



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: GITHINJI, OKWENGU, & J MOHAMMED JJ. A)

CIVIL APPEAL NO. 94 OF 2015

BETWEEN

FLORENCE ASAMI AGORO.....1ST APPELLANT
JACKTON OINDI AGORO.....2ND APPELLANT
RAPHAEL AMUKUYI AGORO.....3RD APPELLANT
REUBEN MAKANGA AGORO.....4TH APPELLANT
CHARLES LUKOSE AGORO.....5TH APPELLANT
ELPHAS MBAYI AGORO.....6TH APPELLANT

AND

SAMUEL OYINDI AGORO.....1ST RESPONDENT
ALLOYSIUS G WANDA.....2ND RESPONDENT
PAMELA KAVOKA WANDA.....3RD RESPONDENT

(Being an Appeal against the Judgment and decree of the High Court of Kenya at Busia (Kibunja, J) delivered on 30th July 2015

in

ELC No 25 of 2012)

JUDGMENT OF THE COURT

BACKGROUND

1. This is a first appeal from the judgment of the High Court at Busia (Kibunja J), where **Florence Asami Agoro** (the 1st appellant), **Jackton Oindi Agoro** (the 2nd appellant), **Raphael Amukuyi Agoro** (the 3rd appellant), **Reuben Makanga Agoro** (the 4th appellant), **Charles Lukose Agoro** (the 5th appellant) and **Elphas Mbayi Agoro** (the 6th appellant) (collectively referred to as the appellants), seek to set aside the judgment of the High Court which dismissed the appellant's case seeking a rectification of the register on the basis that the appellants had failed to prove their case on a balance of probabilities against **Samuel Oyindi Agoro** (the 1st respondent), **Alloysius G Wanda** (the 2nd respondent) and **Pamela Kavoki Wanda** (the 3rd respondent) (collectively referred to as the respondents).

2. The background to the appeal can be gleaned from the plaint dated 30th November, 2012 which was anchored on Sections 25(2), 28 and 93 of the Land Registration Act (LRA). Briefly the 1st respondent and the 1st appellant got married in 1959 under customary law and solemnized their marriage in church on 28th January, 1994. The 1st appellant and the 1st respondent established a home on parcel **No. South**

Teso/Angoromo/3769 where they lived with their children including the 2nd to 6th appellants. The 1st respondent was the registered proprietor of land parcel No. **BUKHAYO/BUGENGI/1727** (the suit property). On 30th March, 2005 the 1st respondent contracted a second marriage to Lucy Adhiambo Odao and lived on the suit property. The 1st appellant registered a caution against the suit property which caution was removed on application by the 1st respondent. On or about 2nd October, 2012 the 1st respondent entered into a sale agreement with the 2nd and 3rd respondents for the sale of the suit property.

3. The appellants claimed that the transfer of the suit property to the 2nd and 3rd respondents without the appellants' consent was unlawful and in contravention of the law; that the transfer of the suit property to the 2nd and 3rd respondents was registered without the consent of the Land Control Board and was therefore null and void; and that the respondents hold the title to the suit property in trust for the appellants. The appellants' claim is against the respondents jointly and severally for the rectification of the register in respect of the suit property by striking out the names of the 2nd and 3rd respondents and the subsequent registration of the appellants and the 1st respondent as joint proprietors thereof. The appellants sought an order directing the District Land Registrar Busia/Teso to rectify the register in respect of the suit property by striking out the names of the 2nd and 3rd respondents and subsequently registering the appellants and the 1st respondent as joint proprietors thereof and costs of the suit.

4. In the respondents' statement of defence dated 4th February, 2013, the 1st respondent admitted to the appellants' claim that he and the 1st appellant established a matrimonial home on **Land Parcel No South Teso/Angoromo/3769**. The 1st respondent averred that he established a matrimonial home on the suit property with his second wife **Lucy Adhiambo Odao** (now deceased) and lived on the property with his second wife and the two issues of their marriage. The 1st respondent denied the appellants' claim that spousal consent and land control board consent were required to transfer the suit property to the 2nd and 3rd respondents or that he was holding the suit property in trust for his dependants. In the reply to defence, the appellants maintained that as the 1st respondent's spouse, the 1st appellant's consent was required to transfer the suit property to the 2nd and 3rd respondents.

5. After hearing the evidence by both parties, the High Court rendered its judgment. The learned judge found that the date of the sale agreement between the 1st respondent and the 2nd and 3rd respondents was 24th August, 2011; that as at that date no spousal consent to transfer property was required under the law; that the LRA which provides for the requirement of spousal consent to transfer came into effect on 2nd May, 2012; and that the LRA was not intended to have retrospective application. On the issue of the Land Control Board consent, the learned judge found that the appellants' claim that the respondents did not obtain Land Control Board consent was not proved as no evidence was availed. The learned judge found that the appellants failed to prove their case against the respondents on a balance of probabilities and dismissed the suit with costs.

6. Aggrieved by that decision, the appellants filed this appeal on the grounds that the learned Judge erred both in law and fact by: disregarding the fact that the transfer of the suit property to the 2nd and 3rd respondents was entered on the register at the Land Registry on 2nd October, 2012 by which time the LRA was applicable and spousal consent to the transfer was therefore required; that the learned judge failed to evaluate the evidence on record to the effect that the sale agreement signed in 2011 by the 1st respondent as vendor and the 2nd and 3rd respondents as purchasers did not amount to a disposition in land; that the disposition took effect on 2nd October, 2012; and that the learned judge misdirected himself in dismissing the suit in the face of conflicting evidence by the respondents who filed a joint statement of defence which they did not establish. The appellants prayed that the appeal be allowed with costs and that the order dismissing the appellants' suit be set aside and substituted with an order for judgment in favour of the appellants with costs.

SUBMISSIONS BY COUNSEL

7. At the hearing of this appeal, learned counsel **Mr. O.M. Wanyama** represented the appellants, learned counsel, **Mr. G. Fwaya** represented the 1st respondent and **Mr E. Jumba** represented the 2nd and 3rd respondents. **Mr Wanyama** relied on his list of authorities and written submissions which he orally highlighted. He submitted that the High Court erred in considering the sale agreement dated 24th August, 2011 between the 1st respondent and the 2nd and 3rd respondents (the sale agreement) in respect of the suit property as an instrument of disposition and not a contract. This was because a sale agreement is not an instrument for disposal of land under the LRA; and that, even assuming that a sale agreement is considered as an instrument of disposal, the disposition would be of no effect until the sale agreement is registered. Thus counsel maintained that the sale agreement had no effect from 24th August 2011 when it was executed until 2nd October 2012 when an entry was made in the register in respect of the suit property giving effect to the sale agreement; that by this time, the LRA had come into force and the sale agreement therefore fell under its ambit; that parties to the sale agreement ought to have complied with the provisions of the LRA and that the 1st respondent ought to have obtained spousal consent to the transfer, failing which the sale transaction between the 1st respondent and the 2nd and 3rd respondents was null and void.

8. **Mr. Fwaya**, learned counsel for the 1st respondent opposed the appeal. He submitted that the sale agreement which was executed on 24th August 2011 provided that the last payment of the purchase price was to be made on 15th October 2011; that this date was the completion date for the sale transaction; and that the completion date being before the LRA came into effect there was no requirement for spousal consent. Counsel further submitted that there was no requirement for the 1st respondents' dependants to consent to the sale transaction as claimed by the appellants; that by the time the LRA came into force in May 2012, the completion date for the transaction had already passed and the sale transaction was therefore not subject to the provisions of the LRA.

9. Learned counsel, **Mr Jumba** opposed the appeal and relied on his list of authorities. Counsel pointed out that the 1st respondent and the 2nd and 3rd respondents who were the only parties to the agreement of sale have not disputed the contents of the sale agreement including the date that it was signed, and the date when the transfer was registered. He submitted that a person who is not a party to an agreement cannot question the contents of the sale agreement when the parties to the agreement were not contesting the contents.

DETERMINATION

10. We have considered the record of appeal, the submissions of counsel, the authorities cited and the law. This being a first appeal, our duty is to analyse and re-assess the evidence on record and reach our own conclusions on the matter. See **Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates** [2013] eKLR. In **Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2EA 212**, this Court stated as follows on the duty of the court sitting on a first appeal:

“On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

11. One main issue for determination is whether spousal consent was a condition precedent to the sale and transfer of the suit property to the 2nd and 3rd respondents at the material time and whether the 1st respondent held the suit property in trust for the appellants as urged by the appellants.

12. A number of provisions of the LRA provide useful guidance in this respect. Section 107(2) on savings and transitional provisions with respect to rights, actions and dispositions provides as follows:

2) Unless the contrary is specifically provided for in this Act or the circumstances are such that the contrary must be presumed to be the case, where any step has been taken to create, acquire, assign, transfer, or otherwise execute a disposition, any such transaction shall be continued in accordance with the law applicable to it immediately prior to the commencement of this Act.

13. Section 2 of the LRA defines “disposition” to mean *inter alia*, sale and any agreement to undertake any such disposition. Section 2 of the LRA also defines an “instrument” to mean (a) any writing, including an enactment that creates or affects legal or equitable rights or liabilities.

14. Our interpretation of the above provisions of the law vis-à-vis agreement for sale of land is that: agreements for sale fall under the definition of instrument as defined in the LRA and that sale of land vide an agreement for sale falls under disposition within the meaning of “disposition” under section 2 of the LRA. Having found that an agreement for sale is a “writing which creates or affects legal or equitable rights or liabilities”, it follows that in the absence of any other provisions in the Act, a sale agreement in respect of transaction which straddles the divide between the pre and post entry into force of the Act will be governed by Section 107 (2) of the LRA.

15. The upshot of Section 107 (2) as applied to the appeal herein is that if the sale agreement was executed before the Act entered into force, then the entire transaction which it relates to will be governed by the provisions of the law in force before the LRA entered into force. Accordingly, even if the sale agreement was executed on August 2011 and the entry in the register was made on 2nd October 2012 as submitted by learned counsel Mr. Wanyama, by dint of section 107 (2) of the LRA, the provisions of the LRA would not be applicable to the transaction in question.

16. Under the now repealed Registered Land Act Cap 300, spousal consent was not a requirement. Such consent became a requirement with the enactment of the LRA that came into force after the signing of the sale agreement.

This Court in **Fredrick Chege Ndogo v. Benard Njoroge Mbugua and 2 others** Civil Appeal No 278 of 2006, stated as follows:

“...the requirement for spousal consent is a recent development in Kenya attributable to the enactment of the Land Registration Act of 2012 and the Land Act 2012 by parliament. It had no application whatsoever to the sale of the suit land which predated the statute...”

17. Accordingly, the provisions of the LRA on spousal consent were not applicable as the Act has not been shown to have retrospective effect. In **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others** [2012] eKLR the Supreme Court stated as follows regarding the retrospective effect of legislation:

“As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature.”

18. From the foregoing, we find that spousal consent from the 1st appellant was not required to the sale transaction between the 1st respondent and the 2nd and 3rd respondents as the LRA had not come into effect on 24th August, 2011 when the sale agreement was signed. This ground of appeal therefore fails.

19. On the appellants’ contention that the sale of the suit property to the 2nd and 3rd respondents was void for failure to obtain the consent of the Land Control Board, from the record, the 1st respondent did not obtain the consent of the Land Control Board to transfer the suit property to the 2nd and 3rd respondents.

Section 6 of the Land Control Act, Cap 302 provides as follows:

“Transactions affecting agricultural land (1) Each of the following transactions that is to say— (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 [Rev. 2017] Land Control CAP. 302 L7-7 [Issue 3] less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 (L.N. 516/1961) 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.”

20. Section 8 (1) of the Land Control Act provides that an application for consent in respect of a controlled transaction shall be made to the appropriate Land Control Board within six (6) months of the making of the agreement for the controlled transaction by any party thereto. The High Court is however empowered to extend that period where it considers that there is sufficient reason to do so.

21. This Court in **Willy Kimutai Kitilit v Michael Kibet [2018] eKLR** – Civil Appeal No. 51 of 2015 stated as follows:

“.....Since the doctrines of constructive trust and proprietary estoppel apply to oral contracts which are void and enforceable (sic), in our view, and by analogy, they equally apply to contracts which are void and enforceable(sic) 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.”

The Court went on to state:

(25) The word equity broadly means a branch of law denoting fundamental principles of justice... Thus, since the current constitution has by virtue of Article 10(2)(b) elevated equity as a principle of justice to a constitutional principle of justice and requires the courts in exercising judicial authority to protect and promote that principle, amongst others, it follows that the equitable doctrines of constructive trust and proprietary estoppel are applicable to and supersede the Land Control Act where a transaction relating to an interest in land is void and enforceable(sic) for lack of consent of the Land Control Board.”

It is clear from the whole of the above quotation that the use of the word enforceable was erroneous.

[The Court clearly intended to use the word unenforceable and not enforceable]

22. Accordingly, constructive trust and the doctrine of estoppel apply in vendor-purchaser sale transactions despite the lack of land control board consent. In the case of **Kiplagat Kotut v Rose Jebor Kipngok Civil Appeal No. 31 of 2015** this Court stated as follows:

“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.”

23. In the instant appeal, it was clearly the intention of the 1st respondent to sell the suit property to the 2nd and 3rd respondents and the intention of the 2nd and 3rd respondents to purchase the suit property from the 1st respondent. It is notable that the 2nd and 3rd respondents paid the agreed purchase price in respect of the suit property in full and that the registration of the transfer was effected in their favour. We therefore find that the 1st respondent established a clear intention to sell the suit property to the 2nd and 3rd respondents. It is on record that the 2nd and 3rd respondents have been in possession of the suit property since 2011 when they purchased it.

24. In the circumstances of this case, the 2nd and 3rd respondents, being innocent purchasers for value, without notice would suffer injustice if they were evicted from the suit property. The doctrine of constructive trust therefore comes into play to ensure that the 2nd and 3rd respondents as the rightful owners of the suit property, retain the suit property, the absence of Land Control Board consent, notwithstanding.

25. The upshot of the foregoing is that we find that the High Court correctly found in favour of the respondents and that this appeal lacks merit. We therefore dismiss the appeal with costs to the respondents.

It is so ordered.

Dated and delivered at Kisumu this 27th day of June, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.