



IN THE COURT OF APPEAL

AT ELDORET

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

CIVIL APPEAL NO. 350 OF 2014

BETWEEN

PATRICK M. SITUMA.....APPELLANT

AND

FELIX WAFULA KHAEMBA.....RESPONDENT

(An Appeal from the Judgment of the High Court at Bungoma

(Hon. Omollo, J) dated 30th September, 2014

in

HCCC NO. 77 OF 2011)

JUDGMENT OF THE COURT

Background

[1] This is a second appeal from a decision of the Environment and Land Court (ELC) (**Omollo J.**) sitting in Bungoma as a first appellate court. Litigation leading to this appeal was commenced in Bungoma Chief Magistrate's Court by **Felix Wafula Khaemba** who is now the respondent in the appeal.

[2] The respondent had sued **Patrick M Situma**, who is now the appellant seeking a permanent injunction restraining the appellant from interfering with the respondent's possession and user of 4 acres (disputed portion) out of land known as **E. Bukusu/E Sang'alo/3045 (the suit property)**. The respondent claimed that the appellant entered the disputed portion through an oral lease agreement entered into between the respondent's father and the appellant, pursuant to which the appellant was given the disputed portion to plant and harvest sugar cane for three rounds namely; plank, 1st Ratoon and 2nd Ratoon.

[3] After the expiry of the said agreement, the appellant was asked by the respondent to leave the disputed portion but he refused to vacate. By this time the respondent's father had died and the suit property had been transferred to the respondent as the registered proprietor. The respondent who contended that the appellant's continued cultivation of the disputed portion was unlawful, unfair, malicious, and a deprivation of the respondent's rights over the property, lodged the suit in an effort to have him restrained.

[4] On his part the appellant denied being a lessee of the disputed portion and maintained that the respondent's father to whom he paid a consideration of Kshs 192,000/=, sold the disputed portion to him on 8th May 1997. He accused the respondent of concealing material facts by clandestinely having the property transferred to himself without informing the appellant of the succession process. He therefore lodged a counter claim seeking to have the respondent ordered to transfer the disputed portion to him.

[5] Having heard the evidence adduced by each party in support of their case, the trial magistrate came to the conclusion that there was enough evidence to show that the appellant bought the suit property from the respondent's deceased father. He wondered how the respondent had the property transferred to him without appropriate succession proceedings and found that there was an element of fraud. He therefore dismissed the respondent's suit with costs to the appellant.

[6] Being aggrieved by the judgment of the trial court, the respondent appealed against the whole judgment to the ELC raising 12 grounds. The respondent argued, *inter alia*, that the learned judge erred in finding that the appellant bought the disputed portion from the respondent; that if there was any sale transaction involving the disputed land then the same was void for failing to comply with section 6(2) of the Land Control Act; that the appellant having dealt with the respondent's father, there was no privity of contract between him and the appellant; and that the appellant's counterclaim was defective as it was not accompanied with a verifying affidavit.

[7] Having heard the respective arguments advanced by both parties, the learned judge of the ELC made findings that the appellant had proved that he bought the disputed portion from the respondent's father; that the appellant cannot enforce the contract of sale against the respondent as he was not the legal administrator of his father's estate; that the sale transaction having been done on 5th August 1997, and the land being agricultural land, section 8 of the Land Control Act required that consent of the Board to the transaction be obtained within 6 months; that no consent having been obtained, the sale was void; and that fraud in the registration of the respondent as proprietor of the suit property was not proved. The learned judge concluded that the respondent's suit was wrongly dismissed, and consequently allowed the appeal, substituted a judgment in favour of the respondent and issued a permanent injunction, and further dismissed the appellant's counter claim.

[8] The ELC judgment did not go well with the appellant who responded by filing the appeal before us. In the amended memorandum of appeal, the appellant has raised 10 grounds. By the grounds, the appellant faulted the learned judge for *inter alia*: failing to find that the trial court did not have jurisdiction over the respondent's suit; granting the order of injunction which also granted an eviction order which had neither been sought nor prayed for; holding that the appellant failed to create a nexus between parcel number 40 and the suit property; invoking the provisions of the Land Control Act, without making a determinative finding as to whether the said parcel of land fell within its purview; failing to exhaustively analyze the evidence tendered by the appellant and the respondent; in setting aside the award in the trial court and awarding the respondent the said costs; failing to purposefully interpret the law as regards the rights of a person in lawful occupation of land *vis-à-vis* the constitutional protection; and dismissing the appellant's counterclaim when the evidence pointed to an overriding interest.

Submissions by counsel

[9] During the hearing of the appeal, learned counsel **Mr. Murunga** who appeared for the appellant, and learned counsel **Mr. Olonyi** who appeared for the respondent, made oral submissions. Mr. Murunga submitted that the learned judge erred in law by not taking into account that the trial court did not have jurisdiction by virtue of **Section 3(1)(c) of the Land Disputes Tribunals Act, No. 18 of 1990**, to hear the respondent's suit as it was a claim for trespass. In this regard counsel relied on the case of **Muhia vs. Mutura [1999] 1 EA 209**

[10] In addition, Mr. Murunga submitted that the respondent acknowledged the existence of an agreement between the appellant and his father, and the fact that appellant was in possession of the disputed portion; that this was sufficient to prove that the appellant had acquired equitable rights over the disputed portion; and that according to **Sections 107 (1) & (2)**, of the Evidence Act, the burden of proof was on the respondent who was disputing the agreement of sale and alleging a lease to prove his allegation; that the appellant's interest was an overriding interest that was protected even when the property was transferred to the respondent. Counsel urged the Court to allow the appeal and order the transfer of the disputed portion to the appellant.

[11] On his part Mr. Olonyi submitted that the appellant having admitted the jurisdiction of the trial court in his defence to the respondent's claim, he cannot at this stage turn round and deny that the trial court had jurisdiction; that the respondent was the registered proprietor of the suit property and is in possession of the property; and that the appellant has only been using the disputed portion as a lessee. Counsel argued that there was no evidence of any transfer of the land to the appellant or consent from the Land Control Board, and therefore if an agreement of sale existed then the same is null and void.

Determination

[12] We have carefully considered this appeal and the submissions made by the parties' counsel. The first issue that we have to address is the issue of jurisdiction as the same provides the backbone upon which all the proceedings are anchored. Indeed, in **Kakuta Maimai Hamisi vs Peris Pesi Tobiko & 2 others [2013] eKLR** this Court underscored the necessity of dealing with the issue of jurisdiction as the first order of business.

[13] We note that the issue of jurisdiction was not raised in the trial court the appellant having admitted the jurisdiction of the trial court. Before the first appellate court the issue of jurisdiction was adverted to in passing in the written submissions but was not fully ventilated nor did the learned judge make any finding on it. Be that as it may, as was stated by this Court in **Muhia v Mutura** (supra); a question of jurisdiction is an issue of law which this Court can take cognizance of notwithstanding the fact that the two lower courts did not address the same.

[14] The issue that arises is whether the trial magistrate had jurisdiction to deal with the respondent's claim in light of Section 3(1) of the **Land Disputes Tribunals (Act No 18 of 1990)**. That section states as follows:

“Subject to this Act all cases of a civil nature involving a dispute as to:

(a) the division of or the determination of boundaries to land including land held in common;

(b) a claim to occupy or work land;

(c) trespass to land,

shall be heard and determined by a Tribunal established under section 4”

[15] The respondent’s claim in the trial court is evident from paragraph 7 of the plaint filed in Bungoma CMCC 924 of 2009 that states as follows:

“7. The plaintiff’s claim against the defendant is for permanent injunction to issue against the defendant by him, (sic) servants, or agents or otherwise howsoever from interfering with the plaintiff’s possession and user and or in any manner dealing with the subject title to the detriment of the plaintiff”

[16] The final prayers sought are as follows:

“(a) A permanent injunction as per paragraph 7 of the plaint;

(b) Costs of the suit;

(c) Any other or further relief this honourable court may deem fair or just to grant”

[17] The respondent’s claim as pleaded did not fall within section 3(1) of the **Land Disputes Tribunals (Act No 18 of 1990)**. The position becomes clearer when one looks at the appellant’s amended statement of defence and counterclaim, wherein the appellant denies being a lessee on the disputed portion and maintains that he has a purchaser’s interest having purchased the same from the respondent’s father, and counterclaims for an order directing the respondent to transfer the disputed portion to him. In our view the dispute between the respondent and the appellant was not one of trespass but involved ownership of the disputed portion. Moreover, the orders sought were in the nature of mandatory injunctions that the Tribunal had no jurisdiction to handle. We find that the trial magistrate had jurisdiction to deal with the dispute.

[18] The two lower courts made concurrent findings of fact that there was an agreement of sale between the appellant and the respondent’s father for the sale of the disputed portion to the appellant at the consideration of Kshs 192,000/= that the appellant duly paid. This agreement was entered into on 5th August 1997. The learned Judge found that the suit property having been agricultural land, the transaction involving the disputed portion was subject to the provisions of the Land Control Act. The fact that the appellant was put in possession of the suit land by the respondent’s predecessor in title to the suit land created a trust in the appellant’s favour for the disputed portion for as long as the sale agreement was valid. Section 6 (1) provides that an application for consent of the Land Control Board is to be made within six (6) months of the making of a sale agreement by any party thereto provided that for sufficient reason, the High Court may extend the period.

[19] The learned judge in arriving at the determination that the sale agreement dated 5th August, 1997 was null and void stated as follows;

“The respondent (the appellant herein) claimed he bought the land on 5th August 1997 from Pasit Khaemba- deceased. He did not follow the process of obtaining title deed of the sold portion in his name between the time he bought the land and in the year 2004 when the said Pasit died. He told this court that he did not process title into his name due to unavoidable circumstances without disclosing what they are. Section 6 (1) of Land Control Act Cap 302 lists transactions affecting agricultural land which becomes void if the land control board of that area does not give consent in accordance with the Act. Those transactions include leasing and selling of agricultural land. Section 8 of this Act requires parties to apply for consent within six months of the date of the transaction. In this instant, the process has taken more than six (6) months since its inception and quite obviously it is void as there was no consent obtained.”

[20] The two courts below found that there was a sale agreement entered into between the appellant and the respondent’s deceased father. The appellant and seven (7) other witnesses testified that the appellant purchased the disputed portion for Kshs 192,000/=. The doctrine of proprietary estoppel and constructive trust are applicable in the instant case and the respondent has contractual obligations and a fiduciary duty imposed by law and equity.

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

“(23)...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.”

*The Court 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. As stated by this Court in Kiplagat Kotut v Rose Jebor Kipngok, (unreported) Civil Appeal No 31 of 2015:

“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 mean (sic) 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 appellant to purchase the disputed portion from the respondent’s father and the intention of the respondent’s father to sell the disputed portion to the appellant. It is notable that seven (7) other witnesses testified to that effect. This Court in the case of Peter Ndungu Njenga vs Sophia Watiri Ndungu [2000] eKLR succinctly observed:

“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. The intention of the parties to create a trust must be clearly determined before a trust is implied. See Ayoub vs Standard Bank of S.A [1963] E.A. 619 at pp 622, 623.” [Emphasis supplied].

[24] Applying the aforementioned principles to the instant appeal, we find that the appellant established a clear intention to purchase the disputed portion from the respondent’s father and duly paid the agreed consideration. The fact that the disputed portion is registered in the respondent’s name is immaterial and does not vitiate the appellant’s right to the disputed portion as the respondent remains a constructive trustee in regard to the disputed portion. It is on record that the appellant has been in possession of the disputed portion and has been planting sugarcane since 1997. In the circumstances of this case, the appellant would suffer injustice if he is evicted from the disputed portion as witnesses testified that he purchased the disputed portion from the respondent’s father. The appellant adduced a translated copy of the sale agreement dated 5th August, 1997 between himself and the respondent’s father. The doctrine of constructive trust therefore comes into play to ensure that the appellant herein, as the rightful owner retains the disputed portion.

[25] For the foregoing reasons, we find that in the circumstances of this case, the learned Judge erred in law in failing to consider and apply the doctrine of proprietary estoppel and constructive trust. The learned Judge therefore arrived at a wrong decision in finding that the sale agreement between the appellant and the respondent’s deceased’s father was null and void for want of Land Control Board consent to transfer. Accordingly, we find that this appeal has merit and is allowed. The judgment of the Environment and Land Court delivered on 30th September, 2014 is set aside.

[26] We hereby issue an order for specific performance compelling the respondent to execute the transfer documents and transfer the disputed portion to the appellant within sixty days. In default, we hereby direct and order the Deputy Registrar of this Court to execute the transfer documents whereof the same shall be deemed sufficient to effect transfer of the disputed portion in favour of the appellant. The respondent shall bear the costs in this appeal and costs before the Environment and Land Court.

It is so ordered.

Dated and delivered at Eldoret this 6th 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.