



Chogi & 2 others (Personal Representatives of the Estate of Simon Chogi Gatuma - Deceased) v Kiragu (Environment & Land Case 189 of 2017) [2024] KEELC 3999 (KLR) (16 May 2024) (Judgment)

Neutral citation: [2024] KEELC 3999 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 189 OF 2017**

**JG KEMEL, J
MAY 16, 2024**

BETWEEN

**JOSEPH NDUNGU CHOGI 1ST PLAINTIFF
PETER MWAURA CHOGI 2ND PLAINTIFF
STEPHEN MWAURA CHOGI 3RD PLAINTIFF
PERSONAL REPRESENTATIVES OF THE ESTATE OF SIMON CHOGI
GATUMA - DECEASED**

AND

PETER KAGUNYU KIRAGU DEFENDANT

JUDGMENT

1. Vide a Complaint filed on the 24/2/2017 the Plaintiffs filed suit as the representatives of the estate of their father and original Plaintiff Simon Chogi Gatuma against the Defendant seeking the following orders;
 - a. An injunction to restrain the Defendant from dealing with the said parcel of land L.R. No. Ruiru/Ruiru East Block 2/3445 in any way pending the hearing and determination of the suit.
 - b. An order of eviction of the Defendant from the said land parcel No. L.R. No. Ruiru/Ruiru East Block 2/3445 pending the hearing and determination of the suit.
 - c. Damages for breach of contract.
 - d. Costs of the suit.
2. In denying the claim of the Plaintiffs the Defendant through his Defence and apparent Counterclaim sought the following orders;



- a. That the Plaintiffs suit be dismissed with cost.
 - b. Damages for breach of contract as per Clause No. 4 of their mutual agreement.
 - c. Any other or further orders deemed fit to award in the circumstances of this suit and averments of the Defence.
 - d. That the Plaintiffs be ordered to cooperate with the Defendant and get consent and duly signed transfers in favour of the Defendant.
 - e. That the Plaintiffs be ordered to complete the sale on their end given the substantial amount had already been paid to their deceased father who acknowledged the same before the Honourable Court.
3. On the 15/3/2021 Simon Chogi Gatuma passed away and was substituted by the Plaintiffs.
 4. At the hearing of the suit the Plaintiffs case was led by PW1 – Simon Chogi Gituma who testified and relied on his witness statement dated the 24/2/2016 as his evidence in chief. In addition, he relied on the list of documents adduced in Court. That he sold the suit land to the Defendant while it was still registered in the name of Jacinta Waithera Chogi his late wife. That later he concluded the succession proceedings in the estate of his wife and the land was transmitted in his name. That the Defendant failed to pay the full purchase price having only paid Kshs. 400,000/- leaving a balance of Kshs. 250,000/-. That he handed over possession of the land to the Defendant. He admitted that he did not obtain the land control Board consent. He stated that he desires to refund the monies to the Defendant in return for his land as the Defendant breached the agreement of sale.
 5. In cross he admitted receiving Kshs. 600,000/- from the Defendant leaving a balance of Kshs. 50,000/-. That he was not aware that Kshs. 200,000/- was deposited into his account by the Defendant after he had filed for succession. That the agreement had no time lines but the Defendant was to pay Kshs. 50,000/- at the Land Control Board meeting which never happened.
 6. On 13/4/23 the Defendant testified and relied on his witness statement dated the 30/5/22 as evidence in chief. He adduced documents marked as DEX 1-6 in support of his case.
 7. He stated that when they entered into the agreement of sale the land was still registered in the name of the Plaintiff's wife who was deceased at the time. That he paid a deposit of Kshs. 400,000/- . That he received the original title of the suit land, death certificate and a ballot from the Plaintiff. That the area chief even included him as one of the beneficiaries of the estate of Jacinta in the letter dated the 26/10/2009. He stated that he paid the Plaintiff the sum of Kshs. 200,000/- through a bankers cheques. That he gave him the banker's cheque in person. That the delay in applying for Land Control Board consent arose from the delay in concluding the succession proceedings by the Plaintiff. He stated that according to the agreement of sale the balance of Kshs. 50,000/- was to be paid at the land control board meeting which is held monthly. He stated that the land is now registered in the name of Simon Chogi, deceased. That in his counterclaim he seeks the transfer of the land into his name and the cancellation of the title in the name of Simon Gatuma. That he has already sold the land to third parties who have taken possession and developed the same.
 8. In cross he stated that the Plaintiff and his children proposed him as a beneficiary and got the Chief to write the letter dated the 26/102009 and that explains why the Plaintiff handed over the original title ballot and death certificate to him. That the balance of Kshs 50,000/- was upon obtaining the consent.



Joinder of third parties

9. On the 12/4/2023 Mr Mwangi Advocate filed a Motion for joinder of 18 parties to the suit. The Court determined the application and rendered itself as follows on the 27/9/23;
 - a. For the reasons above the Court finds the application merited. It is allowed as prayed.
 - b. The Applicants are directed to file their pleadings within the next 15 days in default the order shall lapse.
 - c. The Applicants shall pay throw away costs in favour of the Plaintiff in the sum of Kshs 20,000/- within the next 30 days.
 - d. Thereafter the parties to fix the matter for hearing at the earliest.
 - e. Costs shall be paid by the Applicants in favour of the Plaintiff.
10. The Interested Parties failed to comply with the orders of the Court above and most importantly file their pleadings and the Court was successfully moved to set the date for Judgement on the 25/4/24.

Written submissions

11. As to whether the Defendant adhered to the payment schedule in the agreement, the Plaintiff submitted that the transaction was subject to the provisions of the Law of Succession Act and the Land Control Act. That the agreement of sale dated the 13/10/2009 was a mere intention to enter into an agreement for sale of land upon the successful petition of succession of the estate of Jacinta Waithera Chogi, the registered owner of the land.
12. It was further submitted that according to the Chief's letter dated the 26/10/2009 the Defendant was supposed to petition for succession in the estate of Jacinta but he failed thus fell in breach of the contract as a result of which the Plaintiff filed for succession and obtained title in his name. That the Defendant breached the contract when he failed to pay the balance of the purchase price in the sum of Kshs 50,000/-. That the transaction was to be completed in November 2009. Further having not complied with the datelines set out in the agreement of sale, the transaction lapsed. That the Defendant is occupying the suit land illegally and in contravention of the provisions of the Land Control Act.
13. Should the Defendant be evicted from the suit land? The Plaintiffs answered the question in the positive. For breach of contract it was argued that the Plaintiffs are entitled to damages for breach of contract by the Defendant.
14. In addition, the Plaintiffs faulted the Defendant for not filing a Counterclaim and urged the Court not to grant any prayers in favour of the said Defendant. That the only order commendable in the circumstances of all breaches is damages as provided for in the Contract which is recoverable as a civil debt as per the provisions of the Land Control Act.
15. The Plaintiffs further submitted that both the Plaintiffs and the Defendant are guilty of intermeddling in line with the provisions of Section 45 of Law of Succession Act.
16. In summary the Plaintiffs submitted as follows;
 - a. Neither the Plaintiffs nor the Defendant had any locus standi to sell or purchase the suit land, which was then in the name of Jacinta Waithera Chogi, deceased without grant of representation to the estate. The purported agreement for sale dated 13th October 2009, was an exercise in intermeddling with the free property of a deceased person.



- b. Further, even if any of the parties had obtained grant of representation to the estate of Jacinta Waithera Chogi (Deceased) pursuant to the purported agreement for sale, since the transaction was a controlled one, it was mandatory to apply for, and procure, the consent of the Land Control Board within six months of the date of the agreement.
 - c. The suit land has since been transferred to Simon Chogi Gatuma who has since passed on and whose assets are the subject of succession under the Law of Succession Act. As this Court is not a family Court, the Honourable Court cannot make any order in favour of the Defendant affecting the deceased's property which is the subject of another Court under the Law of Succession Act.
 - d. It is the Defendant who breached the contract hence the Defendant cannot be heard to claim any benefit from a transaction which he did not honour.
 - e. The Defendant can only recover whatever he paid to the Plaintiffs as a civil debt which we submit again this Court has no jurisdiction to hear and determine.
 - f. The continuous possession by the Defendant, or those who may be occupying it through his permission, of the suit land, pursuant to a failed transaction is criminal.
17. The Defendant submitted that he complied with the terms of the agreement of sale and paid a total of Kshs. 600,000/- leaving a balance of 50 K pending the land control meeting. The Defendant holds that the agreement of sale was not validly rescinded. That the Plaintiffs frustrated the completion of the agreement on receipt of Kshs. 600,000/- by failing to attend the land board which was a condition for the payment of the balance of the balance in the sum of Kshs. 50,000/-. The Plaintiff was further castigated for failing to issue a 21 day completion notice as provided for under the provisions of the Law Society of Kenya conditions of sale. It was his submissions that the agreement of sale remains valid as the Plaintiffs never notified the Defendant of any termination of the sale agreement
18. Who is the rightful owner of the suit land? The Defendant submitted that he is the rightful owner of the land and has been in possession since 2010 and that the Plaintiffs has neither rescinded the agreement nor refunded the purchase price of Kshs. 600,000/- paid so far.
19. Having considered the pleadings the evidence adduced at the trial and the rival submissions the issues for determination are;
- a. Was the agreement of sale breached and if yes by who?
 - b. Whether there is a valid rescission of the agreement between the parties.
 - c. Whether the Defendant is entitled to the prayers.
 - d. Costs of the suit
20. For avoidance of doubt I wish to reproduce the agreement of sale between the parties dated the 13/10/2009 as follows;

“SALE OF LAND AGREEMENT

VENDOR: Name: SIMON CHOGI GATUMA

ID No. 11029375

Box No: 1057, THIKA

PURCHASER: Name: PETER KAGUNYU KIRAGU



ID No: 7253389

BOX No: 623, THIKA

PROPERTY SOLD: Plot number RUIRU/RUIRU EAST BLOCK 2/3445, ballot number 1091 which the Vendor is a member

CONSIDERATION: The purchase price for the said parcel is in the sum of Kshs. 650,000 (Six hundred & fifty thousand only) which the Vendor acknowledge receipt of Kshs. 400,000/- the same in form of cash – at execution of this agreement. The balance of Kshs. 200,000/- to be paid after filling petition of the deceased (JACINTA WAITHIRA CHOGI who is the registered owner of the aid parcel. The next board meeting is when the final amount of Kshs. 50,000/- will be paid.

TERMS (1) The parties have verified for themselves the particulars of ownership consideration of plot encumbrances if any.

(2) The Vendor undertakes to put purchaser into possession of the plot upon execution of this agreement.

(3) The purchaser has agreed to pay purchase price upon the execution of this agreement.

(4) In default refund the same amount 2 times of the purchase paid price.

IN WITNESS WHEREOF the parties herein have set down their respective hands this 13th day of October 2009.

SIGNED by the VENDOR]

SIMON CHOIGI GATUMA]

]

]

SIGNED by the PURCHASER]

PETER KAGUNYU KIRAGU]

21. Black's Law Dictionary, 9th Edition, page 213 defines a breach of Contract as:-

“A violation of a contractual obligation by failing to perform one's own promise, by repudiating, or by interfering with another parties performance. A breach may be one by non-performance or by repudiation or both. Every breach gives rise to a claim for damages and may give rise to other remedies. Even if the injured party sustains no pecuniary loss or unable to show such loss with sufficient certainty he has at least a claim for nominal damages.”

22. It is trite that the role of the Court is to interpret the contracts of the parties and not to rewrite the contract. This was the decision of the *Court in National Bank of Kenya Ltd Vs. Pipe Plastic Samkolit (K) Ltd* [2011]eKLR. The Court of Appeal stated as follows:-

“A Court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.”



23. The purpose of a written contract in the field of commerce and everyday life cannot be gainsaid. In the case of *Chartbrook Limited Vs. Persimmon Homes Limited* (2009) UKHL 38 as follows;
- “...the very purpose of a formal contract is to put an end to the disputes which would invariably arise if the matter were left upon what the parties said or wrote to each other during the period of their negotiations. It is the formal contract that records the bargain, however different it may be from what they may have stipulated for previously.”
24. It is trite that when parties penned a contract, there is a legitimate expectation that in the exercise of their free will to contract, they intend to keep their bargain as to their obligations to each other and live to the terms of the contract. In the case of *William Kazungu Karisa Vs. Cosmas Angora Chanzera* (2006) eKLR, the Court held that:-
- “The basic rule of Law on Contract is that parties must perform their respective obligation in accordance with the terms of the contract executed by them.”
25. Further the point is amplified in the case of *Kariuki Kinuthia Vs. Job K. Chirchir & 3 Others* (2013)eKLR, where the Court held that:-
- “The contractual effect of representation of fact in contract for the sale of land is stated in *Halsbury Laws of England, fourth Edition*, volume 42 at Para 57 as follows:-
- “The vendor is bound to deliver to the purchaser property corresponding in extent and quality to the property which either by the description in the contract (including any particulars of sale) or by representation of facts made by the vendor, the purchaser expected to get ...”
26. The terms of the agreement of sale dated the 13/10/2009 were clear. The consideration was Kshs. 650,000/-. The sum of Kshs. 400,000/- was paid at the execution of the agreement, receipt was duly acknowledged. The second instalment in the sum of Kshs. 200,000/- was payable after the filing of the succession cause in the estate of Jacinta Chogi, the deceased wife of the Plaintiff and in whose name the land was registered. There was no date agreed as to when the filing of the petition was to be done.
27. It has been argued by the Plaintiffs that pursuant to the letter of the chief dated the 26/10/2009 the Defendant was obligated to petition for the succession of the estate as he had been indicated as one of the beneficiaries. I find this argument superfluous because it is the Plaintiff as the deceased husband who ought to have taken out letters of grant of administration in the estate of his wife. The Plaintiff admitted that he finally petitioned for succession and obtained a grant in the said estate. He however did not see it fit to annex a copy to inform the Court the date it was obtained. That said the Court finds that no blame can be attributed to the Defendant on that account.
28. It was the Plaintiffs case that the Defendant failed to inform him that he had paid the sum of Kshs. 200,000/-. In response the Defendant led evidence that he handed over the bankers cheque dated the 5/2/2010 to the Plaintiff. The Court finds that the Defendant duly paid the monies in 2010 and no reason to attribute any breach to him as in any event he was waiting for the Plaintiff to take the lead in securing the letters of grant of administration in the estate of his wife.
29. With respect of the payment of Kshs. 50,000/- the agreement stipulated that it was payable at the next land board meeting. Although the land control board Act allows any of the parties to apply for the land control board meeting to seek for consent to transfer in practice it requires the cooperation of both parties especially the land owner to take the lead. There is no evidence that the Plaintiff took any steps



to fill the application form for consent nor book the meeting and notify the Defendant nor that the Defendant refused to attend such a meeting. From the evidence led it is clear that upon securing the letters of representation in the estate of his late wife, the Plaintiff had made up his mind not to honour the agreement. The Court agrees with the Defendant that the Plaintiff frustrated the completion of the agreement in that regard.

30. The Court has observed that the agreement was not subject to time being of essence. The timelines were subject to the occurrence of certain events being obtaining the letters of representation in the estate, the booking of the land control board meeting for consent. The Court does not agree with the Plaintiff's position that the agreement was breached by the Defendant.
31. Was the agreement successfully rescinded? I have carefully reviewed the evidence led by the parties and clearly there is none to show that the Plaintiffs rescinded or terminated the agreement of sale by serving a reasonable notice upon the Defendant to complete the agreement. The Court finds that the agreement was not rescinded by the Plaintiffs.
32. *Eldo City Ltd Vs. Corn Products Kenya Ltd & Another* (2013)eKLR where the Court when confronted with a similar case held:

“In my view, to uphold the position where a party can pull out of a transaction when the parties are already at consensus ad idem, will not be prudent in the world of economics. To my mind, that freedom should be limited up to the point the parties are still negotiating. Once all terms have been agreed and settled, that freedom should dissipate. Otherwise mischievous parties with no intention of selling their merchandise may engage serious purchasers in a wild goose chase knowing very well that they can pull out at any stage. I think this is not to be encouraged.”

33. It has been argued by the Plaintiffs that the agreement is illegal by dint of the provisions of Section 45 of *Law of Succession Act* that prohibit the intermeddling with the estate of the deceased. It was the evidence of the Plaintiffs that the estate was successfully succeeded and he obtained title in his name by way of transmission. The Court being a Court of law and a Court of equity, I find the maxim “equity regards as done what should have been done” applicable in the circumstances of this case. This maxim means that when individuals are required, by their agreements or by law, to perform some act of legal significance, equity will regard that act as having been done as it ought to have been done, even before it has actually happened. This makes possible the legal phenomenon of equitable conversion and paves way for the equitable remedy of specific performance.
34. With respect to the failure to obtain land control board consent, I am guided by the case of *Willy Kimutai Kitilit Vs. Michael Kibet* Civil Appeal No. 51 of 2015 where the Appellate Court stated that *the Constitution* under Article 10 (2) (b) has elevated equity as a principle of justice to a constitutional edict. Under Article 10(2) equity is now a national value enshrined in *the constitution*. The Court of Appeal in *Macharia Mwangi Maina & 87 Others Vs. Davidson Mwangi Kagiri* (2014) eKLR and *Willy Kimutai Kitilit Vs. Michael Kibet* Civil Appeal No. 51 of 2015. In these afore-stated cases, the doctrine of constructive trust and proprietary estoppel was applied to bar a vendor of property (who has put the purchaser in possession) from asserting any claim to the property. The position was further affirmed by the same Court in *Kiplagat Kotut Vs. Rose Jebor Kipngok* [2019] eKLR.



35. Further in the case of *William Kipsoi Sigei Vs. Kipkoech Arusei & Another* [2019]eKLR while relying in the case of Kitilit (supra) the Court stated;

“That since the doctrines of constructive trust and proprietary estoppel apply to oral contracts which are void and enforceable, in our view, by analogy they equally apply to contracts which are void and enforceable for lack of consent of the Land Control Board especially where the parties are in breach of the *Land Control Act* and have unreasonable delayed in performing.”

Further the Court stated;

‘Since the doctrines of constructive trust and proprietary estoppel apply to oral contracts which are void and enforceable, in our view and by analogy, they equally apply to contracts which are void and enforceable 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 trust and proprietary estoppel to a contract rendered void by lack of consent of the land control board will largely depend on the circumstances of each particular case.’ (emphasis is mine).

36. That the equitable remedies of estoppel and trust as enshrined in the new Constitution are therefore applicable to such a sale that would have rendered the sale agreement void for want of form. A constructive trust can either be express or implied. A constructive trust can arise in fiduciary relationships, as a direct consequence of unlawful transaction or from the rule that no person should benefit from his own crime. The concept of remedial constructive trust grants the Courts the discretion to grant justice tailored on the facts of the case where the rules are strict.
37. The Plaintiffs therefore obtained a title that was encumbered with a trust in favour of the Defendant.
38. In this case I find that equity imposes a constructive trust on the intention of the seller to fulfill his original intent in other words against the contrary intent not to perform or an unconscionable denial to perform on the part of the seller
39. For the above reasons I find that the Defendant is entitled to the equitable remedy of specific performance as damages are inadequate in this case. I say so because it is apparent that the intention of the Plaintiff to sell the land was clear. The Defendant was put in possession in 2009. He remained in possession until sometime back when he sold the land to third parties who have developed the land. The Plaintiff handed over the original title together with the ballot, the death certificate to the Defendant as a commitment to transfer the land upon successful petitioning for the Letters of Grant of representation which he did.
40. In conclusion I find that the Plaintiffs cannot have his cake and eat it. He acknowledged receipt of Kshs 600,000/- and wants the land to revert to him a position that is ripe for unjust enrichment. Equity loathes unjust enrichment. The sale was concluded and what remained was the formalisation of transfer in favour to the Defendant.
41. The Plaintiffs have argued that the Defendant failed to file a counterclaim however my perusal of the further amended Defendant reveals a counterclaim although the word counterclaim is not indicated.
42. In the case of *Joyce Mugure Mwangi & 7 Others Vs. Joachim Ngugi Kiarie & 16 Others* (2019)eKLR the Court stated that specific performance like any other equitable remedy is discretionary and the Court will only grant it on well-known principles. The jurisdiction of specific performance is based



on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect, such failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or enforceable. Even when a contract is valid and enforceable, specific performance will however not be ordered where there is an adequate alternative remedy. The Court went ahead to state that even where damages are not an adequate remedy specific performance may still be refused on the ground of undue influence or where it will cause severe hardship to the Defendant.

43. The Court is of the view that specific performance is allowable in the circumstances and the claim of damages therefore is disallowed.
44. In the end the Plaintiff's case is dismissed and I enter Judgement in favour of the Defendant as follows;
- a. The Plaintiffs are ordered to execute the necessary documents to transfer the suit land to the Defendant within 45 days from the date of this Judgment.
 - b. Upon execution of the transfer in his name the Defendant to pay the sum of Kshs. 50,000/- to the Plaintiffs within 15 days thereof.
 - c. In default the Deputy Registrar of this Court is mandated to execute all documents to effectuate the orders.
 - d. The Defendant shall have the costs.
45. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 16TH DAY OF MAY, 2024
VIA MICROSOFT TEAMS.**

J G KEMEI

JUDGE

Delivered online in the presence of;

Masore Nyangau for Plaintiffs

Ms. Njoroge for Defendant

Interested Party – Absent

Court Assistants – Phyllis & Oliver

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