

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO.37 OF 2013

WILLY KIMUTAI KITILITPLAINTIFF

VERSUS

MICHAEL KIBETDEFENDANT

J U D G M E N T

INTRODUCTION

1. The plaintiff is the registered owner and LR.No.Kaplamai / Sirende Block 1/Kiplongon/60(suit land) . On 28.3.2013 the plaintiff filed a suit against the defendant claiming the following reliefs.

- a) A declaration that the defendant has no proprietary rights whatsoever over Parcel No. Kaplamai/Sirende Block 1/Kiplongon/60.
- b) A temporary injunction restraining the defendant, his servants and / or agents from trespassing upon, ploughing, planting or in any way interfering with Land parcel No. Kaplamai/Sirende Block 1/Kiplongon/60.
- c) Costs of the suit
- d) Any other relief the court deems fit and just to grant.

2. The defendant filed a defence and counter-claim in which he sought the following reliefs:-

- (a) An order of specific performance requiring the plaintiff to execute all the requisite documents and transfer 2 acres out of parcel No. Kaplamai/Sirende Block1/Kiplongon/60 to the defendant. In the alternative the plaintiff do refund the purchase price.
- b) Costs and interest
- c) Any other relief the Honourable court may deem fit and just to grant.

PLAINTIFF'S CASE

3. The plaintiff testified that he entered into a sale agreement with the defendant in which he agreed to sell to the defendant 2 acres out of the suit land at a consideration of Kshs.300,000/=. He testified that it was a term of the agreement that the defendant was to pay the entire purchase price within one month. He contends that the defendant did not pay the entire purchase price within one month. He contends that the defendant did not pay the entire purchase price as agreed. The defendant instead paid him by instalments until the year 2010 when the defendant completed

paying him. He testified that he sold the land to pay school fees for his children and that since the amount was not paid at once as agreed, he was forced to sell his properties to raise the fees. He therefore contends that the agreement is null and void for want of consent of the land control board.

DEFENDANT'S CASE

4. The defendant testified that on 8.8.2008 he entered into a sale agreement with the plaintiff in which the plaintiff agreed to sell to him two acres out of the suit land at a consideration of shs.300,000/= . He paid Kshs.150,000/= at the execution of the agreement and the balance cleared thereafter. The defendant testified that he paid Kshs.105,000/= to the plaintiff. The balance of Kshs.45000/= was to be paid after transfer. The plaintiff however pressed him for payment of the balance which he cleared and even paid 7,000/= over and above the purchase price for survey fees. The defendant took possession of the land in 2009 after the person who had leased it from the plaintiff harvested his maize . The plaintiff chased away the defendant in the year 2013 using Kenya Police Reservists. He prays that the plaintiff do transfer two acres to him or in the alternative refund him the purchase price at the prevailing market value of the land.

ANALYSIS OF EVIDENCE AND ISSUES FOR DETERMINATION

5. There is no contention that the two parties entered into a sale agreement on 8.8.2008. It is also not contested that the defendant completed the entire purchase price. There is also no contention that the transaction did not receive the consent of the land control board. The issues which emerge for determination are firstly, whether it was a term of the agreement that the entire purchase price was to be paid within one month.

Secondly, whether the defendant has any proprietary rights over the suit land.

Thirdly, whether the defendant is entitled to an order for specific performance notwithstanding the fact that the transaction did not receive the consent of the land control board as required.

6. The sale agreement of 8.8.2008 was produced by the defendant as defendant exhibit 1. It is clear from the agreement that the defendant paid Kshs.150,000/= on 8.8.2008. The balance of Kshs.150,000/= was to be paid on 20.9.2008. It is clear that the balance was not paid on 20.9.2008 as agreed. The plaintiff instead allowed the defendant to pay him by instalments. The defendant was put in possession and continued to pay the instalments until the year 2010 when he cleared the balance. There is nowhere in the agreement where it is stated that payment of the purchase price was to be made in full on the date of the agreement. The agreement produced by the defendant does not support the plaintiff's own pleadings or evidence. A party is bound by his pleadings and the court cannot allow a party to depart from his pleadings. I therefore find that the entire purchase price was not to be paid either once or within one month.
7. The defendant was put in possession of the suit land in 2009. This is after a person who had leased the land from the plaintiff moved out. The defendant fenced the land and planted trees on half an acre and utilized the other 1½ acres for farming. As at the time the plaintiff sold his land to the defendant, he had not obtained title to the same. The plaintiff obtained title on 4.12.2012 as per copy of title deed he produced as plaintiff's exhibit 1. The defendant has been in possession with full knowledge of the plaintiff. The plaintiff had thus created an implied or constructive trust in favour of the defendant who had paid the entire purchase price and was only awaiting to be taken before the land control board for consent. Instead of the plaintiff taking the defendant before the board on obtaining title, he instead kicked out the defendant and filed this suit in court seeking the reliefs enumerated at the beginning of this judgement.
8. In the case of Macharia Mwangi Maina & 87 others vs Davidson Mwangi Kagiri Nyeri civil Appeal No.6 of 2011 the High Court had ordered eviction of the appellants and enjoined them from encroaching on LR.No.6324/10 which was registered in the name of the respondent. The appellants had bought parcels of land from the respondent but the transactions did not receive the consent of the land control board. The appellants appealed to the court of Appeal which set aside

the judgment of the High court holding that the respondents had created an implied or constructive trust in favour of the appellants which trust could not be defeated even though no consent of the land control board had been obtained.

This judgment is on all fours with the present case. The plaintiff herein had sold 2 acres to the defendant who was put in possession. The plaintiff is now seeking for a declaration that the defendant has no proprietary interest in the land and that he should be restrained from utilizing it. The Court of Appeal in the above case had this to say regarding constructive trust:-

“ It is our considered view that the respondent created an implied or constructive trust in favour of those persons who had paid the purchase price pending the sale of all the 240 plots. In Mwangi & another -vs- Mwangi (1986) KLR 328, it was held that the rights of a person in possession or occupation of land are equitable rights which are binding on the land and the land is subject to those rights; the absence of any reference to the existence of a trust under section 126 (1) of the Registered Land Act is merely permissive and not mandatory. In Mutsonga – vs- Nyati (1984) KLR 425 and Kanyi -vs- Muthiora (1984) KLR 712, it was held that the equitable doctrines of implied, constructive and resulting trusts are applicable to registered land by virtue of section 163 of the Registered Land Act which provides for the application of the common law of England as modified by equity. In Yaxley -vs- Gotts & another, (2000) Ch 162, it was held that an oral agreement for sale of property created an interest in the property even though void and unenforceable on the basis of a constructive trust or proprietary estoppel. In the instant case, it was the respondent who put the appellants in possession of the suit property not as licensees but with the intention that he was to transfer individual plot purchased by them. The respondent went ahead and received the purchase price. We are of the considered view that the doctrines of proprietary estoppel and constructive trust are applicable and respondent cannot renege. As Lord Bridge observed in Lloyds Bank PLC – vs – Rosset (1991) 192, 107,132 a constructive trust is based on “ Common intention.” which is an agreement, arrangement or understanding actually reached between the parties and relied on and acted by the claimant. In the instant case, there was a common intention between the appellants and the respondent in relation to the suit property. Nothing in the land control Act prevents the claimants from relying upon the doctrine of constructive trust created by the facts of the case .The respondent all along acted on the basis and represented that the appellant were to obtain proprietary interest in the suit property. Constructive trust is an equitable concept which acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner by defeating the common intention. As was stated by Lord Reid in Steadman -vs- Steadman (1976) Ac 536 at 540,

“ If one party to an agreement stands by and lets the other party incur expense or prejudice his position on the faith of the agreement being valid , he will not then be allowed to turn around and assert that the agreement is unenforceable.”

9. The above court of Appeal decision was quoted with approval in a subsequent decision of the same court in Kisumu court of Appeal Civil Appeal No.3 of 2014 between Sammy Likunyi Adiema and Charles Shamwati Shisikani where it was held as follows:-

“ Before we conclude this judgement, we venture to state that even if the respondent had not invoked the limitation of Actions Act, he would have succeeded on the basis of constructive trust. In the case of Macharia Mwangi Maina & 87 others -vs- Davidson Mwangi Kagiri (2014) eKLR, we held that the appellants who were purchasers of portions of the suit land and had been put in possession of the said portions by the respondent, were protected by section 30(g) of the Registered Land Act. The act of the respondent, we held had created an overriding interest in favour of the appellants in relation to those portions of land.”

DETERMINATION

10. Having found that the plaintiff's action of receiving full purchase price and putting the defendant in possession created a constructive trust in favour of the defendant, I find that the plaintiff's claim cannot be sustained. The same is hereby dismissed with costs to the defendant. On the

other hand, I find that the defendant is entitled to an order of specific performance. Consequently, I enter judgement in favour of the defendant in the counter-claim as follows:-

- a) An order of specific performance requiring the plaintiff to execute all necessary documents to effect transfer of two acres to the defendant out of LR.No.Kaplamai/Sirende Block 1/Kiplongon/60 failing which the Deputy Registrar of this court to do so on his behalf.
- b) The plaintiff shall pay the costs of the suit to the defendant as well as costs of the counter-claim.

Dated , Signed and delivered at Kitale on this 5th day of May 2015.

E. OBAGA

JUDGE

In the presence of Mr. Wafula for Mr. Katama for defendant and M/s Arunga for Plaintiff. Court Clerk - Isabellah.

E. OBAGA

JUDGE

5.5.2015