



THE REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
MILIMANI LAW COURTS
ELC NO. 1327 OF 2013
GRACE WACHUKA MIANO..... PLAINTIFF/APPLICANT
VERSUS
FRANCIS KAMAU GATIBA.....DEFENDANT/RESPONDENT
RULING

Coming up for determination is the Plaintiff's application dated **25th September 2014** seeking orders that:

- 1. Spent**
- 2. Spent**
- 3. Pending the hearing and determination of the case, the Defendant, his servants and agents be restrained from disposing off LR. No. Nginda/Samar Block 1026.**
- 4. The Court does extend the time for applying for the Land Control Board consent to enable the sale transaction herein to be perfected.**
- 5. Costs be borne by the Defendant.**

The application is premised on grounds that there is in existence a valid sale agreement for the sale of **LR Nginda/Samar Block 1026** in which, the Plaintiff has performed and discharged all the requisite obligations. Under Clause 8.2 the Defendant was enjoined to apply for Land Board consent but failed to do so within the statutory period. The Plaintiff avers that there is a real risk that the Defendant will alienate the suit property as he is in possession of the original documents, hence the application for injunction.

The Plaintiff swore an affidavit in support of the application wherein she deposed that they entered into a sale agreement on 10th January 2012. It was a term of the agreement that she would pay Kshs. 300,000/- upon execution of the agreement and Kshs. 200,000/- being the balance of the purchase price within 6 months of the registration in her favor. Further that, the Defendant was obligated to apply for the land control board consent.

It was deposed by the Plaintiff that she paid the Defendant Kshs. 450,000/- leaving a balance of Kshs.50,000/-. However, that the Defendant has been prevaricating his responsibility of obtaining consent. The Plaintiff expressed her apprehension that the Defendant may offer land for sale to a

unsuspecting purchaser to defeat the proceedings.

The Defendant replied the application in his replying affidavit on **25th March 2015** wherein he deposed that he was able to apply for the consent of the land control board as his family declined to sanction the sale. Thereby, that the sale became void once six months from the date of the Agreement expired. It was disposed that there would be no useful purpose served by either extension of time or an injunction as the court cannot be called upon to act in futility.

The Plaintiff swore a further affidavit on 25th May 2015. Thereunder she deposed that the Defendant was being uneconomical with information as he had sold other parcels of land adjacent to hers and he applied and obtained consents for the said transactions. In this regard the Plaintiff annexed copies of letter of consent from the Defendant to Lucy Wangeci Gathuita for parcel 1047 dated 10th October 2013 and a sale agreement between the Defendant and Plaintiff in respect of parcel number 511 dated 22nd September 2011. In addition, that she had purchased other parcels of land from the Defendant and no issues of being denied consent from his family members ever cropped up. The Plaintiff maintained that the Defendant deliberately refused to apply for consent at the land control board consent until the lapse of 6 months to frustrate her efforts and deny her the right of owning the suit property.

The Defendant filed written submissions in furtherance of his position, which I have carefully read and considered the authorities referred to by counsel. The first issue raised in the submission was the application of Section 6 of the Land Control Act. The Defendant submitted that the court cannot validate a transaction which has been rendered void by operation of the law. Further, that the only remedy available to such a party is that she can recover any money or consideration paid in the court of the transaction under Section 7 of the Act. In support of this submission, the Defendant cited the case of **Ezekiel Kisorio Tanui v Jacinta Ekai Nasak Kitale Civil Suit No. 76 OF 2012 (2014) eKLR** which restated the position in the case of **Karui v Gitura (1981) KLR 247** where the Court of Appeal stated,

“The provisions of the Land Control Act are of an imperative nature, there is no room for the application of the doctrine of equity to soften its harshness.”

The second issue submitted on was the subject of spousal consent. The Defendant submitted that the suit property is a matrimonial home where he resides with his family. The Defendant referred to Section 28 of the Land Registration Act which provides at part (a) that spousal rights over matrimonial property is an overriding interest which all registered land is subject to. It was submitted that failure by the wife to give consent to the Defendant to proceed with the sale meant that any transaction on the land was void.

There is no doubt that this was a transaction requiring consent from the Land Control Board per Section 6 of the Land Control Act. The section reads:

6. (1) Each of the following transactions –

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 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.

From the wording of Section 8 of the said Act, either party to the transaction can make an application for

consent. On perusal of the sale agreement between the parties, clause 8.2 thereof provides:

The vendor shall apply for and its own costs obtain all the necessary consents and clearance to facilitate the transfer of the said property to the purchaser.

It is therefore clear that it was the duty of the Defendant as the vendor to make the application.

It is the Defendant's submission that the sale is void for all intents and purposes as the consent was not obtained within the prescribed statutory period. Therefore, that he sale became a nullity once the six months period lapsed without the consent.

The Court of Appeal at Nyeri sitting in Nakuru had an opportunity to discuss the application of Sections 6 and 8 of the Land Control Act in the case of **Hannah Mugure Karago v Peter Karuri Waweru & another Nakuru Civil Appeal No 155 of 2014 [2016] eKLR** as follows:

Section 6(1) and Section 8 (1) of the Land Control Act-Cap 302 have received judicial consideration on many occasions...

Not surprising, there now exists a body of precedent which supports or opposes the strict application of the said provisions in equal measure. Among the decisions propounding a strict and uncompromising application of the letter of the law is KARURI V GITURA [1981] KLR 247 where this Court concluded that the provisions of the Land Control Act are of an imperative nature and that there is no room for the application of any doctrine of equity to soften them. In the same vein is KARIUKI V KARIUKI [1983] KLR 225 where at page 227; Law, J.A. opined that when a transaction is stated by the express terms of an Act of Parliament to be void for all purposes for want of necessary consent, a party to that transaction cannot be guilty of fraud if he relies on the statute to argue that the transaction is void. Similarly in MUNYORORO V MURAGE [1988] KLR 180, strictness held sway with this Court holding that the consent of the Land Control Board had to be obtained within the prescribed time (three months at the time) and that the sale of agricultural land pursuant to consent purportedly obtained outside the prescribed period was void. That strict positivist approach is neither aberrant nor novel as it finds ready precedent elsewhere. Reflecting this school of thought, the words of the great American jurist, Benjamin Cardozo in GRAF V HOPE BUILDING CORPORATION 254 N.Y. 1 at Page 9 [1930] are instructive:-

“Equity works as a supplement for law and does not supercede the prevailing law”.

Sir Robert Edgar Megarry, a renowned English jurist and judge of the Chancery division quoting the 3rd Edition of STORY ON EQUITY also furthers that cause by stating that:-

“ Where a rule, either of the common or statute law, is direct and governs the case with all its circumstances, or the particular point, a court of equity is as much bound by it as a court of law, and can as little justify a departure from it”.

See RE MEGARRY & P.V. BAKER SNELL'S PRINCIPLES OF EQUITY, 25th Ed. Sweet & Maxwell, 1960, page 26.

Not all Judges and jurists embrace such a hard and fast approach to the law even when its consequences appear to be plainly unjust, however.

In WESTLANDS RESIDENTIAL RESORT LIMITED V KAWAKANJA LTD & 2 OTHERS [2013] eKLR, this Court tempered the strictness of Section 6 of the Act somewhat, by accepting submissions by counsel for the appellant which relied on a number of authorities including:-

- The holding in MOHAMED VS BAKARI & 2 OTHERS (2008) 3 KLR (EP) 54 to the effect

that:-

“No man can be allowed to rely on his own wrong to defeat the otherwise valid claim of another man”.

- Cheshire and Burns Modern Law of Real Property by E.H. Burn 16th Edition at page 130:

“If a contract for sale is capable of specific performance, an immediate equitable interest passes to the purchaser and an order for specific performance can be decreed on that basis”.

- Chitty on Contract, 30th Edition, Vol 1 at paragraph 27-003:

“The jurisdiction to order specific performance is based on the existence of a valid and enforceable contract..... it will not be ordered if the contract suffers from some defect, such as failure to comply with formal requirements or mistake or illegality which makes the contract invalid or unenforceable”.

- Fry L.J.’s Specific Performance as quoted in Chitty on Contracts that;

“If a contract be made and one party to it make default in performance, there appears to result to the other party a right at his election either to insist on the actual performance of the contract, or to obtain satisfaction for the non-performance of it”.

The case of MACHARIA MWANGI MAINA & 87 OTHERS V DAVIDSON MWANGI KAGIRI, CA No 26 & 27 of 2011 (Nyeri) presented a situation similar to the one herein and this Court upheld the transaction notwithstanding non-compliance with Section 6 on the basis that;

- *The appellants were in possession of the suit properties as bona fide purchasers;*
- *They were put in possession by the respondent; and*
- *The doctrine of proprietary estoppels applied in the case and stopped the respondent from reneging on the agreements.*

It is worthwhile to examine the rationale behind the Land Control Act and place its troubling provisions in proper context. Before its enactment in its present form, the statute was known as the Land Control (Native Lands) Ordinance (No 28 of 1959) and the eminent Kenyan legal scholar, the late Prof H.W.O. Okoth Ogendo identified the purpose of the legislation as follows:

“The purpose of the Land Control (Native Lands) Ordinance was to protect uninitiated peasants from improvident use of their rights under the new tenure system. Even though individualization was seen as necessary precondition to the planned development of the African areas, it was also appreciated that it could lead to many other problems more difficult to solve than the ones it was intended to eliminate. The Royal Commission had warned, for example, that in many peasant communities individualization had led to ‘the emergence of a chronic state of indebtedness, the continued fragmentation of holdings and the unproductive accumulation and holding of land by a few individuals in circumstances of little income-earning opportunity for those who have parted with the land’. See TENANTS OF THE CROWN, Acts Press (1991) page 74.

There is no doubt that the Ordinance later re-enacted as the Land Control Act of 1967 Cap 302, was informed by noble and deliberate public policy considerations. The Act seeks to regulate transactions in agricultural land by, inter alia: - avoiding sub-division of land holdings into uneconomical units, thus undermining agricultural production; mitigate the danger of landlessness inherent in unchecked sale and alienation of land and controlling land holding by non-Kenyans.

The statutory provisions for attaining these salutary considerations do however provide fertile opportunity for unscrupulous persons to use them as a cloak for mischief. Whereas Section 7 of the Land Control Act provides for the recovery of monies paid in the course of a controlled transaction which becomes void under the act; and Section 22 provides sanction for anyone who acts in furtherance of a void transaction, fraud or unjust enrichment on the part of any such vendor remain a real risk. What would stop a knowledgeable vendor from delaying the process of obtaining consent from the Land Control Board with a view to selling a given property at a higher price; or benefiting from improvements made to a given property by the purchaser?

It appears that human greed or inconsistency and perfidy have found a powerful tool and ally in the provision that declares void all transactions without timely or any consent. The question becomes whether a court of justice would so interpret the provision as to aid a fraudster, mischief maker or a contract breaker.

We are not prepared to hold that courts should provide judicial approval to such dishonesty and lack of integrity and approve of results that are plainly unjust. Nor should they wring their hands and emit impotent sighs in the face of such injustice.

Their Lordships tempered with the strict application of the Act and looked at the conduct of the parties. The Court of Appeal in the **Hannah Mugure Karago v Peter Karuri Waweru (supra)** observed that human greed and perfidy have found a powerful tool and ally in the provision that declares void all transactions without consent and opined that it would be a miscarriage of justice to provide judicial approval to such dishonesty and lack of integrity.

This Court has carefully perused the affidavit evidence of both parties. The Defendant maintains that he did not make an application to the Land Control Board for **Consent** as the property in dispute is matrimonial and that his wife has declined to give her consent. This claim was vehemently opposed by the Plaintiff who deposed that the Defendant was being mischievous in alleging that the property needed spousal consent as he had sold and obtained consent for plots adjacent to the disputed plot.

On perusal of the annexures in the Plaintiff's further affidavit, it is evident that the Defendant has disposed off sub-divisions of **Nginda/Samar**. It is also evident that the Plaintiff has previously purchased one of the sub-divisions. There is no mention of requirement of spousal consent in these transactions. Suffice to add, the agreement between parties was entered into in January 2012 before the coming into force the Land Act, 2012 and Land Registration Act, 2012 in May 2012 where spousal consent was not a requirement. The courts have already established that it was not intended that the Acts would have retrospective application. See **ENW –v- PWM & 3 others (2013) eKLR**. The Defendant relied on the case of **Edith Nyambura Mwanjera v Symon Mwanjera Ndara & 2 others Nairobi ELC Civil Suit No. 1437 of 2013 [2014] eKLR** in support of the submission of spousal consent. I have perused this authority and note that the same is distinguishable from the present case. In the case of **Edith Nyambura Mwanjera**, the sale agreement was entered in 2013 after the commencement of the Land Registration Act. Additionally, the Judge did find that since the issue as to whether the property was matrimonial was disputed it was safe to preserve the same pending the hearing.

On the foregoing, it is my finding that the Defendant running away from the sale agreement under the guise of the nullity of the transaction in respect of Section 6 of the Land Act. The Court is guided by their Lordships in the cases of **Hannah Mugure Karago v Peter Karuri Waweru & another Nakuru Civil Appeal No 155 of 2014 [2016] eKLR** and **Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri [2014] eKLR** that I cannot and should not *wring their hands and emit impotent sighs in the face of such injustice*.

From the foregoing, the Court is satisfied that the Plaintiff has established a prima facie case with chances of success and the court allows the instant application with costs being in the cause

It is so ordered.

Dated, Signed and Delivered this 2nd day of December,2016

L. GACHERU

JUDGE

In the Presence of:-

M/s Muka holding brief M/s Macheru for the Plaintiff/Applicant

Mr Ayieko holding brief for Mr Mbigi for the Defendant/Respondent

Vincent: Court Clerk

L.GACHERU

JUDGE