



IN THE COURT OF APPEAL

AT ELDORET

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

CIVIL APPEAL NO 54 OF 2016

BETWEEN

WILLIAM KIPSOI SIGEI..... APPELLANT

AND

KIPKOECH ARUSEI..... 1ST RESPONDENT

JOHN TUNGE.....2ND RESPONDENT

(An appeal from the judgment of the Environmental and Land Court (Ombwayo, J.) dated 6th November, 2015

in

Civil Appeal No 31 of 2013)

JUDGMENT OF THE COURT

BACKGROUND

1. **William Kipsoi Sigei**, the appellant herein, was sued by **Kipkoech Arusei** and **John Tunge**, the 1st and 2nd respondents respectively in the Chief Magistrate's Court at Eldoret. By an amended plaint dated 27th April, 2007 the 1st respondent alleged that he was the owner of plots 171,172,173,174 and 175 located in Kesses Township, having purchased the plots from the appellant by way of an agreement entered into between himself and the appellant on 19th March 1991. The 1st respondent claimed that he paid the appellant the agreed purchase price, took possession and ownership of the plots and enjoyed quiet possession of the property. At some point in 2003, the 1st respondent sold plot number 171 to the 2nd respondent, who started to develop it. However, the appellant interfered with the 2nd respondent's quiet enjoyment and occupation of the property which prompted the respondents to file suit, seeking a permanent injunction restraining the appellant from interfering with any of the property known as plot numbers 171, 172, 173, 174 and 175, as well as general damages for unlawful interference and costs of the suit.
2. The appellant responded to the suit through a defence to the amended plaint and a counterclaim dated 28th May, 2007. The appellant claimed that the plots Nos 171 to 175 bought by the 1st respondent had been amalgamated into plot No 41 at Kesses Township, and as such, there were no plots of land known as plots number 171 -175 over which the court could exercise its jurisdiction; that the 2nd respondent had no dealings with him, and as such, could not claim anything from him; that at the time of the alleged sale, the 1st respondent did not have title to the suit property and as such, he could not pass any title to the 2nd respondent; that even though he and the 1st respondent had entered into an agreement for the sale of the suit property as alleged, the transaction was void because the property was subject to the provisions of the Land Control Act, which had not been granted.
3. The appellant also filed a counterclaim in which he stated that the respondents had trespassed onto his land, known as plot No 1 Kesses Kelchin Farm instead of confining themselves to the plots that had been initially sold to them. He therefore prayed for an order of injunction against the respondents, restraining them from interfering with his property as well as an order of eviction of the respondents.
4. The trial court, after evaluating the evidence led before it, dismissed both the respondents' and the appellant's claims. The trial court found that neither of the parties had proven their claims to the required standard. In particular, the trial court found that neither of the parties

had title to the suit property; that the only title that was presented to the court was Title No LR 2691 which comprised the entire farm which belonged to the members of the Kesses Kelchin Farm, and as such, the appellant could not have sold to the 1st respondent what he did not own, and similarly, the 1st respondent could not pass better title than he had to the 2nd respondent. As such, the learned judge found that the respondents had not shown that they had a cause of action against the appellant. The trial court also found that the appellant had failed to show that he had a cause of action against the respondents, and dismissed his claim as well.

5. The appellant was aggrieved by that decision, and he filed an appeal to the Environmental and Land Court (ELC). In his grounds of appeal, he contended that: the trial court erred in law and fact in finding that the respondents had not acquired title from the respondent, and therefore ought to have allowed the counterclaim; that the court ought to have granted the orders of eviction and injunction; that the court failed to make a determination on the effects of the provisions of the Land Control Act. The respondents also filed a cross appeal, but due to the fact that it was filed more than two years after the judgment of the trial court and without leave to extend the time for filing a cross appeal, it was struck out by the first appellate court.

6. After hearing the appellant's appeal on merit, the first appellate court agreed that the suit property was in fact, agricultural land, and that the 1st respondent and the appellant had not obtained the consent of the Land Control Board as they were required to. However, the learned judge found that owing to the fact that the appellant received money from the 1st respondent, who had thereafter given him possession of the land, and had since been in possession of the land and even improved the land in question, there had resulted a constructive trust in favour of the 1st respondent. As a result, the sale of the property by the 1st respondent to the 2nd respondent created a resultant trust in favour of the 2nd respondent which could not be defeated by the appellant. The court further found that despite the fact that there was no consent of the Land Control Board, the appellant could not now rely on this fact to vitiate an agreement made over twenty years before. On these grounds, the first appellate court dismissed the appeal.

7. Undeterred, the appellant filed this second appeal. In his memorandum of appeal, the appellant has raised five grounds that: the learned judge erred in law and fact in holding that the transaction between the appellant and the 1st respondent did not require the consent of the Land Control Board; that the first appellate court failed to note that the appellant had only sold 0.5 acres to the 1st respondent and that the respondent had encroached onto the appellant's land and excised 0.25 acres more than what had been sold to him; that the learned judge's decision is untenable and it ought to be set aside; and that the learned judge disregarded the appellant's submissions. The appellant sought orders that the judgment of the Environment and Land Court and of the Chief Magistrate's Court be set aside; the appeal in the Environment and Land Court be allowed; and that costs of the suit and the appeal be awarded to the appellant.

SUBMISSIONS BY COUNSEL

8. The appellant through his counsel, Ms Matoke, expounded on these grounds of appeal. Counsel submitted that it was common ground that the property was registered in a land buying company known as Kesses Kelchin Company Limited which was holding the title deed in trust for the purchasers; that the sale agreement was signed on 19th March 1991 and thus the consent of the Land Control Board ought to have been obtained by 19th September 1991. In counsel's view, the sale transaction became null and void on that date since there was no consent of the Land Control Board.

9. It was the appellant's further contention that the High Court erred in finding that there was no evidence that the transaction between the appellant and the 1st respondent was a controlled transaction and misdirected itself by finding that there was a constructive trust in favour of the respondents. In the appellants view, such a trust, if any, would still require the consent of the Land Control Board, which consent was not granted; that the area that the 1st respondent had trespassed over, was 0.75 acres, yet he had only sold a total acreage of 0.5 acres to the 1st respondent. Accordingly, the respondents were occupying 1.5 more area than they ought to have occupied; that this is one area that the lower courts failed to address, yet it was the genesis of the dispute between the appellant and the respondents. In counsel's view, if the 2nd respondent had not trespassed into the appellant's land, the dispute between the parties would not exist. For these reasons, the appellant prays that the appeal be allowed, the judgment of the trial court be set aside, and judgment in terms of the counterclaim be entered in his favour.

10. The respondents filed submissions which were highlighted on their behalf by their learned counsel, Mr Kibii. In support of the respondents' assertions that the appeal has no merit, Mr Kibii submitted that since no titles have been issued to any of the people who bought parcels of land that comprised the Kesses Kelchin Farm, and no individual title had been created, the appellant had no locus to seek orders of injunction or eviction against the respondents. For this same reason, the respondents submit that the appellant cannot purport to invoke the provisions of the Land Control Act to claim that the agreement for sale is void.

11. Mr Kibii further submitted that even assuming that the consent from the Land Control Board was a prerequisite to the agreement between the appellant and the 1st respondent, substantive justice requires that the respondent's right to occupy the suit property be recognized. In counsel's view, by entering into the sale agreement, the appellant allowed the respondents to undertake substantial development and thus, the appellant created an implied or constructive trust in favour of the respondents, thus protecting him under sections 26, 27, 28 and 30(g) of the repealed Registered Land Act and now under section 25 and 28 of the Land Registration Act. On this basis, the respondents urged us to dismiss the appeal with costs.

DETERMINATION

12. This being a second appeal, our jurisdiction is circumscribed by Section 72 of the Civil Procedure Act to the consideration of matters of law only. In *Kenya Breweries Ltd V Godfrey Odoyo [2010] eKLR (Civil Appeal No. 127 of 2007)* Onyango Otieno, J.A expressed himself on this point as follows:

“In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court in a second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is

perverse.”

13. We have carefully considered the record of appeal, the submissions by learned counsel, the authorities cited and the law. The main issue that falls for our consideration is whether or not the transaction between the appellant and the 1st respondent was void for lack of consent of the Land Control Board; or whether an enforceable constructive trust arose. The trial Court held that L.R No 2691 was in respect of the entire Kesses Kelchin Farm. The first appellate court found that the appellant did not prove that the disputed land falls within a land control area to require the Land Control Board consent, but went on to make a finding that even assuming it did, it did not matter that the transaction in question had proceeded without the consent of the Land Control Board as the circumstances of the transaction resulted in a constructive trust arising in favour of 1st respondent, and that the sale by the 1st respondent to the 2nd respondent similarly created a resulting trust in favour of 2nd respondent, and it was on this basis that the first appellate court dismissed the appellant’s assertion that the transaction was null and void.

14. The Land Control Act applies to agricultural land, and section 6 thereof provides that any transactions, including the sale, transfer, lease, mortgage, division or any other disposal of agricultural land 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.

15. While it is not in dispute that the transaction did not have the consent of the Land Control Board as required in law, the facts show that the 1st respondent had paid the entire amount of the purchase price and as a result, had been allowed occupation of the suit property. The first appellate court, in finding that there had been a constructive trust in favor of the respondents, relied on the decisions of *Mwangi & Another v Mwangi (1986) KLR 328*, and *Gatimu Kinguru v Muya Gathangi (1976) KLR 253* both for the proposition that the creation of a trust over agricultural land in a land control area would not be a transaction that would require consent of the Land Control Board. This is the finding that the appellant would have us upset.

16. In *Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri [2014] eKLR (Macharia Mwangi Maina Decision)* this Court took a similar approach, in a matter where the purchasers of the property were allowed to occupy property that they had paid the full consideration for, and later, among other conditions, failed to secure the consent of the Land Control Board. The question in that appeal was what other remedies would have been available to the purchasers in that case. The Court rendered itself as follows:

“ 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. We are of the considered view that a constructive trust relating to land subject to the Land Control Act is enforceable. Our view on this aspect is guided by the Overriding Objectives of this Court and the need to dispense substantive and not technical justice....”

26. Article 159 (2) (b) of the Constitution requires that justice should not be delayed. This matter has been in the courts since 1993. The persons or groups interested in the suit property are individuals of different status in the Kenyan society. Article 159 (2)(a) of the Constitution requires justice to be administered to all, irrespective of status; Article 159 (2) (g) of the Constitution stipulates that justice shall be administered without undue regard to procedural technicalities. This Court is a court of law and a court of equity; Equity shall suffer no wrong without a remedy; no man shall benefit from his own wrongdoing; and equity detests unjust enrichment. This Court is bound to deliver substantive rather than technical and procedural justice. The relief, orders and directions given in this judgment are aimed at delivery of substantive justice to all parties having legal and equitable interest in the suit property.” (emphasis ours)

17. The appellant urged us to disregard this authority as the court proceeded on an erroneous view that a transaction based on trust is not a controlled transaction on the basis of decisions which were made before the Land Control Act was amended to clarify that transactions based on trust are controlled transactions.

18. In *Willy Kimutai Kitilit v Michael Kibet [2018] eKLR (Willy Kimutai Kitilit decision)*, we considered similar arguments and had the opportunity to consider the *Macharia Mwangi Maina decision* alongside another decision of this Court, differently constituted, *David Sironga Ole Tukai v Francis Arap Muge & 2 others [2014] eKLR (Sironga Ole Tukai Decision)*, where the Court in finding that the *Macharia Mwangi Maina decision* was made in error expressed the view that the clear provisions of section 3(1) of the Judicature Act precluded the application of the doctrines of equity and as such, a transaction that required the consent of the Land Control Board, would, without such a consent, be void and therefore unenforceable in law. In rejecting the arguments in the *Sironga Ole Tukai decision* and following the *Macharia Mwangi Maina decision* this Court in *Willy Kimutai Kitilit* decision noted among other things, that:

“the phrase ‘declaration of trust of agricultural land’ refers to an express creation of a trust by parties over agricultural land by deed or instruments envisaged by section 36 as read with section 66 of the Land Registration Act or section 126 of the repealed Registered Land Act, not a constructive trust or trust created by operation of the law.”

19. In addition, in the same case, the Court noted that equity is one of the national values that the Courts must apply in interpreting the Constitution stating as follows:

“Thus since the current Constitution has by virtue of Article 10(2)(b) elevated equity as a principle of justice to a constitutional principle 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 for lack of consent of the Land Control Board.”

20. Taking into account the *Macharia Mwangi Maina decision* and the *Willy Kimutai Kitilit* decision alongside the circumstances of this case, we are of the view that the fact that the appellant herein, received the full purchase price for the property, allowed the 1st respondent to take possession, and for a period of at least fourteen years, let him remain on the property undisturbed, a constructive trust had been created. We agree with the English decision *Yaxley v Gotts & Another, (2000) Ch 162*, where it was held that an oral agreement for sale of property,

created an interest in the property even though void and unenforceable as a contract; but the oral agreement was still enforceable on the basis of a constructive trust or proprietary estoppel. This was also the approach taken in ***Macharia Mwangi Maina decision*** where the court observed that the appellant had put the respondent into possession of the suit property with the intention that he was to transfer the properties purchased to them and as such, a constructive trust had been created and the appellant could not renege.

21. We come to the conclusion that in the circumstances of this case the equitable doctrines of constructive trust and proprietary estoppel were applicable and enforceable in regard to land subject to the Land Control Act. We therefore agree with the learned judge of the Environment and Land Court that despite the lack of consent of the Land Control Board, the doctrine of constructive trust applied to the agreement between the appellant and the 1st respondent. In the circumstances, we find that the first appellate court, made the correct decision, and we have no justification to interfere with that decision. For this reason, the appeal is hereby dismissed with costs to the respondents.

Dated and Delivered at Eldoret this 25th day of July, 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.