



**Pamba & another v Akokor & another (As Legal Representatives
of James Mariach Kokita - Deceased) (Environment & Land Case
18 of 2014) [2023] KEELC 15834 (KLR) (28 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 15834 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 18 OF 2014
FO NYAGAKA, J
FEBRUARY 28, 2023**

BETWEEN

MNANG'AT STEPHEN PAMBA 1ST PLAINTIFF

SALOME CHEPKEMEI LOSIANGOLE 2ND PLAINTIFF

AND

VERONICA C. AKOKOR 1ST DEFENDANT

PAULINE KOKITA 2ND DEFENDANT

AS LEGAL REPRESENTATIVES OF JAMES MARIACH KOKITA - DECEASED

JUDGMENT

1. The Plaintiffs' joint claim against the Defendants, as pleaded in their Plaint dated February 4, 2014 and amended on November 5, 2019, was for:
 - (a) A declaration that the agreement for sale of two (2) acres forming part of LR Number West Pokot Ker 'A'/4050 is not a controlled transaction and as such the legal representative of the deceased 1st Defendant and 2nd Defendant should effect transfer of the same to the Plaintiffs and in default the Deputy Registrar of the High Court of Kenya Kitale do execute the transfer in favor of the Plaintiffs on behalf of the Defendants.
 - (b) In the alternative, an extension of the period for application for consent of the Land Control Board for such period as the Honorable Court may deem just and expedient.
 - (c) Further in the alternative, the sum of Kshs 800,000.00 being the amount due and owing from the Defendants to the Plaintiffs under the said agreement plus interest thereon at such rate as the Honorable Court may deem fit from December 28, 2010 till payment in full and general damages for breach of contract.



- (d) Costs of this suit together with interest thereon at such rate and for such period of time as this Honorable Court may deem fit to grant.
 - (e) Any other relief that the Honorable Court may deem just and fair to grant in the circumstances.
2. The suit was defended. The 1st Defendant filed his Statement of Defence dated February 19, 2014 on the same day. The 2nd Defendant filed her Statement of Defence dated February 17, 2014 on April 3, 2014. They denied each and every allegation contained in the Plaintiff. He prayed that the suit be dismissed with costs.

The Plaintiffs' Case

3. The Plaintiffs were husband and wife. Their case was that the Defendants were at all material times the joint owners and beneficially entitled to all that parcel of land namely LR No West Pokot Ker 'A'/4050 in Psigirio Sub-location Makutano Town West Pokot County. They would later be informed by Losiangolo Pkeko that the Defendants were intent on selling their land.
4. The 1st Plaintiff, PW1, approached them for negotiation of the purchase price. The negotiations took place at Kapenguria Post Office. Initially, it was agreed that the Defendants would sell three (3) acres but reneged to two (2) acres. By an agreement dated December 28, 2010 produced in evidence as P Exhibit 1, the Defendants sold two (2) of the suit land to the Plaintiffs for the price of Kshs 800,000.00.
5. At the time of executing the agreement, the said sum was paid to the Defendants to pave way for facilitation of the transfer process to the Plaintiffs. It took place at the Defendants' home in the presence of the area Chief and Assistant Chief. He denied that there was any commotion, affirming that the 2nd Defendant willfully executed the agreement. He also denied that the Defendants' daughter Lonah Kokita witnessed the agreement in the company of her siblings.
6. Although the sale agreement indicated that he paid cash, the 1st Plaintiff testified that he paid the cash through the bank. He added that he deposited Kshs 1,200,000.000. Since only two (2) acres had been purchased, it was agreed that the Defendants would refund Kshs 400,000.00.
7. Upon execution, the Plaintiffs took immediate possession and became exclusive occupiers of the suit land by fencing on the land. Notably, the suit land was not situate within a land controlled area and was thus not a controlled transaction requiring consent. Be that as it may, if the Court found so, they urged that the same be declared frustrated so that the Defendants do not benefit from their own breach. In so doing, they prayed that the Court grants an extension for the Application for consent.
8. In spite of the agreed terms of agreement, the Defendants had failed to fulfill their obligations hence the suit. Alternatively, they had failed to refund them the purchase price hence the suit. The Plaintiffs through their Advocate demanded the same as claimed in the present suit vide a letter dated May 24, 2013. It was produced and marked in evidence as P Exhibit 2. They prayed that the suit be allowed.
9. When cross examined, the 1st Plaintiff made reference to the proceedings captured in Kapenguria Criminal Case No 540 of 2014 where he testified that he only met and agreed with the 1st Defendant to the exclusion of the 2nd Defendant. He recalled that in that transaction, there were not cash but bank slip transactions. The Defendants were charged with a criminal case four (4) months after a letter dated January 1, 2014 written that the 1st Defendant was found unfit to plead.
10. Speaking to the 2nd Defendant's letter responding to his demand, he acknowledged that she sent by an enclosure thereof a Cheque No xxxx in the sum of Kshs 650,000.00. The 2nd Defendant was, on an ex gratia basis, willing to refund the purchase price but the 1st Plaintiff rejected it through his Advocate



in a letter dated July 16, 2013 because it was incomplete. He also rejected a second proposal to pay a sum of Kshs 770,000.00 as that wasn't the full purchase price.

The Defendants' Case

11. The 1st Defendant died on February 14, 2016. Letters of Administration ad litem were taken out by Veronica Akokor and Pauline Kokita, the Administratrixes of his estate to represent him in the suit.
12. The 2nd Defendant, DW1 was the 2nd wife of the deceased. She was the registered proprietor of LR No West Pokot/Keringet 'A'/4050 as evidenced through D Exhibit 5. It was previously jointly owned by herself and her deceased husband, and she now held it in trust for her children since May 31, 2013. She testified that suit land was not situate within a municipality as it was five (5) kms away from Makutano Town.
13. On December 28, 2010, the 1st Defendant came home with the 1st Plaintiff and two (2) other persons namely Ritchiel L Berii and Charles Kapelikenei. This was the first time she met the 1st Plaintiff. The 1st Defendant then coerced the 2nd Defendant to execute the sale agreement, the subject of the present suit. The 2nd Plaintiff did not execute the said agreement. At the same time, no funds were given to the 1st Defendant.
14. Upon inquiry as to what she was signing, a quarrel ensued. Their daughter Lonah Kokita, DW2 tried to intervene to stop the fight. However, she was silenced by the 1st Defendant who hit her with a mobile phone. She was then kicked out of the house together with her siblings. They later learned that the deceased had illegally sold the 2nd Defendant's land. But her evidence was that she was then forced to sign the agreement at that time, in absence of the children but in presence of the chief who remarked, 'hata wanawake hawana shamba', interpreted to mean 'women do not own land'. She stated that she did not see money exchange hands.
15. DW2, Lonah Mariarch, who was DW1's daughter testified along the lines of the evidence of her mother. First, she adopted her written witness statement, dated February 20, 2014 and filed on February 24, 2014. She stated in it and orally how she heard of a commotion in the house when the father and the chief and others had entered and on rushing and inquiring what was going on she was hit by a mobile phone and was ordered out of the house. She obliged. After that she learnt that the mother had signed the agreement which was for sale of land.
16. DW1 continued in her testimony that after the ordeal, the 2nd Defendant wrote a letter to the 1st Plaintiff on April 30, 2011 expressing displeasure with the clandestine transaction. She then wrote a letter dated May 18, 2011 through Counsel to the Chairman of the Land Control Board Kapenguria Division urging that the transaction be refused. She then advised the 1st Plaintiff to obtain his money from the 1st Defendant.
17. On August 5, 2011, D Exhibit 6, the 2nd Defendant and her two (2) children warned the 1st Plaintiff against his provocative activities on their land. They accused him of trespass. They resisted any further actions by him and copied the letter to security officers, area District Officer, the OCS and the Chief.
18. The 1st Plaintiff responded through his Advocate in letter dated May 25, 2013 demanding for the transfer of the land or a refund of the full purchase price of Kshs 800,000.00. In their response produced as D Exhibit 2a letter dated May 27, 2013, the 2nd Defendant demanded a sum of Kshs 120,000.00 as licence fee since the 1st Plaintiff had actively cultivated on the suit land for three (3) years. He was offered Kshs 650,000.00 by forwarding a Cheque No xxxx marked as D Exhibit 2b in that sum. She testified that this refund was approved by her deceased husband after he approved the transfer of



- land to the 2nd Defendant's name. She denied that the transaction was intended to defeat the agreement the Plaintiffs had with the deceased person.
19. It was after this new registration as proprietors that the Defendants were charged with the offence of obtaining money by false pretences and malicious damage to property in Kapenguria Criminal Case No 540 of 2014. She produced the proceedings marked as D Exhibit 1 where the Court acquitted her for the offence of obtaining money by false pretences but was convicted for malicious damage to property on the strength of the fact that she had destroyed the fence that the 1st Plaintiff has erected on the suit land.
 20. Acknowledging receipt of the letter dated May 27, 2013 marked as D Exhibit 3, the 1st Plaintiff declined to accept the cheque stating that he fulfilled his obligations as per the agreement. He thus sought a full refund of the purchase price based on the current market value. The 2nd Defendant's Advocate responded on January 8, 2014 through a letter marked in evidence as D Exhibit 4. She offered to refund him Kshs 770,000.00 on an ex gratia basis. She added that she did not recall the 1st Plaintiff paying them as alleged.
 21. Speaking to the deceased's mental status at trial in Kapenguria Criminal Case No 540 of 2014, DW3 Dr Job Sabwami Wanjala a mental disorder practitioner working at Kapenguria County Referral Hospital testified that the deceased was referred to him for mental assessment by the Court. In his report dated January 1, 2014 marked in evidence as D Exhibit 7, he observed that at the time of assessment of him the deceased was kempt, easily established rapport, coherent speech and had a flat mood. On concentration, he observed he was unable to do so. His immediate memory was recent and remote and poor especially of recent events. His conclusion was that he was unfit to plead.
 22. DW2 testified further that the 1st Plaintiff had since vacated the suit land. The 2nd Defendant prayed that the suit be dismissed. She was willing to refund the 1st Plaintiff's money so that she could live peacefully with her children.
 23. DW3, one Job Sabwami Wanjala, who then worked in Kapenguria County Referral Hospital testified that he deals with treatment of patients with mental illness. He stated that he assessed the 1st Defendant, now deceased, upon him being referred by the Magistrate in Kapenguria Law Courts for purposes of ascertaining if he was fit to stand trial. It was upon this that he made the report he gave in evidence.

Submissions

24. At the close of viva voce evidence, parties urged their cases with their respective rival written submissions. According to the Plaintiffs' submissions dated September 29, 2022 and filed on October 3, 2022, the parties herein were in a lawfully binding contract in which the Defendants failed to honor their obligations. Submitting that a court cannot rewrite a contract, the Plaintiffs prayed that this Court upholds the effect of the said contract which is to peacefully grant the parcel of land and not refund the purchase price. They continued that by dint of Section 8 of the *Land Control Act*, this Court should extend leave to apply for consent before the Land Control Board if the suit premises is found to be within an agricultural locality. They argued that they bore overriding interests by way of constructive trust and proprietary estoppel since they took possession, fenced off and started utilization of the property upon its purchase. As such the property belonged to them. They cited several authorities as well as Section 28 (b) of the *Land Registration Act* for this argument.
25. The Defendants' arguments captured in their submissions dated October 24, 2022 and filed on October 27, 2022 was that the suit land was matrimonial property. As such, the paramount consent of the 2nd Defendant, which they argued was not granted, voided the contract. They submitted that



the contract was invalid for failing to meet the prerequisite requirements of a contract since the 2nd Defendant did not execute the contract on her own accord. They continued that the deceased as per the medical report lacked capacity to enter into a contract. They denied that the purchase price was made since no evidence supported that notion. They continued that the parcel of land as cited by the Plaintiffs did not exist and as such could not claim from the Defendants. Finally, they closed their arguments stating that the only recourse available to the Plaintiffs lay in a refund of the purchase price. However, they could only claim from the deceased since the 2nd Defendant never benefited from the funds. That they could only recover from the person to whom it was paid to. Be that as it may, they denied ever being in receipt of those funds.

Analysis and Disposition

26. I have carefully considered the pleadings, the evidence and the submissions relied on by parties. I have also considered the testimonies shared by rival parties and given due consideration to the law applicable.
27. The Plaintiffs and the Defendants entered into a contract dated December 28, 2010 for the sale of two (2) acres of land excised from all that parcel of land, as captured in the sale agreement namely LR No WP/KER 'A' 4050. But in opposition to that claim, the Defendants argued that the parcel of land as captured in the Plaintiffs' pleadings was not the one registered in favor of the 2nd Defendant's name, that is to say, LR No West Pokot/Keringet 'A'/4050.
28. However, I also observe that in their testimonies, the Defendants conceded that the agreement was executed by the Defendants. And specifically, DW1, the 2nd Defendant, admitted in cross-examination that the portion of land her husband was selling to Stephen was two acres which were part of West Pokot/Keringet 'A'/4050. Of importance was the establishment of the fact that it was this parcel of land that was subsequently registered in favor of the 2nd Defendant. It was her testimony on oath she agreed with her husband prior to his death to transfer the property solely in his name and a refund be made to the Plaintiff. Flowing from this, I find and hold that the property in dispute is in respect to all that parcel of land situated in LR No West Pokot/Keringet 'A'/4050. In any event, the sale agreement dated December 28, 2010, the material date herein, produced as P Exhibit 1, referred to the seller being 'the registered owner of plot No W/P/Ker 'A' 4050' and the seller therein was James Mariach Kokita of ID No xxxx.
29. The Defendants submitted, although not pleaded in the 2nd Defendant's Defence dated February 17, 2014 and filed on April 3, 2014, and the 1st Defendant's Statement of Defence dated February 19, 2014 and filed the same date, that the 1st Defendant was incapacitated to contract in 2010 pursuant to the medical report drawn in January 1, 2014. That argument is not accepted and is dismissed for two (2) reasons; firstly, submissions are not pleadings and cannot take the place of those or even evidence as was stated in the case of *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another [2014] eKLR* and secondly, a medical report does not operate retrospectively. The medical report relied on by the Defendants does not in any way point to any mental infirmity at the time of entering into the agreement. If there was any incapacity detected, it was only at the time when criminal charges were preferred and he was not fit to plead to the charges, which was much later. Suffice to add that the very party testified that it was by mutual agreement with the deceased prior to his death to transfer the suit land to the 2nd Defendant and refund the Plaintiffs the purchase price. That would not be possible to be done with a person of mental infirmity of the nature the party testified. As such, the Defendants are estopped from approbating and reprobating.
30. Under the terms of engagement of the contract, the seller was to give immediate vacant possession of the said piece of land to the buyer after signing the agreement. It was further agreed that the seller was to



facilitate the transfer process immediately after payment in full. Each party also undertook to abide by the terms and conditions of the agreement noting that the suit land was sold free from encumbrances. The contract, however, contained a breach clause.

31. The 2nd Defendant argued that since she never executed the contract on her own volition, that contract was defeated ab initio. However, up to date, the 2nd Defendant has never formally rescinded the contract or taken any steps to vitiate the agreements laid out before to defeat the alleged unlawful intention of the parties.
32. The 2nd Defendant's evidence was that she was exacted by her husband to execute the contract. However, it appears that later on, the two (2) parties unanimously agreed to transfer the suit land to her favor. The question this Court wonders aloud about is: what stopped her at that juncture from claiming coercion in the manner done so now? Why didn't she take affirmative steps to defeat an illegal contract as alleged? Her actions or lack thereof and only up to the time of filing the defence, lead this court to hold that the 2nd Defendant was not deliberate as to the truthfulness of the facts herein. Again, if the parties would unanimously agree to refund the money paid as per the contract, it goes without saying that they voluntarily entered into it. It is difficult for one to believe that the 2nd Defendant was coerced into entering into the contract only for subsequent times to agree into rescinding it. Thus, finding that the parties herein voluntarily entered into a contract, I proceed to determine what the consequential effect if any there was upon breach by any party.
33. The 2nd Defendant raised the defence of lack of spousal consent in the transaction and that the property was matrimonial in nature. While that is plausible, I note that the contract was entered into on December 28, 2010. There are two evidentiary facts that work against that kind of contention. First, it is not shown anywhere that the home of the Defendants was put specifically on any portion of the two (2) acres that were sold to the Plaintiffs as to make the portion constitute a matrimonial home. In terms of Section 6(1), matrimonial property consists of -
 - (a) The matrimonial home or homes;
 - (b) Household goods and effects in the matrimonial home or homes; or
 - (c) Any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.' This is not one. It has not in any way been shown that the suit land was acquired during the subsistence of the marriage of the 1st Defendant with the 2nd. The evidence of PW1 and DW1 shows that the portion was actually in use for farming.
34. Additionally, the law requiring spousal consent in relation to transactions of this nature, that is to say the *Land Registration Act*, Act No 3 of 2012 as read with the *Matrimonial Property Act*, 2013, were enacted in 2012 and 2013 and commenced on May 2, 2012 and January 16, 2014 respectively. That was way after the transaction was entered into. The law does not act retrospectively. Be it known to the Defendants that the law is not enacted to foster injustices and create excuses for unjust enrichment. A holistic interpretation of any law however vague it may be should be towards enhancing social justice and public good. I mean that the vagueness should be resolved in favour of a proper functioning of society and not creation of loopholes. That is what is envisaged under the mischief rule of statutory interpretation. One should learn to look beyond the gap left by the law to grasp the beautiful good that the law could have wished to bring out. Thus, I find the kind of Defendants' defence one acts of grasping at straws and therefore wholly without basis and I dismiss it.
35. The Plaintiffs case is that following execution and payment of the contract, the 1st Plaintiff fenced off the area sold to him. I must point out at this juncture that under the contract, the purchase price was acknowledged in receipt thereof at the time of executing the agreement by the seller. It was thus



immaterial whether the 2nd Defendant saw the money exchange on the date of execution because it was done so before the contract was signed. Even then, it was voluntarily acknowledged.

36. It is the finding of this Court, which flows from the evidence on record, that the Plaintiff was ultimately forced out of his apportioned area as the Defendants colluded to frustrate any further activities on his end. This led him to lodge a complaint against the Defendants who were charged with the offence of obtaining money by false presences and malicious damage to property in Kapenguria Criminal Case No 540 of 2014. The 2nd Defendant was convicted for malicious damage to property. This was the strength of her own admission to the fact that she resisted the sale of the property. As such, she damaged the erected fence, barbed wire and posts of the Plaintiffs.
37. The Plaintiffs' intention of utilizing the allocated land were met with resistance and disquiet promoting the 1st Plaintiff to leave the suit premises. The actions of the Defendants frustrated the Plaintiffs' right to peaceful and quiet use and enjoyment of that portion of land agreed to be sold. They were in blatant breach of their terms of agreement for that aspect and for additionally failing to comply with their further obligations to facilitate the transfer process.
38. As rightly stated by the Plaintiffs in submissions, a court cannot rewrite a contract. Its duty is limited to enforcing the same. In this instance, there were no express consequences for breach. However, I do take cognizance of the fact that the Plaintiff paid the full purchase price and that the 2nd Defendant expressed willingness to refund the same, although she kept emphasizing that it was ex gratia.
39. The 2nd Defendant has not expressed any difficulty in abiding by the terms encapsulated in the agreement which included facilitating the process of transfer. She instead opted to refund the purchase price as stated earlier. However, I find that going by the fact that a court cannot rewrite a contract, it behooves this court to retain the contractual relationship rather than restore parties to their original positions absent of the contract without any justifiable cause. A refund of the purchase price would not be the adequate remedy herein since that was not the intention of the parties at first or even later as there was no mutual agreement to that effect.
40. It is evident that the Defendants were intent on dislodging the Plaintiffs' claim to own the property. This is what led to the subsequent registration of the title in 2nd Defendant's name irrespective of the existence of the contract and the destruction of the Plaintiff's property. The Plaintiffs urged this court to inject the doctrine of constructive trust and proprietary estoppel in the facts and circumstances of this case for the purpose of obtaining consent from the Land Control Board. Under its definition in the [Land Control Act](#), agricultural land means land that is not within a municipality or a township or a market. The title deed in respect to the suit land further does not indicate that it is within a municipality. Taking into account the foregoing, coupled with the 2nd Defendant's evidence, I take the view that the property is agricultural land since it is located five (5) kms away from the municipality. The Plaintiff failed to justify that it was located in a non-controlled transaction area.
41. The purpose of the doctrine of constructive trust and proprietary estoppel was as held in [Yaxley v Gotts \[2000\] Ch 162](#) is concerned with equity's intervention to provide relief against unconscionable conduct.
42. The Plaintiffs fulfilled their obligations in this suit; they paid the purchase price in full with the expectation that the Defendants would meet their end of the bargain. However, they were met with lack of cooperation, reneging and damaging to property. The Defendants actually actively took part in preventing the Plaintiffs from entering into possession even when they had received and held onto the monies agreed upon regarding the transaction. The 2nd Defendant even extended to a point of preposterously registering the property in her name. It is evidently clear that these acts of the



Defendants were intended to defeat the Plaintiffs' rightful claim. I find and hold that as long as the Plaintiffs intended but were unable to be in occupation of the land sold to them by the Defendants' actions, the Defendants were constructively holding the property in trust for them.

43. It is instructive to note that under Section 8 of the *Land Control Act*, an application for consent to transfer land shall be made within six (6) months after the sale agreement in question. The consequential effect of non-compliance is to declare the contract void and unenforceable. Looking at the law in that generalization, what supposes the contract is that it is void. However, I adopt the guidance of the Court of *Appeal Willy Kimutai Kitilit v Michael Kibet [2018] eKLR* that held as follows regarding this doctrine:

' 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 and proprietary estoppel to a contract rendered void by lack of the consent of Land Control Board will largely depend on the circumstances of each particular case.

There is another stronger reason for applying the doctrines of constructive trust and proprietary estoppel to the *Land Control Act*. By Article 10(2) (b) of the *Constitution* of Kenya, equity is one of the national values (emphasis supplied) which binds the courts in interpreting any law (Article 10(1) (b)). Further, by Article 159(2) (e), the courts in exercising judicial authority are required to protect and promote the purpose and principles of the *Constitution*. Moreover, as stated before, by virtue of clause 7 of the Transitional and Consequential Provisions in the Sixth Schedule to the *Constitution*, the *Land Control Act* should be construed with the alterations, adaptations, and exceptions necessary to bring it into conformity with the *Constitution*. The word equity broadly means a branch of law denoting fundamental principles of justice.

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.'

44. Based on the above, I find that the contract entered into on December 28, 2010 remains operational and not void on the basis of the doctrine of constructive trust and in contrast with the doctrine of unjust enrichment and is enforceable.
45. The upshot of my analysis is that the Plaintiffs' claim is merited having proved it on a preponderance of the evidence adduced. Given also that courts should give effective remedies capable of execution, I hereby enter judgment as follows:
- (a) The Plaintiffs are entitled to be and are hereby declared the legal owners of the two (2) acres of land purchased from and being part of all that parcel of land known as West Pokot/Keringet 'A'/4050.
 - (b) The legal representative(s) of the deceased 1st Defendant and 2nd Defendant hold in trust the two acres of the suit land, namely, West Pokot/Keringet 'A'/4050 for the Plaintiffs and shall effect the necessary transfer documents of the same to favor the Plaintiffs within thirty (30)



days from the date of this orders failing which the Deputy Registrar of the High Court of Kenya Kitale shall execute the necessary transfer forms in favor of the Plaintiffs.

(c) Costs of this suit together with interest thereon at court rates.

46. It is so ordered.

**JUDGMENT DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS
28TH DAY OF FEBRUARY, 2023**

HON. DR.IUR FRED NYAGAKA

JUDGE, ELC KITALE

