



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: GITHINJI, J. MOHAMED & OTIENO-ODEK, JJA)

CIVIL APPEAL No. 31 of 2015

BETWEEN

KIPLAGAT KOTUT.....APPELLANT

AND

ROSE JEBOR KIPNGOK.....RESPONDENT

(Being an appeal from the judgment and decree of the Environment and Land Court (S. Munyao J.) delivered on 27th November 2014

in

ELC Case No. 35 of 201

formerly

Eldoret HCCC No. 35 of 2011)

JUDGMENT OF THE COURT

1. The appellant, **Kiplagat Kotut**, filed suit against the respondent **Rose Jebor Kipngok**, for specific performance of a contract for sale of land. By agreement dated on 31st January 2000, the respondent agreed to sell to the appellant all that freehold land known as LR No. Plateau/Plateau Block 2 (Uasin Gishu) 63 at a price of Ksh. 700,000/= (hereinafter referred to as the suit property). The sale was to be completed upon discharge of charge by **Agricultural Finance Corporation (AFC)**.

2. The appellant asserts that he performed all his obligations under the agreement and even paid the outstanding loan due to AFC; and that he obtained consent to transfer the land dated 11th January 2001 from the Land Control Board. It was a term of the agreement that upon completion of payment of the loan due to AFC, the respondent should transfer the suit property to the appellant. In the suit, it is contended that notwithstanding performance of all his obligation, including payment of the loan due to AFC, the respondent has failed and or refused to transfer the property to the appellant. As a consequence, the appellant filed suit before the Environment and Land Court seeking an order for specific performance to compel the respondent to transfer the property. An alternative prayer was for the Deputy Registrar to execute the instrument of transfer in favour of the appellant.

3. The respondent filed a defence and counterclaim to the suit. She admitted entering into an agreement to sell the suit property to the appellant. In the counterclaim, it is averred that the appellant did not pay the entire purchase price; that a balance of Ksh. 70,000/= together with interest is outstanding. In the defence, it is alleged that the appellant fraudulently acquired the consent of the Land Control Board. The particulars of the fraud are pleaded *to wit* the consent of the Land Control Board was obtained without authorization and participation of the respondent; the consent was obtained when the property was charged to AFC. In the counterclaim the respondent prayed for a declaration that the sale transaction between the parties was a nullity as the consent of the **Land Control Board** was irregularly obtained. An additional prayer is that the appellant be refunded his deposit and be evicted from the suit property.

4. Upon hearing the parties, the trial judge dismissed the claim for specific performance and granted the prayers in the counterclaim. The judge made the following orders:

“(a) *The sale agreement dated 31st January 2000 between the plaintiff and defendant over land parcel Plateau/Plateau Block 2*

(Uasin Gishu) 63 cannot be enforced for want of a valid consent of Land Control Board, the consent having been applied for and obtained outside the 6 months of the agreement, and the said agreement is hereby declared null and void.

(b) The plaintiff's remedy is to claim a refund of the money paid under the transaction, but this court is unable to make any determination on this point as no evidence was tabled on the exact amount of money paid under the transaction. The plaintiff is at liberty to file a separate claim for this and the claim if and when filed, will be determined on its merits.

(c) The defendant is entitled to vacant possession of the land parcel Plateau/Plateau Block 2 (UASIN GISHU) 63 and the plaintiff is hereby ordered to vacate the suit land within 30 days from the date hereof. In default, the defendant is at liberty to apply for an ordered of eviction.

(d) There shall be no order as to costs."

5. Aggrieved by the judgment of the trial court, the appellant has lodged the instant appeal citing the following abridged grounds of appeal:

(i) The judge erred in failing to consider and determine the entire evidence on record.

(ii) The judge erred in considering matters not pleaded by the parties in their pleadings and canvassing his own matters in the judgment.

(iii) The judge erred in failing to appreciate the appellant's evidence in its entirety.

(iv) The judge erred in finding the consent of the Land Control Board was obtained outside time yet the issue was neither specifically pleaded nor canvassed during trial.

(v) The judge erred in finding the sale agreement between the parties was void despite the appellant being in possession of the suit property.

(vi) The judge erred in failing to consider the respondent had confirmed selling the suit property and receiving the entire purchase price and placing the appellant in possession thereby creating a constructive trust in favour of the appellant.

(vii) The judge erred in making a finding on an incompetent and defective counterclaim.

(viii) The judge erred in failing to take into consideration matters he ought to have considered and took into account matters he ought not to have considered.

6. At the hearing of this appeal, learned counsel Mr. J. K. Korir appeared for the appellant while learned counsel Mr. P. K. Kibii appeared for the respondent. Both parties filed written submissions and list of authorities.

APPELLANT'S SUBMISSION

7. Counsel while rehashing background facts reiterated the appellant's case that he purchased the suit property from the respondent vide a sale agreement dated 31st January 2000. It was submitted that the judge erred in finding the sale agreement void for want of a valid consent from the Land Control Board. It is contended that the judge ignored the fact that the appellant was put in possession of the suit property by the respondent and the purchase price was paid in full. Counsel opined that the judge erred and ignored the fact that the respondent had admitted in evidence that she sold the suit property to the appellant. It was submitted that upon being put into possession, a constructive trust was created between the appellant and respondent. In support of submission on constructive trust, the appellant cited the decision of this Court sitting at Nyeri in **Macharia Mwangi Maina & 87 Others - v- Davidson Mwangi Kagiri (2014) eKLR**. Counsel also cited the decision of this Court sitting in Eldoret in **Willy Kimutai Kitilit -v- Michael Kibet Civil Appeal No. 51 of 2015**. In these aforesaid cases, the doctrine of constructive trust and proprietary estoppel was applied to bar a vendor of property (who has put the purchaser in possession) from asserting any claim to the property. Counsel submitted that in the instant matter, the judge erred in failing to apply the doctrine of constructive trust and proprietary estoppel.

8. The appellant further faults the trial judge for delving into and making an erroneous determination on validity of the consent obtained from the Land Control Board. It was submitted that the contestation that the consent was applied for outside the six (6) month statutory period was never specifically pleaded as required by **Order 2 rule 4 of the Civil Procedure Rules**; that the issue of validity of the consent was never canvassed by the parties during trial; and the judge erred in raising the issue and making a determination thereon without hearing the parties.

RESPONDENT'S SUBMISSION

9. The respondent in her written submission similarly rehashed background facts of the case. Centering on the validity of the consent of the Land Control Board, counsel submitted that there is clear and ample evidence that the issue of the consent having been obtained outside the six-month period was pleaded and canvassed before the trial court; that during cross-examination and in their respective written submissions, both parties addressed the trial court on the issue. Citing the case of **Samwel Kiplimo Rono -v- Thomas Auta Marita & another [2013] eKLR**, it was submitted that the consent of Land Control Board had to be applied for within six months from the date of the sale agreement. Counsel recapped that the suit property is agricultural and consent of the Land Control Board is mandatory. Quoting **Section 8 (1) of the Land Control Act**, it was that submitted failure to apply for consent within the requisite six months renders the sale agreement null and void. (See also **Hirani Ngaithe -v- Wanjiku Munge [1979] KLR 50 at 52**).

10. On the issue of constructive trust, the respondent submitted that the same was neither pleaded nor canvassed before the trial court; that it is not open to the appellant at this stage to raise new issues; and that the appellant cannot litigate outside the scope of the pleadings filed before the trial court. The respondent recalled that this Court in two pivotal decisions namely **Macharia Mwangi Maina & 87 Others - v- Davidson Mwangi Kagiri (2014) eKLR** and **Willy Kimutai Kitilit v- Michael Kibet Civil Appeal No. 51 of 2015** held that constructive trust and the doctrine of estoppel apply in vendor-purchaser sale transactions despite lack of consent of the Land Control Board. Counsel distinguished the decisions. It was urged that the case of **Willy Kimutai Kitilit** (supra) is distinguishable as consent of the Land Control Board was not required as the vendor had not obtained title to the suit property at the time the sale agreement was entered into. The case of **Macharia Mwangi** (supra) was distinguished on the basis that the consent of the Land Control Board was not required as the vendor had to wait for all plots to be sold. Citing the case of **David Sirongo Ole Tukai -v- Francis arap Muge (2014) eKLR, Nairobi Civil Appeal No. 76 of 2014** counsel submitted that the principles of equity cannot contradict express statutory provisions, in this particular case the provisions of the **Land Control Act, Cap 302** of the Laws of Kenya. Counsel urged us to find the instant appeal has no merit and should be dismissed.

ANALYSIS

11. This is a first appeal. We have considered rival submissions by counsel and examined the record of appeal and the authorities cited. Being a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions in the matter. In **Selle -vs- Associated Motor Boat Co., [1968] EA 123**, it was stated:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E. A. C. A. 270).”

20. After analyzing the grounds of appeal urged in this matter, two issues stand out for consideration and determination. Most of the grounds urged are repetitive and can be summarized thus: that the trial judge erred in his evaluation of evidence on record. The other pivotal issue is whether the judge erred in arriving at the conclusion that the sale agreement between the parties was null and void for want of a valid consent from the Land Control Board.

21. We have carefully analyzed the judgment of the trial court and evaluation of the evidence on record. The learned judge correctly considered all factual issues and contestations raised by the parties. For instance, the learned judge evaluated whether the appellant paid the sum of Ksh. 700,000/= that was the purchase price for the suit property. The trial judge expressly made a finding and expressed *“for sure, there is the payment of Ksh. 700,000/=acknowledged in the agreement but I cannot tell the other sums paid by the appellant to AFC.”* The judgment by the trial court shows the judge made a determination and held that on a balance of probabilities, the sum of Ksh. 700,000/= was paid to the respondent on execution of the sale agreement.

22. As to whether the respondent executed the sale agreement, we are satisfied that the trial judge correctly weighted and analyzed the evidence and made a finding that the respondent executed the sale agreement and acknowledged receipt of payment. In arriving at the conclusion, the learned judge aptly stated that the respondent *“executed the agreement which contained the clause that she had been paid and acknowledges receipt, she is now estopped from attempting to renege from that clause.”*

23. On the issue of fraud, we are satisfied the trial judge appropriately evaluated the evidence and stated that the respondent *“has not in any way pleaded that the agreement is a fraud, or is vitiated by other factors, which would have entitled this court to nullify the agreement. She is therefore bound by the terms thereof.”*

24. In this appeal, it is urged that fraud was not specifically pleaded in the counterclaim lodged by the respondent. We have examined the Defence and Counterclaim as filed. One of the particulars of the alleged fraud is that the consent of the Land Control Board was obtained irregularly; that the appellant obtained the consent without authorization and participation of the respondent. Our reading of the Defence and Counterclaim shows fraud was pleaded and particulars given. We find the trial court did not err in making a determination premised on the allegations of fraud.

25. We now consider the contestation relating to validity of the consent of the Land Control Board obtained by the appellant. This is the fulcrum of this appeal. The appellant contends that the trial judge erred in finding that the sale agreement between the parties was null and void for want of consent of the Land Control Board within six months as stipulated in **Section 8 (1)** of the **Land Control Act**. An application for consent of the Land Control Board is to be made within six months of the making of a sale agreement by any party thereto provided that for sufficient reason, the High Court may extend the period.

26. The learned judge in arriving at the determination that the sale agreement dated 31st October 2000 was null and void expressed as follows:

“The agreement of the parties is dated 31st January 2000. Six months expired on 31st July 2000. It is within this period that the application for consent needed to be made. There was no application made to the High Court to extend time. Instead, the application was made on 28th December 2000 and probably lodged on 11th January 2001, which is the date given in the consent. This was clearly outside the time frame provided by law. The same contravened the provisions of Section 8 of the Land Control Act and cannot be allowed to stand. On this point, the law is clear on the time required to obtain consent, it cannot be argued that a consent obtained in contravention of the law is a good consent.

I have no choice but to hold that no valid consent of the Land Control Board was ever issued as the application and consent

came outside the time stipulated by law without there being an extension by the High Court as required by law.

Having held that there was no valid consent of the Land Control Board, it follows that the plaintiff's claim must fail. I am unable to order specific performance on a contract that has been nullified by operation of law. The plaintiff's claim is therefore hereby dismissed."

27. We have deliberated on the reasoning by the trial court on validity of the consent of the Land Control Board. Certain pertinent facts are evident and proven from the record. It is indisputable that the sale agreement was entered into between the appellant and the respondent; pursuant to the agreement, the respondent received the purchase price of Ksh. 700,000/= from the appellant. The trial judge correctly held that the respondent is estopped from reneging on the sale agreement. We agree with the judge and add that the doctrine of proprietary estoppel and constructive trust are applicable in the instant case and the respondent cannot renege from her contractual obligations as well as fiduciary duty imposed by law and equity. As Lord Bridge observed in **Llyods Bank Plc -vs- Rosset, (1991) 1 AC 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 on by a claimant.

28. In the instant case, the appellant is the claimant and there was a common intention between the appellant and the respondent in relation to the suit property. Nothing in the **Land Control Act** prevents the appellant 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 was to obtain proprietary interest in the suit property. As was stated by Lord Reid in **Steadman -vs- Steadman (1976) AC 536, 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".

21. Locally, in **Mwangi & another -vs- Mwangi, (1986) KLR 328**, it was held that the creation of a trust over agricultural land situated in a land control area, does not constitute any "other disposal or dealing" with the land within the meaning of **Section 6 (1) (a)** of the **Land Control Act** and therefore the consent of the local Land Control Board is not required. This position had earlier been applied in the case of **Gatimu Kinguru -vs- Muya Gathangi (1976) KLR, 253** where it was stated:

"The creation of a trust over agricultural land in a land control area does not constitute an "other disposal of or dealing" for the purpose of Section 6(1) of the Land Control Act and, therefore, does not require the consent of the local Land Control Board..."

22. This Court in **Willy Kimutai Kitilit** (supra) expressed as follows:

".....Since the doctrines of constructive trust and proprietary estoppel apply to oral contracts which are void and enforceable, in our view, and by analogy, they equally apply to contracts which are void and enforceable for lack of consent of the Land Control Board especially where the parties in breach of the Land Control Act have unreasonably delayed in performing the contract. However, whether the court will apply the doctrines of constructive and proprietary estoppel to a contract rendered void by lack of the consent of Land Control Board will largely depend on the circumstances of each particular case.

[24] There is another stronger reason for applying the doctrines of constructive trust and proprietary estoppel to the Land Control Act. By Article 10(2) (b) of the Constitution of Kenya, equity is one of the national values (emphasis supplied) which binds the courts in interpreting any law (Article 10(1) (b)). Further, by Article 159(2) (e), the courts in exercising judicial authority are required to protect and promote the purpose and principles of the Constitution. Moreover, as stated before, by virtue of clause 7 of the Transitional and Consequential Provisions in the Sixth Schedule to the Constitution, the Land Control Act should be construed with the alterations, adaptations, and exceptions necessary to bring it into conformity with the Constitution."

23. In **Isack M'Inanga Kiebia -v- Isaaya Theuri M'Lintari & another, Nyeri Civil Appeal No. 24 of 2014**, this Court expressed itself thus:

"Unless a trust is proved, the respondents have neither possessory nor occupational rights that can be protected as overriding interests... We hasten to add that to prove a trust in land; one need not be in actual physical possession and occupation of the land."

24. We hasten to state that the **Land Control Act, Cap 302** of the Laws of Kenya was never intended to be an instrument or statute for unjust enrichment. It was never meant to exempt a mala fide vendor from his contractual obligations. The statute comes to the aid of persons who act in good faith without taking undue advantage of the other party. It is not a statute aimed at aiding unconscionable conduct between the parties. It is in this context that the doctrine of constructive trust comes into play to **restore property to the rightful owner and to prevent unjust enrichment**. It prevents unconscionable conduct and ensures one party does not benefit at the expense of another.

25. Comparatively, in the Canadian cases of **Pettkus v. Becker, [1980] 2 S.C.R. 834** and **Soulos v. Korkontzilas, [1997] 2 S.C.R. 217**, it was held constructive trust may be imposed where three elements are present: (a) the enrichment of the defendant; (a) the corresponding deprivation of the plaintiff; and (a) the absence of a juristic reason for the enrichment. Constructive trust holds persons in different situations to high standards of trust and probity and prevent them from retaining property which in good conscience they should not be permitted to retain. It is in this regard that in this matter we find the respondent must be held to a high standard of trust and probity and in good conscience should not be allowed to keep the suit property.

26. Notwithstanding the foregoing, in this matter, there is no dispute the respondent put the appellant in possession of the suit property. The Supreme Court in Isack M’Inanga Kiebia vs. Isaaya Theuri M’lintari & another [2018] eKLR, **Petition No. 10 of 2015** expressed itself thus:

“[53] We also declare that, rights of a person in possession or actual occupation under Section 30(g) of the Registered Land Act, are customary rights. This statement of legal principle, therefore reverses the age old pronouncements to the contrary in Obiero v. Opiyo and Esiroyo v. Esiroyo. Once it is concluded, that such rights subsist, a court need not fall back upon a customary trust to accord them legal sanctity, since they are already recognized by statute as overriding interests.”

27. In this matter, the appellant sought to distinguish the decision of this Court in *Willy Kimutai Kitilit* (supra) by stating that the consent of the Land Control Board was not required as the vendor had not obtained title to the suit property at the time the sale agreement was entered into. The appellant also sought to distinguish the case of *Macharia Mwangi* (supra) submitting that consent of the Land Control Board was not required as the vendor had to wait for all plots.

28. We are not persuaded by the appellant’s distinction; the attempt to distinguish the two cases has no merit. The two decisions of this Court lay down general principles of law to be applied on a case by case basis. We see no good reason to depart from the aforesaid decision of this Court. We reiterate that the learned judge erred in law in failing to apply the concept of constructive trust and the doctrine of equitable estoppel in this matter.

29. In Peter Ndungu Njenga vs. Sophia Watiri Ndungu [2000] eKLR this Court expressed itself as follows:

“The concept of trust is not new. In case of absolute necessity, but only in case of absolute necessity, the court may presume a trust. But such presumption is not to be arrived at easily. The courts will not imply a trust save in order to give effect to the intention of the parties. (Emphasis supplied)

30. In the instant appeal, what was the intention of the parties? The appellant and respondent entered into a sale agreement over the suit property; the purchase price was paid; the respondent put the appellant into possession of the property; both parties acted on the sale agreement and altered their respective positions. As correctly held by the trial judge, the respondent cannot renege on the agreement; the doctrine of proprietary estoppel bars her from doing so. In our considered view, the intention of the parties was to buy and sell the suit property. The appellant was to purchase, the respondent was to sell. Inescapably, the facts of this case bring to fore the maxim that equity treats as done that which ought to be done. The function of the maxim was given in *Re Anstis* [1886] 31 Ch D 596 where it was stated if parties have entered into a contract that is specifically enforceable, equity will treat the contract as having been performed. The maxim is often relevant where land is transferred between parties but formalities have not been observed. In such a situation, the legal title will remain with the vendor and the purchaser will have a recognized title in equity. Thus, the vendor is holding the property on a constructive trust for the purchaser.

31. In this matter, the respondent submitted that there is no place for the equitable doctrines of constructive trust and proprietary estoppel in light of the express provisions of **Section 8 (1)** of the **Land Control Act**. We disagree. As was stated in *Willy Kimutai Kitilit -v- Michael Kibet* (supra) under **Article 10(2) (b)** of the Constitution of Kenya, **equity** is one of the national values (**emphasis supplied**) which binds the courts in interpreting any law (**Article 10(1) (b)**). We hold that it is the Constitution through **Article 10 (2) (b)** that provides the legal framework that underpin the application of equity in dispute resolution. The contestation that equity cannot override the express provisions of statute is an anachronism inconsistent with **Article 10 (2) (b)** of the 2010 Constitution.

32. For the foregoing reasons, we find the learned judge erred in law in failing to consider and apply the doctrine of proprietary estoppel and constructive trust in this matter. Having fallen into error, the judge arrived at a wrong decision in finding that the sale agreement between the parties was null and void. We have no option but to set aside in entirety the judgment of the Environment and Land Court dated 27th November 2014. Having set aside the judgment, it follows that the respondent’s counterclaim as stated and prayed for in the Defence and Counterclaim dated 31st January 2012 be and is hereby dismissed.

33. The final orders of this Court is that this appeal has merit and is hereby allowed. The prayers sought in the Plaintiff dated 4th March 2011 be and are hereby granted. For avoidance of doubt, we hereby issue an order for specific performance compelling the respondent to execute the instrument of transfer and transfer the suit property LR No. Plateau/Plateau Block 2 (UASIN GISHU) 63 to the appellant. In default, we hereby direct and order the Deputy Registrar to execute the instrument of transfer whereof the same shall be deemed sufficient to effect transfer of LR Plateau/Plateau Block 2 (UASIN GISHU) 63 in favour of the appellant. The respondent shall bear costs in this appeal and costs before the Environment and Land Court. It is so ordered.

Dated and delivered at Eldoret this 7th day of March, 2019.

E.M. GITHINJI

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR