



REPUBLIC OF KENYA



**Njuki v Kiburi & 2 others (Environment and Land Appeal
22 of 2020) [2024] KEELC 4111 (KLR) (9 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4111 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND APPEAL 22 OF 2020**

JO OLOLA, J

MAY 9, 2024

BETWEEN

MARGARET WAGITHI NJUKI APPELLANT

AND

BENARD WAWERU KIBURI 1ST RESPONDENT

BENSON KARIUKI KIBURI 2ND RESPONDENT

JACKSON MWANGI KIBURI 3RD RESPONDENT

JUDGMENT

1. This is an Appeal arising from the Judgment of the Honourable D. K. Matutu, Principal Magistrate delivered on 30th June, 2020 in Mukurweini PMELC Case No. 28 of 2018.
2. By a Plaint dated 23rd August 2016, Margaret Wagithi Njuki (the Appellant herein) had sought for Judgment against the three (3) Respondents for:
 - (a) Specific performance of the land sale agreement dated 5th December, 2012 for a consideration of Kshs.300,000/-;
 - (b) Damages for breach of contract as per paragraph 10 of the land sale agreement dated 5th December 2012;
 - (c) Costs of the suit; and
 - (d) Interest on (b) and (c) above at Court rates from the date of filing the suit until payment in full.
3. Those prayers were the result of the Appellants contention that on 5th December, 2012 she had entered into a sale agreement with the 1st and 2nd Respondents acting on behalf of the 3rd Respondent who is their brother, for the sale of one (1) acre of land which was to be excised from Land Parcel No. Gikondi/Gikondi/1697.



4. It was the Appellant's case that she had paid the sum of Kshs.287,000/- to the Respondents in instalments and she was willing to pay the balance of Kshs.13,000/- but the Respondents had failed and/or neglected to obtain the relevant consents as per their agreement in order to facilitate the transfer of the portion of land that she had purchased to herself.
5. In his Statement of Defence dated 26th October, 2016, Bernard Waweru Kiburi (the 1st Respondent) denied being in default of the Sale Agreement. It was the 1st Respondent's case that he was willing to complete the sale transaction but was unable to do so due to the lack of co-operation on the part of the 2nd and 3rd Respondents with whom he was to equally share the remaining portion of the suit land.
6. But in their Joint Statement of Defence dated 28th September 2016, Benson Kariuki Kiburi and Jackson Mwangi Kiburi (the 2nd and 3rd Respondents) contended that they were strangers to the land Sale Agreement dated 5th December, 2012 as they were not Parties thereto. It was further their case that the Appellant's claim disclosed no cause of action against themselves and that the same was incompetent and ought to be dismissed with costs to themselves.
7. Having heard the dispute and in his Judgment dated 30th June, 2020 aforesaid, the Learned Trial Magistrate concluded that the Appellant had failed to prove her case to the required standard and proceeded to dismiss the same.
8. Aggrieved with the said determination, the Appellant moved to this Court on 6th August, 2020 and lodged the Memorandum of Appeal dated 27th July, 2020 urging this Court to set aside the Judgment and decree arising from the Lower Court on the grounds that:
 1. The Learned Trial Magistrate erred in law and in fact in failing to find that the Appellant had proofed (sic) her case to the required standard;
 2. The Learned Trial Magistrate erred in law and in fact in failing to find that there existed a constructive trust in favour of the Appellant;
 3. The Learned Trial Magistrate erred in law and in fact in inferring that the Appellant had a responsibility to apply to the Land Control Board for consent to transfer a legal obligation imposed on the Respondents;
 4. The Learned Trial Magistrate erred in law and in fact in finding that there was no binding contract between the Appellant and Respondent despite the 1st Respondent acknowledging that there existed a valid agreement between the Respondents and (the) Appellant; and
 5. The Learned Trial Magistrate erred in law and in fact in re-writing the agreement for sale between the Parties rather than interpreting (it) in accordance to the law.
9. This being a first Appeal, this Court has a duty to re-evaluate, re-analyse and to reconsider the evidence presented before the trial Court and to draw its own conclusions [*Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR].
10. Accordingly, I have carefully perused and considered the Record of Appeal as well as the Judgment delivered by the Learned Trial Magistrate. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates representing the Parties herein.
11. By her Complaint before the trial Court, the Appellant herein had sought for an order of specific performance of the land Sale Agreement dated 5th December, 2012 as executed between herself on the one part and the 1st and 2nd Respondent on the other part. The Appellant had sought damages for breach of contract as well the costs of the suit.



12. The reason for those prayers was the Appellant's contention that the three (3) Respondents who are brothers had sold to her an acre of land that was to be excised from the parcel of land then known as LR No. Gikondi/Gikondi 1697 measuring some 1.214 Ha. It was the Appellant's case that though the Sale Agreement was only executed between herself and the 1st and 2nd Respondents, the said Respondents were also acting on behalf of the 3rd Respondent who is their brother and was aware of the transaction.
13. The Appellant told the Court that the purchase price for the said parcel of land was Kshs.300,000/- out of which she had paid the sum of Kshs.287,000/- to the Respondents. She further told the Court that even though she was ready and willing to pay the balance of the Kshs.13,000/- the Respondents had failed and/or neglected to obtain the relevant consent to facilitate the transfer of the portion of land she had bought to herself.
14. On his part, the 1st Respondent did not deny entering into the Sale Agreement. It was his case that even though on his part he was ready and willing to complete the sale transaction, he was unable to do so due to the lack of co-operation on the part of his Co-Respondents with whom he was to share the remaining portion of the land.
15. The 2nd and 3rd Respondents did not testify at the trial. In their joint Statement of Defence filed in the trial Court, they had asserted that they were strangers to the Sale Agreement referred to by the Appellant and their brother the 1st Respondent.
16. Having analysed the evidence presented before himself, the Learned Trial Magistrate concluded as follows at Paragraphs 11 and 12 of the Judgment.

“ 11. It is for the Plaintiff to prove (sic) the case against the Defendants to the required standard – on a balance of probability. The Plaintiff's claim is based on (the) fact that she bought land from the Defendant(s) who have since refused to transfer the portion to her. The Defendants are divided on whether there was a valid agreement. The first Defendant admits entering into (an) Agreement and receiving the money. The second and third Defendants maintain they were strangers to the Agreement. On the question whether there was a valid Agreement, it suffices to look at the Agreement itself. The Agreement dated 5th December 2012 indicates that the Plaintiff signed the Agreement with the first Defendant and with the second Defendant indicated as “on their behalf and on behalf of Jackson Mwangi Kiburi.” Even the subsequent acknowledgment are signed in the same style. No power of Attorney is filed. The Agreement does not meet the essentials of a valid contract as provided for under Section 3(3) of the *Laws of Contract Act*.

12. The proviso to Section 3(3) of the *Law of Contract Act*, provides that the requirements of contract being in writing; signed by all Parties and signature of each Party signing has been attested to by a witness “does not affect the creation of a resulting, implied or constructive trust.” The Plaintiff says there was an implied trust in allowing the Plaintiff possession. This only came up in submissions and not in pleadings.”



17. The trial Court then delved into a detailed discussion on the effects of the failure by the Parties to obtain a Land Control Board consent for the sale transaction and concluded as follows at paragraph 15 of the Judgment.

“ 15. What can one make of the circumstances of this Case? The first Defendant sold land to the Plaintiff. The Agreement was reduced into writing. Consideration was received and the Plaintiff took possession. She has utilized the land. The Defendants have since reneged on the Agreement. It was the responsibility of either party to obtain consent. The transaction was (a) controlled transaction. The failure to obtain Land Control Board consent was fatal. As found above, the Agreement was not valid for not complying with the *Law of Contract Act*. It was in writing but not signed by all the Parties. An implied trust cannot be imported into a transaction that is clearly invalid, null and void for all interests and purposes.”

18. It was however rather difficult for this Court to agree with the conclusions made by the trial Court. A perusal of the record herein reveals that the parcel of land known as LR No. Gikondi/Gikondi/1697 was registered in the joint names of the three Respondents herein.

19. By the Sale Agreement dated 5th December 2012, the 1st and 2nd Respondents entered into an agreement to sell a portion of the land measuring one (1) acre to the Appellants. In respect to the 3rd Respondent, clause 1 of the agreement provided as follows:

“ 1. The vendors and their brother Jackson Mwangi Kiburi have agreed to sell and the purchaser has agreed to buy a portion of 1.0 acre out of land Parcel No. Gikondi/Gikondi/1697 measuring 1.214 Ha. or thereabouts free from all encumbrances.”

20. In support of her case, the Appellant told the Court that all the three brothers were selling to her the land and that they talked with the 3rd Respondent who was absent on phone. That position was supported by the 1st Respondent. In his testimony-in-chief before the trial Court, the proceedings record the 1st Respondent to have testified as follows:

“ ... The 2nd and 3rd Defendants are my brothers. I know the Plaintiff. I recorded Statements on 26th October, 2016. I wish to adopt it. We were selling land to Waguthi one acre of land. We concluded the sale. I was ready to sell. We did not conclude the sale. My brothers refused to conclude the sale. We received the money Kshs.200,000/-.”

21. On cross-examination by Counsel for the Appellant, the 1st Respondent testified as follows:

“ We sold the land. We received the money, I signed the acknowledgement.

... The balance is Kshs.30,000/- we had received Kshs.270,000/-. I do not know why my brothers have refused to conclude the sale. We all received the money. Plaintiff has used the land since 2013. I am ready she gets my 3 points which is my share.”



22. On further cross-examination by Counsel for the 2nd and 3rd Respondents, the 1st Respondent testified thus:

“We sold one acre of land. We were to share the remaining. Jackson agreed to the sale. Benson signed for Jackson. Benson was an adult when we sold the land. We all received the money. The acknowledgment says I received on behalf of the others. Antony Maina was witness. I did not sell my share. The three of us sold the land. We did survey and divided into three. We were giving out the Plaintiffs share. I have sold land. I will give the Plaintiff my three points from my share.”

23. That then was the evidence placed before the trial Court. The Parties that testified before the Court gave evidence that all the 3 brothers had entered into a Sale Agreement to sell the 1 acre portion of land to the Appellant and that she was immediately put in possession. The idea that the Respondents were divided on the validity of the Agreement was neither supported by any fact nor evidence.

24. While the 2nd and 3rd Respondents denied knowledge of the Agreement dated 5th December, 2012 in their joint Statement of Defence, they did not support that position at the trial. I say so because even though they participated in the trial and heard the testimony of both the Appellant and the 1st Respondent, they chose in their collective wisdom not to call any evidence in rebuttal.

25. As it were, it is trite law that pleadings are not evidence. Having filed their joint Statement of Defence it was incumbent upon the 2nd and 3rd Respondents to testify in support thereof. Having chosen not to call any testimony in support of their Defence, even after hearing the evidence of both the Appellant and the 1st Respondent, the only conclusion that the Court could arrive at was that they had conceded to the position taken by both the Appellant and the 1st Respondent.

26. In regard to the issue of the Land Control Board Consent, Clause 6, 7 and 8 of the Agreement provided as follows:

- “6. The vendors undertake to obtain consent to sub-divide the said portion before 31st day January, 2023;
7. The vendors undertake to obtain consent to transfer the said portion to the purchaser before 30th day of March, 2013; and
8. The vendors shall meet the subdivision fees payable to the necessary authorities to effect the sub-division of the said portion.

27. That being the case, it was again clearly erroneous on the part of the trial Court to state that both Parties had the responsibility to obtain the Land Control Board consent. Clause 7 of the Agreement clearly placed the responsibility to do so upon the Respondents.

28. In any event, in so far as the provisions of Sections 6 and 7 of the [Land Control Act](#) make it mandatory for the consent of the Land Control Board to be obtained within six months for transactions involving sale of agricultural land like in this case, the Courts have repeatedly expressed the view that failure to obtain Land Control Board Consent does not invalidate such transactions.

29. As the Court of Appeal stated in [Willy Kimutai Kitilit v Michael Kibet](#) (2018) eKLR:

“The *Land Control Act* does not, unlike Section 3(3) of the *Law of Contract Act* and Section 38(2) of the *Land Act* save the operation of the doctrines of constructive trust or proprietary estoppel nor expressly provide that they are not applicable to controlled land transactions.



Although the purpose of the two statutes are apparently different, they both limit the freedom of contract by making the contract void and enforceable. 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...”

30. Again as was stated by the same Court in *Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagiri* (2014) eKLR:

“... a constructive trust is based on a “common intention” which is an agreement, arrangement or understanding actually reached between the Parties and relied on and acted on by the claimant. In the instant case, there was a common intention between the appellants and respondents in relation to the suit property. Nothing in the Land Control Act prevents the claimants from relying upon the doctrine of constructive trust created by the facts of the case. The respondent all along acted on the basis and represented that the appellants were to obtain proprietary interest in the suit property. Constructive trust is an equitable concept which acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner by defeating the common intention.”

31. Considering a similar matter in *William Kipsoi Sigei v Kipkoeb Arusei & another* (2019) eKLR, the Court of Appeal held as follows:

“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...”

32. In the matter before me, it was evident that the Respondents had received more than 90% of the purchase price from the Appellant pursuant to a Sale Agreement executed on 5th December, 2012. The Appellant was put in possession of the one acre portion of the land and she had since constructed a house thereon and was solely using the rest of the land for farming activities. The failure to obtain the Land Control Board Consent was because the 2nd and 3rd Respondents changed their mind on the sale. The Respondents have neither refunded the purchase price so far paid nor have they stopped her from developing the land. A constructive trust had therefore since been created.

33. As it were, a specific performance order as sought by the Appellant is a decree by a Court of Law compelling a party to perform their obligations. From the material placed before the trial Court, it was apparent that the Appellant had fulfilled her part of the bargain by almost completing payment of the purchase price. It was apparent that the Respondents had reneged in the performance of the Sale Agreement and that the Appellant was therefore entitled to seek for the enforcement of the contract.

34. In the premises, I am persuaded that this Appeal has merit. I allow the same, set aside the Judgment of the Learned Trial Magistrate dated 30th June, 2020 and substitute the same with an order allowing Prayer ‘a’ of the Appellant’s claim dated 23rd August, 2016.

35. The Appellant shall have both the costs of the suit in the Lower Court as well as for this Appeal.

36. It is so ordered.



**JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT
NYERI THIS 9TH DAY OF MAY, 2024:**

In the presence of:

Mrs. Maina for the Appellant

Mr. C. M. King'ori for the Respondents

Court assistant - Kendi

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J. O. OLOLA

JUDGE

