



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, J.J.A.)

CIVIL APPEAL NO. 349 OF 2014

BETWEEN

FRANCIS SOITA.....APPELLANT

AND

JOHN SIMIYU NDALILA.....RESPONDENT

*(An Appeal from the judgment of the High Court of Kenya*

*at Bungoma, A. Omollo, J.) dated 17<sup>th</sup> September, 2014*

in

H.C. ENVIRONMENT AND LAND CASE NO. 26 OF 2013

(Formerly Bungoma High Court Civil Case No. 52 of 2012)

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JUDGMENT OF THE COURT

[1] This is an appeal from the judgment and decree of the Environment and Land Court at Bungoma, (*A. Omollo, J.*) in the following terms:-

**“1. The defendant to transfer 1<sup>3</sup>/<sub>4</sub> acres of land from land parcel No S. Namwela/S. Malakisi/635 to the plaintiff forthwith. In default the Deputy Registrar to sign transfer documents on behalf of the defendant herein.**

**2. The Counter-claim is dismissed.**

**3. The costs are awarded to the plaintiff.”**

[2] The respondent herein filed a suit against the appellant herein claiming a total of 1<sup>3</sup>/<sub>4</sub> acres which he claimed to have bought from the appellant on various occasions between 15<sup>th</sup> October, 1998 and 16<sup>th</sup> October, 2001 at a consideration of Shs. 91,200/= and which land the appellant had failed to transfer.

The respondent gave evidence in support of his claim and called one witness, **Richard Wose**. The respondent testified *inter alia*, that by five sale agreements, he purchased a total of 1<sup>3</sup>/<sub>4</sub> acres of land from the appellant's land title No. S. Namwela/S. Malakisi/635, that the appellant sold the land in portions; that he paid a total of Shs. 91,200 for the land; that the agreements were written in Kiswahili language; that the appellant signed the agreements which were witnessed by **Joanes**, the appellant's wife who thumb-printed the agreements; that trees were planted to mark the boundaries and that in 2008, the appellant refused to go to the Land Control Board for the consent. He produced the agreements as exhibits.

Richard Wose, the respondent's witness testified that he wrote three of the five agreements for sale of 1/2 ; 1/4; 1/4 acre respectively; that the

respondent paid Shs 23, 000/=; 11,500/=; and 15,000/= respectively; that the sale agreements were witnessed by **Joanes Soita**, the appellant's wife.

[3] In his statement of defence and Counter-claim, the appellant denied selling the land to the respondent and averred that he leased 1<sup>3</sup>/<sub>4</sub> acres to the respondent who was paying quarterly ahead of the planting season; that the respondent took advantage of his illiteracy; that it later dawned on him that the agreements were in fact for sale of land, that the agreements are a forgery and that it was resolved before the Chief that Shs.90,000/= paid under the agreements be refunded. By the counter-claim, the appellant sought a permanent injunction to restrain the respondent from trespassing or remaining in the land.

In his evidence, the appellant stated that in 1998 he needed money for treatment and approached **Fred Simiyu Ndalila**, the respondent's brother about selling the land, that the respondent's brother wanted to buy ½ an acre of the land; that they agreed that the appellant would lease the land; that the appellant's brother continued leasing the land and paid money to him in respect of the lease; that the respondent's brother had possession of the land since 1999, that in 2011, he told him to leave as the lease was over and reported to the Chief, and that they did not seek the consent of the Land Control Board.

In his evidence in cross-examination by the respondent, he admitted that he went to the respondent's house; that he told the respondent that he wanted to lease the 1<sup>1</sup>/<sub>2</sub> acres and not to sell, that they agreed and he was paid the money and that he had not refused to refund the money.

[4] The trial Judge framed four issues, the main ones being firstly, whether there was a sale or lease agreement between the appellant and respondent and secondly, if there was a sale, whether it became void for lack of Land Control Board consent.

On the first main issue, the learned Judge made a finding of fact that there was a sale of land and not a lease between the appellant and the respondent. On the second main issue, the learned Judge made a finding that the agreement of sale became void for lack of consent of the Land Control Board.

Nevertheless, the learned Judge relying on decisions of this Court particularly **Macharia Mwangi maina & 87 others v. Davidson Mwangi Kagiri [2014] eKLR** held that the respondent had established his rights over the portion of land that he was claiming under the equitable doctrines and stated:-

**“It is without doubt that the defendant having received the purchase price in full is estopped from relying on the defence that their agreement is void for non-compliance with Section 6 of the Land Control Act.”**

[5] The only main ground of appeal is that the trial Judge erred in law and in fact in holding that failure to comply with **Section 6** of the Land Control Act does not invalidate a land transaction.

**Mr. Wafula**, the learned counsel for the appellant distinguished the **Macharia Mwangi Maina** case from this case. He contended that the Court in **Macharia Mwangi Maina** case held that the consent of the Land Control Board was not required because the vendor had to wait for the completion of the sale of all the 240 plots before he could seek consent and also because the vendor had not obtained title to the land.

The respondent on his part submitted that the consent of the Land Control Board was obtained after the judgment after which he was registered as proprietor and issued with a title deed.

[6] By **Section 6 (1)** of the Land Control Act, a sale, transfer, amongst other transactions in agricultural land is void for all purposes unless the Land Control Board has given its consent. In **Macharia Mwangi Maina** case, the Court held, amongst other things, that nothing in the Land Control Act prevents a purchaser from relying upon the doctrine of constructive trust created by the facts of the case and that a constructive trust relating to land subject to the Land Control Act is enforceable.

This Court has recently followed that decision in **Willy Kimutai Kitilit v. Michael Kibet – Eldoret Civil Appeal No. 51 of 2015** and added:

**“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 promote and protect that principle amongst others, it follows that the equitable doctrines of constructive trust and proprietary estoppel are applicable to and supersede Land Control Act where a transaction relating to an interest in land is void and unenforceable for lack of consent of the Land Control Board.”**

[7] In this case, the appellant in 1999 sold a total of 1<sup>3</sup>/<sub>4</sub> acres from his land title No. S. Malakisi/S. Namwela/635 which measures approximately 5.14 Hectares. He received the purchase price and put the respondent in possession. In the year 2011, - over ten years since the sale he sought to evict the respondent and refused to apply for the consent of the Land Control Board. The respondent filed a suit seeking an order of transfer.

In **Halsbury's Laws of England, Vol. 16(2) 4<sup>th</sup> Edition – Reissue** at para 1089, the authors' state:

**“Unlike other kinds of estoppel, proprietary estoppel may be a cause of action but only where it involves the promise of an interest in land.”**

From the facts of the case, we are satisfied that the respondent was entitled to the land by the doctrines of constructive trust and proprietary

estoppel and that the appeal has no merit.

[8] For the foregoing reasons, the appeal is dismissed with costs.

**Dated and Delivered at Eldoret this 17<sup>th</sup> day of May, 2018.**

**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**

*copy of the original.*

**DEPUTY REGISTRAR**