



IN THE COURT OF APPEAL

AT ELDORET

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

J. MOHAMMED, J.J.A.)

CIVIL APPEAL NO. 51 OF 2015

BETWEEN

WILLY KIMUTAI KITILIT.....APPELLANT

AND

MICHAEL KIBET.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya, Environment and Land Court at Kitale, (Obaga, J.) dated 5th March, 2015

in

ELC C NO. 37 OF 2013)

JUDGMENT OF THE COURT

[1] This is an appeal from the judgment of the Environment and Land Court (*Obaga, J.*) dismissing the appellant's suit and allowing the respondent's counter-claim granting an order of specific performance requiring the appellant to transfer two acres (2) out of land title **No. Kaplamai/Sirende Block 1/Kiplongon/60** to the respondent (*suit land*).

[2] By a plaint filed on 28th March, 2013, the appellant averred, among other things that, in August, 2008, he intended to sell two acres of land to the respondent at a price of Shs. 150,000/= per acre, that the respondent took possession of the land; that the respondent breached the agreement by failing to pay the purchase price as agreed; that no consent of the Land Control Board was obtained and the agreement is null and void, and that the respondent had continued to claim the land although he had no proprietary rights. He sought a declaration that the respondent had no proprietary right over the land and a temporary injunction restraining the respondent from trespassing upon or interfering with the suit land.

[3] The respondent filed a defence and counter-claim which was later amended. The respondent averred that he had paid the entire purchase price of Shs. 300,000/=, that entry and possession were undertaken with the appellant's full consent and knowledge and, that the agreement was not null and void as the sale was not a controlled transaction since the land was charged to Settlement Fund Trustees (SFT) until 4th December, 2012. By the counter-claim, the respondent sought an order of specific performance, costs and interest.

In the reply to the defence and counter-claim, the appellant stated that, the suit was agricultural land; consent of Land Control Board was required and that the time for seeking and obtaining the consent of the Land Control Board began running in August, 2008.

[4] The appellant and the respondent gave evidence at the trial and neither called any witnesses. The learned Judge in his judgment made the following findings of fact:

(i) **The appellant entered into a written agreement on 8th August, 2008, for the sale of two acres from his land at a consideration of Shs. 300,000/=.**

(ii) **The respondent paid Shs. 150,000/= on the date of the agreement and the balance was to be paid on 20th September, 2008. The agreement did not provide that the purchase price was to be paid either at once or within a month. The balance**

was not paid on the agreed date but the appellant allowed the respondent to pay the balance by instalments.

(iii) The respondent was put in possession and took possession in 2009 and continued to pay the instalments until 2010 when he cleared the balance. The respondent fenced the land and planted trees on half acre and utilized the other 1¹/₂ acres for farming.

The respondent has been in possession with full knowledge of the appellant.

(iv) The appellant obtained title to the land on 4th December, 2012.

(v) The transaction did not receive the consent of the Land Control Board.

[5] On the basis of those findings, the trial court relying on **Macharia Mwangi Maina & 87 Others v. Davidson Mwangi Kagiri [2014] eKLR** – (Macharia Mwangi decision) a decision of the Court of Appeal sitting at Nyeri, held that the appellant’s action of receiving the full purchase price and putting the respondent in possession created a constructive trust in favour of the respondent, dismissed the appellant’s claim and granted an order of specific performance in favour of the respondent.

[6] The appeal is based on three grounds namely: that the judge misdirected himself in law in failing to find that the agreement was null and void for lack of Land Control Board consent; the judge erred in law when he allowed the prayer for specific performance and lastly, that the judge erred in law when he held that the appellant had created a constructive trust in favour of the appellant. As is clear from the grounds of appeal, the appeal does not challenge the findings of fact by the learned Judge and is based purely on points of law.

[7] This appeal relates to the application of the Land Control Act (*Act*) which commenced on 12th December, 1967. As the preamble of the Act states, it provides for controlled transactions in agricultural land. The transactions affecting agricultural land which are controlled are specified in **Section 6(1)** of the Land Control Act and include, sale, transfer, lease, mortgage, partition, sub-division and sale of shares in a private company or co-operative society which owns land. **Section 6 (1)** further provides that such a transaction:

“is void for all purposes unless the Land Control Board for the land control board area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.”

Section 6 (2) of the Land Control Act provides:

“For avoidance of doubt, it is declared that the declaration of trust of agricultural land situated within a Land Control Board area is a dealing in land for purposes of subsection (1)”.

Further, **Section 6 (3) (b)** states that **Section 6** of the Land Control Act does not apply to:

“a transaction to which the Government or the Settlement Fund Trustees or (in respect of Trust land) a county council is a party.”

[8] **Section 8 (1)** requires that an application for consent should be made in the prescribed form within six months of the making of the agreement but the proviso thereto gives the High Court power to extend the period if it considers that there are sufficient reasons to do so upon such conditions, if any, as it may think fit. **Section 8 (2)** requires the Land Control Board either to give or refuse its consent and **Section 9 (1)** specifies the matters that the Land Control Board should consider and the principles it should apply in making its decision whether to grant or refuse consent. **Section 11 (1)** of the Act provides for appeals from the decision of the Land Control Board to the Provincial Land Control Appeals Board for each Province chaired by a Provincial Commissioner. Further appeal is provided under **Section 13 (1)** to Land Control Appeal Board chaired by the Minister.

[9] Under **Section 7** of the Land Control Act, consideration paid for a transaction which becomes void is recoverable as a debt subject to **Section 22** which provides:

“Where a controlled transaction; or an agreement to be a party to a controlled transaction, is avoided by Section 6 and any person –

(a) pays or receives any money; or

(b) enters into or remains in possession of the land, in such circumstances as to give rise to a reasonable presumption that the person pays or receives the money or enters into or remains in possession in furtherance of the avoided transaction or agreement, that person shall be guilty of an offence and liable to a fine not exceeding three thousand shillings or to imprisonment for a term not exceeding three months or to both such fine and imprisonment.”

Lastly, **Section 24** of the Land Control Act gives the President of the Republic of Kenya power to exempt any land, share, any controlled transaction or any person from all or any of the provisions of the Act.

[10] The 2010 Constitution, in **Article 60 (1)** provides for the principles of land policy which include equitable access to land, security of land rights and in **Article 67 (1)** established the National Land Commission as the overall body in charge of land. **Article 68** authorizes Parliament to, among other things, revise, consolidate and rationalize existing land laws. Pursuant to that power, Parliament has reformed

the land laws. It has enacted, the Land Registration Act 2018 (Chapter 300 (LRA) which repeals five other legislations; the Land Act 2012 (*Chapter 280*) which has repealed two other legislations and the Community Land Act – No. 27 of 2016.

[11] By **Section 25** of the Land Registration Act, the rights of a proprietor of land whether acquired on first registration or subsequently for valuable consideration or by an order of a court shall not be liable to be defeated except as provided in the Act. However, **Section 25 (2)** of LRA provides that the provisions of the section does relieve a proprietor from any duty or obligation to which the proprietor is subject to as a trustee.

Under **Section 28** of the Land Registration Act, all registered land is subject to overriding interests without being noted on the register specified therein which includes trusts, including customary trusts, rights acquired or in the process of being acquired by virtue of any written law relating to limitation of actions or by prescription and any other rights provided under any written law.

[12] **Part v** of the Land Act deals with the administration and management of private land. **Section 38** of that Act as amended by **Section 55** of the Land Laws (*Amendment*) Act No. 28 of 2016 deals with the validity of a contract for sale of land. **Section 38 (1)** provides, in essence, that no suit shall be brought upon a contract for disposition of an interest in land unless the contract on which the suit is founded is in writing, is signed by all parties thereto and the signature of each party has been attested by a witness who was present when the contract was signed. Further, **Section 38 (2)** provides:

“**Subsection (1) shall not apply to –**

(a) a contract made in the course of a public auction.

(b) the creation or operation of a resulting, implied or a constructive trust; or

(c) any agreement or contract made or entered into before the commencement of this Act, provided that-

(i) the verbal contracts shall be reduced to writing within two years from the date of the enactment of this Act; and

(ii) the Cabinet Secretary shall put a notice of the requirement to reduce the contracts in writing in a newspaper of nationwide circulation.”

[13] The Law of Contract Act, **Chapter 23** of the Laws of Kenya provides in **Section 3** that:

“**No suit shall be brought upon a contract for the disposition of an interest in land unless-**

(a) the contract on which the suit is founded –

(i) is in writing.

(ii) is signed by all parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party.

Provided that this Section shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap 526); nor shall anything in it affect the creation of a resulting, implied or constructive trust.”

[14] **Sections 39, 40, and 41** of the Land Act provides for the rights of a vendor in relation to a contract for sale of land and the procedure for obtaining an order of possession where the purchaser is in breach. Similarly, **Section 42** provides for the rights of the purchaser against rescission of a contract for the sale of land and **Section 42 (3)** gives the court power to grant relief to the purchaser.

Lastly, **Section 161 (2)** of the Land Act provides:

“**All law relating to land shall be construed with the alterations, adaptations, qualifications and exceptions necessary to give effect to this Act.”**

[15] In the case of **Macharia Mwangi Maina**, relied on by the learned Judge, the appellant (*vendor*) had sub-divided his land into 240 one acre plots, and by an agreement of sale sold some of those plots to the respondents and others (*purchasers*). Upon paying the full purchase price and survey fees, he put each purchaser in possession. The purchasers in the suit claimed to have developed his own portion by erecting permanent structures, built schools, churches and installed water and electricity. The vendor did not make an application for consent of the Land Control Board or obtain the consent. Later, the vendor filed a suit for injunctions and eviction. The purchasers filed a defence and counter-claim seeking an order to compel the vendor to transfer the land to them. The trial Judge entered judgment for the vendor and dismissed the counter-claim on the basis that the suit land being agricultural land the consent of the Land Control Board was required and in the absence of the consent, the agreements of sale were not enforceable. In the appeal before this Court, the purchasers’ counsel contended that the purchasers were entitled to the land by constructive trust and that the Land Control Act should be interpreted in the light of the 2010 Constitution to ensure that the purchasers received substantive justice. This Court sitting at Nyeri, held, *inter alia*, that the possession of the

land by purchasers was an overriding interest in favour of the purchasers and further at paragraph 20 that:

“In instant case, there was common intention between the appellants and the respondent in relation to 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 Court stated later at paragraph 25 thus:

“The transaction between the parties is to the effect that the respondent created a constructive trust in favour of all persons who paid the purchase price. We are of the considered view that a constructive trust relating to land subject to Land Control Act is enforceable.”

[16] In a later case, David Ole Tukai v. Francis Arap Muge & 2 Others [2014] eKLR relied on by the appellant, this Court sitting at Nairobi and differently constituted differed with the Court in Macharia Mwangi Maina Decision case (*supra*) for several reasons, the main one being on the application of the equitable principles to the Land Control Act. In the latter case, the Court held in part:

“... First and foremost, we have already stated that in our opinion granted the express unequivocal and comprehensive provisions of the Land Control Act, there is no room for the courts to import doctrine of equity in the Act. This is one simple message of Section 3 of the Judicature Act.

Consequently, invocation of equitable doctrines of constructive trust and estoppel to override the provisions of the Land Control Act has, in our view, no legal foundation. We have also noted that this Court has previously held in a line of consistent decisions and in very clear terms that there was no room for application of the doctrines of equity in the Land Control Act.”

The Court allowed the appeal from the decision of the High Court which had held that in the situation before the court, the solution was to apply the principles of equity, and natural justice to temper the harshness of law such as **Section 6** of the Land Control Act.

[17] We have extensively quoted the provisions of the Land Control Act, the Constitution and the current land laws in order to demonstrate that the Land Control Act is not a modern legislation although it has not been repealed. Some of the institutions created by the Land Control Act are no longer in existence, for instance, the office of District Commissioner, Provincial Commissioner and the Central Land Control Appeals Board. The President who had power under that Act to exempt transactions from the provisions of the Act has no longer power under the Constitution to deal with matters relating to land. The policy behind the Land Control Act, nevertheless, it is clear that some aspects of the policy may not be valid under the current Constitution. Some of the principles for granting or refusing consent stipulated in **Section 9** may not pass muster under the current Constitution. The Constitution in Article 60 (1) spells the principles of land policy, provides for land holding by non-citizens in **Article 65** and **Section 159** of the Land Act, as amended by Land Laws (*Amendment*) Act, 2016, provides that the minimum land holding acreage and maximum land holding acreage shall be subject to provisions of **Article 66 (1)** and **60 (1)** of the Constitution respectively.

However, **clause 7 (1)** of the Transitional and Consequential Provisions in the Sixth Schedule to the Constitution of Kenya 2010, provides:

“All law in force immediately before the effective date continues to be in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it in conformity with this Constitution.”

[18] The doctrines of equity are part of our laws although **Section 3** of the Judicature Act subordinates common law and the doctrines of equity to the Constitution and written law in that order. **Sections 3(3)** of the Law of Contract Act and **Section 38 (2)** of the Land Act as amended clearly stipulate that the requirement that contracts for disposition of an interest in land should be in writing does not affect the creation or operation of a resulting, implied or constructive trust. The equity of proprietary estoppel is omitted but as the decision in Yaxley v. Gotts [2000] Ch. 162 (Yaxley’s case) on which the Court in Macharia Mwangi Maina Decision relied, amongst others, shows that the doctrine of constructive trust and proprietary estoppel overlaps and both are concerned with equity’s intervention to provide relief against unconscionable conduct.

[19] In Yaxley’s case, the English Court of Appeal was dealing with the validity of an oral agreement by purchasers of a house to grant a long lease on the ground floor to a builder in exchange for labour, materials and services supplied. **Section 2** of the English Law of Property (*miscellaneous provisions*) Act, 1989 provided in part:-

“(1) A contract for sale or other disposition of an interest in land can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document...”

(5) This section does not apply to ... and nothing in this section affects the creation or operation of resulting, implied or constructive trusts...”

It was contended in that case that the oral agreement was void and that the doctrine of proprietary estoppel could not operate to give effect to such an agreement.

It was held in part that:

“an oral agreement whereby the purchaser of a house promised to grant another, in exchange for materials and services supplied an interest in the property, though void and unenforceable under Section 2 of the Act of 1989, was still enforceable on the basis of constructive trust and Section 2 (5) in circumstances where, previously, the doctrine of part performance or proprietary estoppel might have been relied upon ...”

On his part *Beldam L. J.* said at p. 193 para D

“In my view the provision that nothing in Section 2 of the Act of 1989 is to affect the creation or operation of a resulting, implied or constructive trusts effectively excludes from operation of the cases in which an interest in land might equally well be claimed by relying on constructive trust or proprietary estoppel.”

[20] One of the reasons the Court gave in **David Sironga ole Tukai decision** for differing with the decision in **Macharia Mwangi Maina (supra)** was that the Court in the latter case ignored the provisions of **Section 6 (2)** of the Land Control Act. However, in our view, the phrase “*declaration of a trust of agricultural land*” refers to an express creation of a trust by parties over agricultural land by deed or instrument as envisaged by **Section 36** as read with **Section 66** of the Land Registration Act or **Section 126** of the repealed Registered Land Act, and not a constructive trust or trust created by operation of the law.

In **Public Trustee v. Wanduru Ndegwa [1984] eKLR, Madan, JA.**, as he then was said:

“The provisions of Land Control Act have no application to where the claim to title of agricultural land is by operation of law such as by adverse possession. It is not an agreement, a transaction or a dealing in agricultural land.”

Similarly, equity is law and **Section 6 (2)** does not prohibit a court in exercise of its equitable jurisdiction in the process of adjudicating a land dispute from declaring that a party holds land in a fiduciary capacity.

A court’s decision being final and binding subject to appeal, it would be illogical to hold that such a decision of a court requires the consent of the Land Control Board before it becomes final and valid.

[21] Another reason proffered by the Court in **David Sironga ole Tukai decision**, is that possession which is declared by **Section 22** of the Land Control Act to be illegal cannot constitute an overriding interest. By proviso to **Section 28** of the repealed Registered Land Act and by **Section 25 (2)** of Land Registration Act, the registration of a person as proprietor of land does not relieve him from any obligation to which he is subject to as a trustee. Further, by **Section 28** of the Land Registration Act, trusts are now overriding interests to which all registered land is subject to.

Lastly, by **Section 22** of the Land Control Act, possession is only illegal if it is in furtherance of the avoided transaction or agreement. Since trusts are overriding interests to which land is subject and since by **Section 161 (2)** of the Land Act, all laws have to be construed in conformity with the Land Act, a person put in possession by the proprietor and claiming an equitable interest cannot be in occupation of land illegally pending the determination of the nature and extent of the equitable rights by a court.

[22] The decision in **Yaxley’s** case was confined to the validity of oral contracts in the sale of land and dealt with a similar provision of the law to **Section 3 (3)** of the Law of Contract Act as now modified by **Section 38 (2)** of the Land Act.

A contract for the sale of land to which the Land Control Act applies is not void from inception nor is it an illegal contract. It becomes void when no application for consent of the Land Control Board is made or if made, it is refused and the appeal from the refusal, if any, has been dismissed (*see Section 9 (2)*). The Land Control Act prescribes the time within which the application for consent should be made to the Land Control Board but does not prescribe the time within which the Land Control Board should reach a decision or the time within which any appeal should be determined. The process from the time of the making the application to the time of the determination of the appeal, if any, may obviously take time. However, the requirement that an application for the consent should be made within six months of the making of the agreement and the provisions of **Section 7** of the Land Control Act for recovery of the consideration is an indication that Parliament intended that controlled land transactions should be concluded within a reasonable time.

[23] 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. 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.

[24] 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.

[25] The word **equity** broadly means a branch of law denoting fundamental principles of justice. It has various meanings according to the context but three definitions from *Black’s Law Dictionary, Ninth Edition* will suffice for our purpose:

“1.

---2. **The body of principles constituting what is fair and right.**

3. The recourse to principles of justice to correct or supplement the law as applied to particular circumstances ---

4. The system of law or body of principles originating in the English Court of Chancery and superseding the common and statute law (together called “Law” in the narrower sense) when the two conflict”

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.

[26] For the reasons in paragraphs 20, 21, 22, 23, 24 and 25 above, we are in agreement with the **Macharia Mwangi Maina decision** that the equitable doctrines of constructive trust and proprietary estoppel are applicable and enforceable to land subject to the Land Control Act, though this is subject to the circumstances of the particular case. Upon the application of the equitable doctrines, the court in its discretion may award damages and where damages are an inadequate remedy grant the equitable remedy of specific performance.

[27] Turning to the present appeal, the learned Judge made the findings of fact in terms of paragraph 3 above and also made a finding of law that the appellant created a constructive trust in favour of the respondent. It was not in dispute that the appellant sold a 2 acre portion of his land comprising of 2.440 Hectares to the respondent in 2008. He gave possession of the land to the respondent who fenced the land and developed a portion of half an acre by planting trees. The respondent paid the last instalment of the purchase price in 2010. However, the appellant did not transfer the 2 acres to the respondent and instead caused the whole land to be registered in his name on 4th December, 2012, and filed a suit for the eviction of the respondent thereafter. By the time the appellant caused himself to be registered as the proprietor of the whole piece of land he was a constructive trustee for the respondent and it would be unjust and inequitable to allow the appellant to retain the 2 acres that he had sold to the respondent in the circumstances of the case.

As we have held in essence that, the lack of the consent of Land Control Board does not preclude the court from giving effect to equitable principles, in particular the doctrine of constructive trust, we find that the trial court reached the correct decision and therefore the appeal has no merit.

[28] For the foregoing reasons, the appeal is dismissed with costs to the respondent.

Dated and delivered at Eldoret this 17th day of May, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR