



Boen ((Suing As A Personal And Legal Representative Of The Estate Of The Late Jacob Koboeno Rono, Ad Litem)) v Kiplimo (Environment and Land Appeal E005 of 2022) [2024] KEELC 1623 (KLR) (14 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1623 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT AND LAND APPEAL E005 OF 2022
MN MWANYALE, J
MARCH 14, 2024**

BETWEEN

**THOMAS KIRWA BOEN APPELLANT
(SUING AS A PERSONAL AND LEGAL REPRESENTATIVE OF THE ESTATE
OF THE LATE JACOB KOBOENO RONO, AD LITEM)**

AND

JONAH KIPLIMO RESPONDENT

JUDGMENT

1. It is the Appellant's, Thomas Kirwa Boen, position in this Appeal and as before the Trial Court that the agreements for sale dated 12th January 2008, 19th January 2008, 2nd October 2008, 19th May 2009 and 6th September 2011 are null and void for offending the provisions of Section 6 and 8 of Land Control Act there big no consent to transfer from the Land Control Board.
2. The Trial Court, Honourable D. A. Ocharo Principal Magistrate having found and held otherwise provoked this appeal in which the Appellant through Messrs. Rotich Langat and Partners Advocates vide the Memorandum of Appeal dated 1st July 2022 penned 8 grounds of appeal and sought orders that;
 - a. the This appeal be allowed in favour of the Appellant.
 - b. The judgment and decree in Kapsabet Principal Magistrate Court Environment and land case No. 18 of 2019 be reviewed and or set aside and in lieu therefore this Honourable Appellate Court do award a favorable judgment to the Appellant.
 - c. The appellant be awarded the cost of this appeal and in lieu therefore this Honourable Appellate Court do award a favorable judgment.



- d. Any other order that this Honourable court deems just and expedient to grant.
3. The 8 grounds of Appeal raised in the Memorandum of Appeal can be condensed into four grounds to wit;
 - i. that, the Honourable Learned Magistrate erred in fact and in law in disregarding the Plaintiffs' pleadings and defence to counterclaim and more particularly by failing to decide on the effect of Section 6 and 7 of the Land Control Board Act.
 - ii. the Honourable learned Magistrate erred in fact and in law in disregarding the Appellants' Submissions and disregarding issues for determination in tandem with the pleadings and dismissing the appellant's case and ruling in favour of the respondents against the weight of the Evidence and the law and applying wrong principles in determining the Appellant's disputes.
 - iii. the learned Trial Magistrate misdirected himself on the provisions of section 26 and 27 of the *Land Registration Act, 2012* on determination of Appellant's disputes against the Respondents.
 - iv. the learned Trial Magistrate erred in law and fact by failing to give a concise determination and reasons for his judgment as the entire judgment runs against the weight of the evidence on record and lacks clarity, reasoning and merit and the Appellant's constitutional rights to property, rights to fair trial and right to be heard were offended.
 4. On the strength of the above grounds the Appellant sought for the orders set out at paragraph 2 above.
 5. The record of Appeal was filed on 24th February 2023, and an application for substitution was filed as the original Appellant Jacob Kiboen Rono had passed on and was substituted by Thomas Kirwa Boen and a supplementary record of appeal was filed to reflect the new Appellant pursuant to the substitution.
 6. The Appeal was admitted for hearing and directions issued for canvassing of the same vide written submissions, at which point the Appellant instructed the firm of Sala and Mudany to Act alongside the firm of Rotich, Langat and Partners, while Duncan Tallam and Company Advocates continued appearing for the Respondents.

Appellants Submissions: -

7. The Appellant filed his submissions dated 29th January 2024, in his submissions the Appellant frames and submitted on 2 issues for determination, to wit,
 - a) whether the purported agreements dated 12/1/2008, 19/5/2009, 3/10/2008 and 6/9/2011 are valid or void thus unenforceable by operations of the law Section 6 and 7 of the *Land Control Act*.
 - b) whether the Plaintiff or the Defendant is entitled to the reliefs sought and the consequences of orders granted by this Court to both parties.
8. It is the Appellant's submissions in respect of issue number 1 above that at the time of filing of the counterclaim in the primary suit on 9th April 2019, around 10 years later, the agreements dated 12/1/2008, 19/5/2009, 3/10/2008 and 6/9/2011 were by then void and enforceable under the provisions of Section 6 and 8 of the *Land Control Act*.
9. The Appellants' Advocates in support of the submission has quoted both Section 6 and 8 and submits that since the respondent did not file any application for leave to obtain Land Control Board consent his



counter – claim cannot stand; since the failure to obtain the Land Control Board consents within 6 months, the agreements became void and unenforceable after 6 months.

10. In support of this limb of submissions the Appellant has cited the decision in the case of *Leonard Njonjo Kariuki v Njoroge Kariuki alias Benson Njonjo* C.A. No. 26 of 1979, as well as *Kariuki v Gitura* (1981) KLR 247, and *Kariuki v Kariuki* 1983 KLR 225.
11. The Appellant submits that the Respondent is entitled to a refund of his monies as provided for under Section 7 of the *Land Control Act* and since he did not plead for the same he is not entitled to the same as it would be time barred under Section 4 of the Limitation of Action Act submits the Appellant.
12. On the strength of the above the Appellant’s submits for dismissal of the counter claim and allowing the Plaintiffs suit.

Respondents Submissions: -

13. In his submissions the Respondent has framed two issues for determination.
 - a. Whether there exists Agreements for Sale between the Appellant and the Respondent.
 - b. Whether the Agreements for Sale are enforceable or unenforceable by operation of law by virtue of Section 6, 7 and 8 of the Land Control Board Act.
14. On issue number 1 the Respondent submits that there existed agreement for sale which the Respondent purchased a total 0.9 acres out of Nandi/Kaboi/841 and the Respondent took possession of the entire portion of 0.9 acres and planted tea on it. The Agreements of Sale were produced as D Exhibits 1 (a – d) and the Respondent thus met the evidentiary burden of proof as provided under Section 107 of the *Evidence Act*.
15. Since there was no contest as to agreements being forged and to their validity, so submits the Respondent, the fact of the sale of the portion measuring 0.9 acres was thus proven at the trial.
16. With regard to issue number 2, the Respondent submits that the full purchase price having paid, the Appellant allowed a survey to be made and allowed the Respondent to take possession of the 0.9 acres this he created a constructive trust as was held in the decision in the case of *Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagiri* (2017) eKLR which the Respondent places reliance on.
17. The Respondent further submits placing reliance on the decision in *Aliaza v Saul* (Civil Appeal) that the doctrine of constructive trust is meant to restore property to the rightful owner and to prevent unjust enrichment; thus, the agreements for sale are valid, legal and enforceable and urges the Court to uphold the decision of the Trial Court.
18. In submitting so, the Respondents has additionally placed reliance on the decision in
 - i) *Wily Kimutai Kitilit v Michael Kibet* (2018) eKLR and
 - ii) *Kiplagat Kotut v Rose Jebor Kipngok* (2019) eKLR

Issues for Determination: -

19. Before framing the issues of determination, a number of issues of uncontested issues were settled at the trial Court, and are deemed settled herein.
 - i. The original Appellant Jacob Kiboen Rono is the Registered proprietor of all that parcel of land known as Nandi/Kaiboi/841 Measuring 5.98 Ha



- ii. It is also common ground as was pleaded by the Appellant at paragraph 5 of his plaint, that the Respondent is occupying 0.90 acres within Nandi/Kaboi/841, a fact also alluded at paragraph 6 of the Defence and Counter claim.
20. Having perused the Record of Appeal, and the submissions of the parties, the Court frames the following as issues for determination.
- a. What is the nature of the transaction between the original Appellant and Respondents, was it a sale transaction as pleaded by the Respondent or a lease transaction as alleged by the Appellant
 - b. If the transaction is a sale transaction or a lease transaction is it unenforceable by virtue of Section 6 and 8 of the *Land Control Act*, as submitted by the Appellant, or is it enforceable under constructive trust as submitted by the Respondents.
 - c. What reliefs ought to issue?
 - d. Who bears the costs of the appeal?

Analysis and Determination: -

21. This being a first Appeal it is incumbent on this Court as was stated by the Court of Appeal in its decision in the case of *Selle v Associated Motor Boat Company Limited* to reevaluate and analyses the evidence before the trial Court so as to reach an Independent conclusion.
22. In his plaint the original Appellant Jacob Kiboen Rono at paragraph 4 and 5 of his plaint pleaded that he had leased out 0.90 acres to Jonah Kiplimo the Defendant now Respondent, but Jonah Kiplimo has now alleged to have purchased the said 0.90 acres.
23. It was the original Appellant's testimony as PW1, that he had not sold the parcel but had leased and there was no written agreement, PW2 Wilfred Kiptabei Boen, also alluded to the lease but stated that there was no lease agreement. This is what the Plaintiff and his witness stated about the lease and the Appellant produced a copy of the title of Nandi/Kaboi/841 in evidence.
24. On his part the Defendant now Respondent in his Defence and counterclaim, pleaded the existence of the agreements for sale and he produced 4 agreements for sale as well as a letter requesting the Appellant to attend the Land Control Board. The Respondent stated that he had utilized the property since 2008 when he planted tea.
25. Both the Appellant and Respondent being the Plaintiff and Defendant in the trial court were required to adduce evidence under section 107 of the *Evidence Act* in support of the plaint and in support of the counterclaim.
26. The Appellant failed to produce the lease arrangement with the defendant and denied the existence of any written Agreement. the Respondent on his part, produced a total of 4 Agreements sale dated on various dates and a letter requiring the Appellant to attend the Land Control Board for purposes of obtaining a consent.
27. The trial Court did find the existence of the Agreement for sale and agreed with the Respondent but did not assign any reasons for the same. Having evaluated the evidence before trial Court the above, I find that the Appellant did not discharge his evidentiary burden on the existence of a lease, while the Respondent by producing a total of 4 agreements for sales as well as a letter requiring attendance for purpose of obtaining consent to transfer, thus discharged his evidentiary burden under Section 107 of the *Evidence Act*, and the Court returns a finding that the transaction between the Appellant and the



Respondent for the reasons advanced above was a sale transaction as pleaded in the counter claim as opposed to a lease transactions pleaded in the Plaintiff.

28. Thus, in answer to issue number 1 the transaction between the Appellant and the Respondent was a sale transaction, and the court shall now examine the enforceability or non-enforceability of the Agreement for the sale.
29. It is the Appellant position and submissions which forms the Gravari an of the Appeal that the Agreements for sale between the Appellant and the Respondent are unenforceable for lack of LCB consent thus in breach of Sections 688 of the *Land Control Act*. In support of this limb of submissions the Appellant has cited the authorities set out at paragraph 10 of this judgment.
30. The Respondent's position is that the Agreements for Sale are enforceable since having paid the full purchase price and taken possessions a Constructive Trust was created and the Respondent has placed reliance on the decisions set out at paragraphs 16 and 18 of this judgment.
31. At paragraph 19 of this judgment the court noted that it is unconsted fact that the Respondent is occupying 0.90acres within Nandi /Kaiboi /841 having planted tea thereon, as pleaded at paragraph 5 of the Plaintiff and alluded at paragraph 6 of the Defence and Counterclaim.
32. Having found that there was a sale transaction between the original Appellant and the Respondent, the occupation of the Respondent on the 0.90 acres by way of planting tea must thus be deemed to have been pursuant to the agreements for sale.
33. Was this agreement for sale thus void and unenforceable by virtue of Section 6 and 8 of the *Land Control Act*?
34. In the impugned judgment the Trial Court did not address itself on the imports of the said Sections, and neither did the Court give reasons for finding the existence of a sale transaction between the Appellant and the Respondent.
35. Having re-evaluated the evidence and having found the existence of a sale transaction, this Court must thus answer the import of Section 6 and 8 of the *Land Control Act* as it ought to have firstly been addressed by the trial Court, and secondly the same being an issue for determination framed by the parties in this Appeal as well as the Court itself.
36. The authorities cited by the Appellant on the interpretation of Section 6 and 8 of the *Land Control Act* give the pre-2010 constitution position, while the authorities cited by the Respondent give the post 2010 constitution position.
37. The pre-2010 constitution decisions favored unenforceability of an agreement for sale, where parties did not obtain the Land Control Board consent to transfer while the post 2010 constitution decisions do infer an existence of a constructive trust, where there was full payments of the purchase price and the purchaser has taken possession.
38. In arriving at the above conclusion, I am guided by the decision in *Macharia Mwangi Maina and 87 others v Davidson Mwangi Kagiri* 2014 eKLR, were at paragraph 22 the Court of Appeal states as follows; -

“we take note that the judicial decisions cited by the Respondent were all made prior to the promulgation of the 2010 Constitution of Kenya and before the overriding objectives principles were enacted in the *Appellate jurisdiction Act* chapter 8 laws of Kenya.....”



39. At paragraph 29 of the said decision the Court went further to observe as follows;

“The totality of our re-evaluation of the facts and applicable law in this case leads us to conclude that the Honourable Judge erred in failing to consider that the Appellants were in possession of the suit property, that the Respondent had created a constructive trust in favour of all individuals who had paid the purchase price for the respective plots and the Trial Court erred in failing to note that the consent of the Land Control Board is not required where a trust is created in agricultural land.....”

40. The above position was reiterated in the *Wily Kimutai Kitilit v Michael Kibet* (2018) eKLR decision cited by the Respondent, at paragraph 26 of the said decision the Court observed as follows; “for the reasons in paragraphs 20, 21, 22, 23, 24 and 25 above we are in agreement with the Macharia Mwangi Maina decision that the equitable doctrines of constructive trust and proprietary estoppel and applicable and enforceable to land subject to the *Land Control Act*, though this is subject to the circumstances of the particular case. Upon the application of the equitable doctrines, the Court in its discretion may award damages and where damages are an inadequate remedy grant the equitable remedy of specific performance.....”

41. The *Macharia – Mwangi Maina* and the *Willy Kimutai* decision were followed in the Court of Appeal in its subsequent decisions in *George Chayunga Aliaza v Zephania Khisa Saul* 2022 eKLR as well as in *Kiplagat Kotut v Rose Jebor Kipngok* 2019 eKLR.

42. Additionally, the *Macharia – Mwangi Maina* and the *Willy Kimutai Kitilit* decisions have now been cited with approval by the Supreme Court in its decision rendered on 28th December 2023 in the case of *Amind Sha and others v Mombasa Bricks and Tiles Limited*, where the Court stated inter alia “in *Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagiri* Civil Appeal No. 6/2021 consolidated with No. 26 and 27 of 2011 (2014) eKLR and in *Willy Kimutai Kitilit v Michael Kibet* civil Appeal No. 2015 (2018) eKLR, the Court of Appeal in matters involving the sale of land held that the equitable doctrines of constructive trust and proprietary estoppel are applicable and enforceable to land, subject to circumstances of the case.

78. The applicability of the doctrine of Constructive Trust is therefore now settled within out jurisdiction and is applied to land sale transaction.”

43. From the above decision, doctrine of Constructive Trust applies as an exception to Section 6 and 8 of the *Land Control Act* depending on the circumstances of each case.

44. What then are the circumstances of this case? The circumstances of this case is presented by the unconsted facts as set out at paragraph 19 of this judgment, where the Court noted that it is undisputed that the original Appellant Jacob Kiboen Rono (now deceased) is the registered proprietor of all that parcel of land know as Nandi/Kaiboi/841 measuring 5.98 Ha and that the Respondent has taken possession of 0.90 acres in the said parcel by planting tea and the Court having returned a finding that the transaction between the original Appellant and the Respondent was a sale transaction in view of the agreements for sale which was agricultural land the circumstances thus reveal the existence of a constructive trust as was defined in the Macharia – Mwangi Maina decision; where the Court held at paragraph 25 “ the transaction between the parties is to the effect that the Respondent created a constructive trust in favour of all persons who paid the purchase price....”

45. Similarly, the Court finds in that in the circumstances of this case, the original Appellant by giving possession to the Respondent and receiving the purchase price created a Constructive Trust.



46. Among the grounds of Appeal penned by the Appellants is that the Learned Magistrate did not give the reasons behind allowing the counterclaim and to that extent I agree with the Appellant and his Advocate but having re-evaluated the facts and evidence on record, I agree with the conclusion reached by the Trial Court for reasons that having found the existence of a constructive trust, the same is an exception to Section 6 and 8 of the Land Control Act and the agreements were thus enforceable.
47. As observed at paragraph 40 of this judgment, in the Willy Kitilit decisions, the Court had observed that, “upon the application of the equitable doctrines, the Court in its discretion may award damages and here damages are an inadequate remedy grant the equitable remedy of specific performance.”
48. In the counterclaim, the Respondent as the Plaintiff thereof had at paragraph 6 and prayer 1 sought for a subdivision and transfer of 0.9 acres out of Nandi/Kaiboi/841 to him. This essentially was a prayer for specific performance, which the Court could and was right to award.
49. In the plaint and Defence to the Counterclaim, the Appellant had pleaded at paragraph 6 of the plaint that the Defendant’s claim was time barred by virtue of Limitation of Action Act and in his submissions, the Appellant had submitted the suit to be time barred by Section 4 (i) of the Limitation for Action Act.
50. This being a legal issue that was not considered by the Trial Court, but has come up as the Court re-evaluate the facts, evidence and submission before the trial Court, it is incumbent for the Court to make a determination on it, so as to make a finding as to whether the remedy of specific performance was rightfully available to the Respondent or was time barred; thus not available.
51. As observed at paragraph 43 and 45 of this judgment, the circumstances of this case reveal to existence of a constructive trust. Having found the existence of a trust, the counterclaim would be excepted under Section 20 (i) of the Limitation of Actions Act, and the remedy of the specific performance was available to the Respondent, and this Court thus agrees with the conclusion reached by the Trial Court as the Appeal herein is not merited for the reasons advanced and the same is destined to fail as it does here with a thud, the same having being dismissed with costs.

Disposition:-

52. The Appeal is hereby dismissed and the judgment of Hon. D. A. Ocharo Principal Magistrate delivered on 8th day of June 2022 in Kapsabet Environment and Land Case No, 18/2019 between Jacob Kiboen Rono v Jonah Kiplimo is hereby upheld.

Costs of the Appeal and costs in the Lower Court matter are awarded to the Respondent.

JUDGMENT, DELIVERED AND DATED AT KAPSABET THIS 14TH DAY OF MARCH 2024.

HON. M. N. MWANYALE,

JUDGE

In the presence of;

1. Mr. Sala for the Appellant
2. Mr. Wanjohi holding brief for Mr. Rotich appearing alongside the firm of Sala and Munday for Appellant
3. No appearance for Mr. Tallam for Respondent

