **Land Case No. 53 of 2014** the defendant claimed the following reliefs:-

**(a) A declaration that the agreements for sale of 13 acres forming part of Plot No. 109 Lumboka Farm are not controlled transactions and as such the plaintiff should effect transfer to the defendant and in default the Deputy Registrar of the court should execute the transfer documents on behalf of the plaintiff.**

**(b) In the alternative, an extension of the period for application for consent of the Land Control Board for such period as the court may deem just and expedient.**

**(c) Costs.**

**(d) Any other relief the Honourable Court may deem just and fair in the circumstances.**

### **DEFENDANT'S CASE**

4. The defendant testified that on diverse dates, he entered into agreements with the plaintiff for purchase of land comprised in **Plot No. 109** commonly known as **Lumboka Farm**. On **20/12/2005** he bought **3 acres**. On **23/1/2006** he bought another **3 acres**. On **22/7/2007** he bought **2 acres**.

5. On **6/2/2007** the plaintiff offered him **3 acres** but he took **2 acres**. Later on on the same day the plaintiff sold to him **2 acres**. The defendant testified that he paid a total of **Kshs.1,750,000/=**. He was put in possession of the **13 acres**. During the post election violence of **2007/2008** the plaintiff used his sons who went and removed the boundary marking the **13 acres**. He went and reported the incident to the area chief.

6. The plaintiff's family convened a meeting in which they contested that he bought the **13 acres** he was claiming. They however conceded that he had paid a total of **Kshs.1,100,000/=**. He was not party to the family meeting.

7. On **27/11/2013** a clan meeting was convened in which the defendant presented all agreements between him and the plaintiff. The clan elders found out that he had purchased **11 acres** and had paid **Kshs.1,750,000/=**. The defendant contends that he is entitled to **13 acres** and he does not understand why the clan elders found that he was only entitled to **11 acres**. The defendant testified that following the interference with the boundary by the plaintiff's sons, he is now occupying **5.3 acres**.

### **ANALYSIS OF EVIDENCE AND ISSUES FOR DETERMINATION**

8. A careful look at the pleadings and evidence shows that the following issues are for determination:-

**(a) Whether the defendant purchased 13 acres from the plaintiff.**

**(b) Whether the property purchased falls in an area which requires consent of the land control board to be obtained.**

**(c) Did the defendant pay for the land which he purchased?**

9. The defendant produced the agreement dated **23/5/2005** for **3 acres**. The purchase price was **Kshs.330,000/=**. He paid a deposit of **Kshs.160,000/=** and the balance was to be paid on various dates. The last installment of **kshs.30,000/=** was to be paid on **15/1/2006**. All the payments were acknowledged on the agreement produced as Defence Exhibit 1.

10. The defendant produced an agreement dated **23/1/2006** [Defence Exhibit 3(a)]. In this agreement, he bought **3 acres** at **Kshs.450,000/=** on the signing the agreement. The second installment of **Kshs.69,000/=** was made on **4/6/2006**. The third installment of **Kshs.40,000/=** was made on **21/7/2006**. The fourth installment of **Kshs.100,000/=** was made on **6/9/2006**. The fifth installment of **Kshs.50,400/=** was made on **28/10/2006**. The sixth and last installment of **Kshs.100,000/=** was made on **19/1/2007**. All these payments were acknowledged and the acknowledgements were produced as Defence exhibits Nos.3

(b) to (f) respectively.

11. On **22/7/2006** the defendant bought **one acre** at **Kshs.100,000/=**. The agreement was produced as Defence Exhibit 4. On **6/2/2007** he entered into another agreement for purchase of **2 acres**. He paid a deposit of **Kshs.140,000/=** on that date and the balance of **Kshs.179,000/=** was to be paid before June, 2007. The agreement of 6/2/2007 was produced as Defence Exhibit 5. The defendant testified that the plaintiff had wanted to sell to him 3 acres but he took 2 acres. Later on that day i.e. **6/2/2007** the plaintiff sold to him **2 acres**. He produced the agreement as Defence Exhibit 6.

12. When a dispute arose between the defendant and the plaintiff the area chief summoned the plaintiff vide letter of 9/4/2008 [Defence Exhibit 7]. The family of the plaintiff convened a meeting and unilaterally resolved that they were now selling land to the defendant at the prevailing market price of **Kshs.220,000/= per acre**. They found that the defendant had paid a total of **Kshs.1,156,000/=** and decided to give him **5.3 acres**. The resolutions of the plaintiff's family were produced as Defence Exhibit 7.

13. The defendant took the dispute to the clan who summoned the plaintiff but he did not attend. Upon going through the documents which the defendant had, they found that he had paid a total of **Kshs.1,750,000/=** and that he was entitled to **11 acres**. The minutes of the clan were produced as Defence Exhibit 7.

14. Though the defendant claims that he bought **2 acres** on **20/12/2005** the agreement he produced as Defence Exhibit 2 does not support his claim. First the agreement is not legible. Secondly there are various figures ranging from 5, 3 and 2. It is therefore not possible to decipher what was being sold. I therefore find that the defendant bought **11 acres** for which he fully paid as per the agreed amount. It will be unfair for the plaintiff's sons to make a unilateral decision to sell the land at the prevailing market price of **Kshs.220,000/= per acre** as at **15/4/2008**. There were valid contracts between the defendant and the plaintiff.

15. The plaintiff's claim which was dismissed for non attendance was that he had sold 3 acres to the defendant vide an agreement dated 23/1/2006. He wanted that agreement declared null and void for want of the consent of the land control board. It is clear that the plaintiff is out to defraud the defendant. He sold to him a total of 11 acres. The family of the plaintiff unilaterally decided to put the purchase price at Kshs.220,000/= per acre hence giving the defendant 5.3 acres. It is ironical that he is now turning round to file a claim based on sale of 3 acres.

16. There is no evidence at all adduced to show that the land which the defendant bought does not fall in an area which is not subject to the provisions of the land control board. This is agricultural land and consent of the land control board was required.

17. Even though it is clear that there was no consent of the land control board, the plaintiff put the defendant in possession of the 11 acres. He was there until 2007/2008 when post election violence erupted. This is when the plaintiff's sons destroyed the boundary and confined the defendant to 5.3 acres. I am aware that there are conflicting decisions from the Court of Appeal on the issue of consent of the land control board. I will go with the decision which appeals to my conscience. It is unfair to sell land to a person, put him in possession and turn round later to claim that there was no consent of the land control board. I go with the decision in *Nyeri Civil April No. 6 of 2011 Macharia Mwangi Maina & 87 Others -vs- Davidson Mwangi Kagiri* and in *Kisumu Civil Appeal No.3 of 2014 Sammy Likuyi Adiema -vs- Charles Shamwati Shisikari [2014] eKLR*. In both cases, the issue was whether failure to obtain consent of the land control board can be raised to defeat a claim to land where a purchaser is put in possession but no land control board consent is obtained. I agree that doctrines of equity cannot be used to override the provisions of a statute. However what the courts should consider is the circumstances of the case as well as the intention of the legislature in enacting that particular statute which applied the doctrine of constructive trust.

18. The Land Control Act commenced on 12/12/1967. Its objective was to control transactions in

agricultural land. The country had just gained independence and there was need to control transactions in land to safeguard agriculture. This is why the Act applied only to certain controlled sections. The object then may not be what we are experiencing now over 40 years later. We are seeing people wanting to own even  $\frac{1}{8}$  of an acre in agricultural areas. The land control boards are not turning away these people. It is therefore clear that the Act has outlived its usefulness. Infact this Act was among those which were to be repealed alongside other statutes when the new land laws came into effect. For unknown reasons, it was not repealed. There is still need for its repeal. It will therefore be unfair to keep invoking its provisions even when it is clear that persons who sold their land long ago are now coming up to claim that the transactions are null and void for lack of consent of the land control board

19. In appropriate cases like in this one, courts should not act mechanically and hang on to provisions of statutes which have outlived their usefulness. It is unfair to kick out a person who bought land, paid for it, settled on it just because the seller has realized that he can exploit certain provisions of an Act to make a killing by selling the land again at a higher price or re-claim what he had already sold.

## **DECISION**

20. I find that the defendant has proved that he bought **11 acres** from the plaintiff. He paid the agreed sum in full. The plaintiff should meet his part of the bargain. I therefore find that this is a proper case where an order of specific performance should issue. An order of specific performance is hereby issued directing the plaintiff to transfer **11 acres** to the defendant as per the agreement between the two failing which the Deputy Registrar of this court to sign all necessary documents to effect transfer of the **11 acres** in favour of the defendant. A permanent injunction is also issued restraining the plaintiff or any other person acting on his behalf from interfering with the **11 acres** which the defendant bought. The defendant shall have costs of the dismissed claim and the costs of this counter-claim.

**Dated, signed and delivered at Kitale on this 26<sup>th</sup> day of September, 2016.**

**E. OBAGA**

**JUDGE**

**COURT**

Judgement signed in court in the absence of parties and their advocates who were aware of the date of delivery of judgement.

**E. OBAGA**

**JUDGE**

**26/9/2016**