



**IN THE COURT OF APPEAL**

**AT ELDORET**

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

**CIVIL APPEAL NO.59 OF 2015**

**BETWEEN**

**WILLIAM KIPTARBEI KORIR.....1<sup>ST</sup> APPELLANT**

**PETER KIPSAT LELEI.....2<sup>ND</sup> APPELLANT**

**SUSAN KEMEI.....3<sup>RD</sup> APPELLANT**

**NIXON KIPCHUMBA.....4<sup>TH</sup> APPELLANT**

**DAVD BUTTY.....5<sup>TH</sup> APPELLANT**

**WILLIAM BUTTY.....6<sup>TH</sup> APPELLANT**

**DINAH KORIR.....7<sup>TH</sup> APPELLANT**

**VERSUS**

**DANSON MUNIU NJERU.....RESPONDENT**

***(An Application for extension of time to file appeal from the decision, Judgment and the Decree given at Eldoret, (Munyao Sila, J.) dated 26<sup>th</sup> February, 2014***

**in**

**ELDORET HIGH COURT E & L CASE NO. 170 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, (Munyao Sila, J.) allowing the respondent’s suit; granting an order of eviction against the appellants from land title No. Cheptiret/Cheplaskei Block 3 (Sertwet)/103 and dismissing the appellants’ counter-claim with costs.

**[2]** On 29<sup>th</sup> July, 2004, the respondent as the legal representative of the estate of James Gachobe Njeru, who died on 3<sup>rd</sup> August 1995, filed a suit against the appellants herein claiming that the appellants have been in illegal occupation of Land Title No. Cheptiret/Cheplaskei Block 3/Sertwet/103 since 1994 and sought an order of permanent injunction, eviction, mesne profits and costs.

The evidence tendered at the trial showed that Nixon Kipchumba, (4<sup>th</sup> appellant) is the son of William Kiptarbei Koros – 1<sup>st</sup> appellant while Dinah Korir, the 7<sup>th</sup> appellant is the wife of the 1<sup>st</sup> appellant.

The evidence also showed that Susan Kemei (3<sup>rd</sup> appellant) is the mother-in-law of Peter Kipsat Lelei, the 2<sup>nd</sup> appellant, and that David Butty, (5<sup>th</sup> appellant) and William Butty – 6<sup>th</sup> appellant are sons of Susan Kemei.

[3] The appellants filed a joint statement of defence which was later amended to plead a counter-claim.

By the amended defence and counterclaim, the appellants pleaded that they are rightfully and legally in possession of the land; that by agreement of sale entered on 12<sup>th</sup> May, 1994, the deceased James Gachobe Njeru sold the entire suit land to the 1<sup>st</sup> appellant who was to take 3 acres; Solomon Chepkimis who was to take one acre and 2<sup>nd</sup> appellant who was to take 5 acres for a consideration of shs.279,000/=; that the respondent has a duty to effect the transfer of the land, that the 1<sup>st</sup> and 2<sup>nd</sup> appellants complied with the terms of the agreement but the vendor died before he could execute the transfer and that the 1<sup>st</sup> and 2<sup>nd</sup> appellants subsequently settled their respective families on the suit land with the knowledge of the vendor.

The 1<sup>st</sup> and 2<sup>nd</sup> appellants sought a declaration that they are entitled to the respective portions of land sold to them and an order compelling the respondent to execute transfer documents and, alternatively, refund of purchase price at current market price of shs.300,000/= per acre, costs of developments, (which was specified), general damages for breach of contract and any other relief that the court may deem just to grant.

The respondent in his reply to defence and counter-claim generally denied the assertions of fact in the defence and counter-claim and averred, inter alia, that the agreement made on 12<sup>th</sup> May, 1994 is unenforceable, null and void by operation of the law; that the suit land being agricultural land the sale was not sanctioned by the Land Control Act and became null and void 6 months after it was entered into and that the occupation of the land by the appellants constitutes a trespass to land.

[4] The respondent gave evidence at the trial and produced relevant documents including the grant of the letters of administration, certificate of confirmation of the grant and a copy of the title deed. He stated that he had no knowledge of the agreement of sale dated 12<sup>th</sup> May, 1994; that there was an agreement to sell one acre to Solomon Chepkimis, that the appellants were in possession of the land and that he was not ready to refund the purchase price or pay compensation.

On their part, both the 1<sup>st</sup> and 2<sup>nd</sup> appellants gave evidence relating to the purchase of the land from the deceased and produced the agreement of sale, the consent of the Land Control Board giving consent to sub-division of land into three parcels and the mutation.

The 1<sup>st</sup> appellant stated that he took possession of the portion he had purchased in 1995; that he developed the land and that on 19<sup>th</sup> September 2002 he entered into a supplementary agreement with the respondent in which he agreed to pay shs.30,000/= as additional purchase price which he paid.

The 2<sup>nd</sup> appellant testified that he took possession of the portion he bought in 1995; that the purchase price was paid including shs.22,000/= which he paid to Agricultural Finance Corporation to clear the loan that the deceased had taken and that developments have been done on the land that are worth more than shs. one million.

[5] The trial court appreciated that the agreement of sale dated 12<sup>th</sup> May, 1994 was entered into between the deceased and the three joint purchasers including the 1<sup>st</sup> and 2<sup>nd</sup> appellants, money paid and consent of the Land Control Board obtained for sub-division but declared the agreement null and void for lack of consent of the Land Control Board for transfer. In addition, the court made a finding that the appellants had not demonstrated any legal right that would entitle them to remain on the land.

As regards the counter-claim, the trial court made a finding that the claim could not be sustained as the consent of the Land Control Board was not obtained and further that the second agreement entered into between the respondent and the 1<sup>st</sup> appellant on 19<sup>th</sup> September, 2002 was void since the respondent had no capacity to enter into the contract and further the consent of the Land Control Board was not obtained.

As regards the recovery of the purchase price and damages, the trial court made a finding, inter alia, that since the claim was made about thirteen years from the time the agreement became void, the claim was barred by limitation.

[6] In this appeal the finding that the agreement of sale dated 12<sup>th</sup> May, 1994 was void for lack of consent of the Land Control Board for transfer is assailed on three main grounds.

Firstly, it is contended that it was not pleaded that the agreement was null and void, nor was a declaration of invalidity of the agreement sought. Mr Yego, learned counsel for the appellants submitted that the respondent did not plead that the agreement was rendered void by failure to obtain the consent of the Land Control Board, that the issue was not raised in the reply to the amended defence and counter-claim nor framed as an issue and, that the issue was first raised in the respondent's submissions. Whilst conceding that the respondent did not seek a declaratory order, Mr Momanyi, learned counsel for the respondent submitted, amongst other things, that since the appellants had sought relief based on the agreement, the court had a duty to make a finding on it.

[7] We have considered this ground of appeal. It is clear that the statement of issues filed on 18<sup>th</sup> November, 2004 raised the issue whether there was any legally enforceable agreement between the 1<sup>st</sup> and 2<sup>nd</sup> appellants and the deceased relating to the suit land. Further, the issue was specifically pleaded in paragraph 8 of the defence to the counter-claim thus;

***“The suit land is agricultural land the sale was not sanctioned by the Land Control Board and it became null and void 6 months after it was entered into.”***

Lastly, the respondent's counsel made submissions on the issue of lack of consent at the trial and the appellants' counsel made replying submissions.

It is clear, therefore, that the issue of the invalidity of the agreement of sale for lack of consent was pleaded and framed as an issue for the determination by the court. This ground of appeal lacks merit.

[8] Secondly, it is contended that the learned Judge erred in law in failing to appreciate that a consent to sub-divide the land into three portions constituted a consent in respect of the transaction and the consent contemplated by the parties thereby validating the agreement.

By the agreement of sale, the deceased sold the entire piece of land to three joint purchasers but the agreement stipulated the acreage of each of the three purchasers. The agreement further provided that the parties had agreed that the consent of the Land Control Board would be sought on 14<sup>th</sup> June, 1994 and that the transfer would be executed upon payment of the balance of purchase price. By the agreement, the purchasers agreed to partition the land between themselves in accordance with the acreage purchased by each. An application dated 9<sup>th</sup> June, 1994 for consent of the Land Control Board for sub-division of the said land into three portions of 3, 1 and 5 acres was made and a consent for sub-division of the suit land into three portions as stipulated in the agreement was given on 14<sup>th</sup> June, 1994. The mutation Form was also prepared by the surveyor but apparently, it was not registered against the title.

It is contended by the appellants' counsel that the consent was a valid consent for the transaction and that the consent to transfer was superfluous and not mandatory. On the other hand, the respondent's counsel submitted that the consent to the transfer was mandatory.

[9] Whereas the parties contemplated that the vendor would obtain consent for transfer and thereafter transfer the whole piece of land to the three purchasers jointly leaving the partition to the purchasers, that is not what happened.

Under the law, if the deceased was transferring the whole land to the purchasers, there was no requirement for partition. However, the deceased applied for consent for sub-division and such a consent was obtained. **Section 6(1) (a)** of the Land Control Act, provides;

**“Each of the following transactions – the sale, transfer ... partition ... is void for all purposes unless the Land Control Board has given its consent in respect of the transaction.”**

Thus, the sale, transfer and partition are distinct transactions each requiring the consent of the Land Control Board. The consent applied for and granted was expressly for “sub-division” of the suit land into three portions. The appellants are in effect asking the court to change the nature of the consent applied for and granted into a consent of another nature which the court cannot lawfully do nor impute, without any evidence of mistake, an intention by the Land Control Board to grant a consent for transfer.

[10] Thirdly, it is contended that a consent to transfer was not required by virtue of the provisions of **section 6 (3) (a)** of the Land Control Act which provides that the provisions for consent do not apply to;

**“the transmission of land by virtue of a will or intestacy of a deceased person, unless the transmission would result in the division of the land into two or more parcels to be held under separate titles.”**

The appellants' counsel submitted that since the deceased had obtained consent to sub-divide the land and had the intention to transfer, the respondent was bound upon the death of the deceased to transmit the land to the purchasers. On his part, the respondent's counsel submitted that the respondent had no legal duty to transfer the land by transmission once he obtained the letters of administration.

By **section 79 of the Law of Succession Act**, once a grant of representation has been made, all the property of a deceased person vests on the personal representative in his capacity as personal representative.

By section 122 of the Registered Land Act (RLA), now repealed, and re-enacted as **section 62 (1)** of the Land Registration Act (LRA), a personal representative holds the land, lease, charge,

**“subject to any liabilities rights or interests which are unregistered but are nevertheless enforceable and subject to which the deceased proprietor held the same...”**

Further, by **section 119 (2)** of the Repealed Registered Land Act, (now section 61 (2) of the Land Registration Act):

**“Upon production of a grant, the Registrar, may without requiring the personal representative to be registered, register by transmission.**

**(a) Any transfer by the personal representative.”**

The word “transmission” is defined in **section 3** of the repealed RLA partly as

**“the passing of land, lease or a charge from one person to another by operation of law or death...”**

The same word is defined in **section 2** of the LRA as:

**“the passing of land, lease or a charge from one person to another by operation of law or death, insolvency or otherwise.”**

[11] In this case, the sale of land survived the death of the deceased. Before transfer, the deceased held the land subject to the unregistered rights and interests of the purchasers. The respondent as a legal representative of the deceased held the said land subject to those rights or interests. Since the consent to sub-divide the land into three parcels had been granted by the Land Control Board, a transfer by the respondent to the 1<sup>st</sup> and 2<sup>nd</sup> appellants could be validity registered by transmission without the consent of the Land Control Board to the transfer.

Furthermore, in respect of the 1<sup>st</sup> appellant, the respondent had by the supplementary agreement dated 19<sup>th</sup> September, 2002 acknowledged the validity of the 1994 agreement, received shs.30,000/= as additional purchase price and undertaken to file succession proceedings and sign all necessary documents to facilitate the transfer of 3 acres to him.

The respondent subsequently filed the succession proceedings and was appointed a personal representative of the deceased vendor. By **section 62 (2)** of the Land Registration Act, the registration of a personal representative as proprietor of land by transmission “*relates back to and take effect from date of the death of the proprietor*”. It has not been suggested that the respondent was an intermedler. By the second agreement, the respondent merely acknowledged the right or interest of the 1<sup>st</sup> appellant to which the land was subject to.

In the circumstances, we hold that the learned Judge erred in law in failing to give effect to the exemption of the transactions under section 6 (3) (a) of the Land Control Act and further hold that, there was no legal bar to the enforcement of the two agreements of sale as against the respondent in his capacity as a personal representative of the deceased vendor.

[12] Lastly, the appellants’ counsel submitted that the respondent created an implied constructive trust in favour of the appellants. Counsel relied on the authority of **Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri [2014] eKLR** where this Court held, *inter alia* that;

***“a constructive trust relating to land subject to the Land Control Act is enforceable.”***

In **Willy Kimutai Kitilit versus Michael Kibet** – Eldoret Civil Appeal No. 51 of 2015, this Court has just followed the decision in **Macharia Mwangi Maina’s** case 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 protect and promote that principle, amongst others, 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 unenforceable for lack of consent of the Land Control Board.”***

The respondent’s counsel submitted that the doctrine of estoppel does not apply as the 1994 agreement was null and void by operation of law.

[13] This is a case where the deceased by a written agreement sold the entire land to three joint purchasers including the 1<sup>st</sup> and 2<sup>nd</sup> appellants, received the purchase price, gave each vacant possession and left the land. The deceased in addition obtained the consent to sub-divide the land pursuant to the agreement but died before he transferred the land.

The 1<sup>st</sup> and 2<sup>nd</sup> appellants settled their families on respective portions and each developed the land by building dwelling houses. By the time the respondent filed a suit for eviction, each of the 1<sup>st</sup> and 2<sup>nd</sup> appellants had been in possession of the land for over ten years.

It is clear that the deceased and the 1<sup>st</sup> and 2<sup>nd</sup> appellants had common intention that each purchaser would get the interest purchased. The doctrine of constructive trust applies in those circumstances.

Moreover, the deceased by a written agreement made representation to each of the 1<sup>st</sup> and 2<sup>nd</sup> appellants that they would get an interest in land and each acted to his own detriment by settling the family on the land and developing the land. Similarly, the doctrine of proprietary estoppel applies in those circumstances.

[14] The authors of **Halsbury’s laws of England Vol.16 (2) 4<sup>th</sup> Ed. Re-issue** state at para 1089:

***“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.”***

By section 28 (b) of the Land Registration Act, trusts are now overriding interests to which registered land is subject.

The facts upon which the equity of constructive trust rests are not in controversy. They were fully pleaded and submissions made on them only that the equity was not clearly articulated by the appellants before the trial Judge.

The application of the equities of constructive trust and proprietary estoppel being inferences from the established and uncontested facts is a point of law which this Court is entitled to entertain in the interest of justice although raised for the first time in the appeal.

In the circumstances of the case, it would be unconscionable to allow the respondent as an administrator of the deceased vendor to resile from the transaction entered into between the deceased and the 1<sup>st</sup> and 2<sup>nd</sup> appellants or from the transaction entered into between the 1<sup>st</sup>

appellant and the respondent.

[15] In conclusion, we find that the respondent's suit for eviction of the appellants had no merit. We further find that the 1<sup>st</sup> and 2<sup>nd</sup> appellants proved that the respondent was enjoined to transfer the portions sold by transmission and that the same land was subject to constructive trust in favour of the 1<sup>st</sup> and 2<sup>nd</sup> appellants for the interest each purchased.

[16] For the above reasons;

(i) *the appeal of each appellant is allowed.*

(ii) *The Judgment of the lower court allowing the respondent's suit and granting an order of injunction is set aside and, in lieu thereof, the respondent's suit is hereby dismissed.*

(iii) *The Judgment dismissing the appellants' counter-claim is set aside and, in lieu thereof, the counter-claim is allowed to the extent that Judgment is entered for;*

a) *A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> appellants are entitled to portions measuring 5.0 acres and 3.0 acres respectively on parcel of land known as Cheptiret/Cheplaskei Block 3 (Sertwet/103 by virtue of sale agreement entered into between themselves and the late James Gachobe Njeru and by doctrine of constructive trust.*

b) *An order compelling the respondent in his capacity as the personal representative of the estate of the late James Gachobe Njeru to sign the necessary documents of transfer by transmission in favour of the 1<sup>st</sup> and 2<sup>nd</sup> appellants within 14 days from the date hereof and in default the Registrar of the Court to execute the necessary documents.*

(iv) *The respondent shall pay the 1<sup>st</sup> and 2<sup>nd</sup> appellants the costs of the appeal and of the suit and counterclaim in the court below.*

**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**

.....

**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**