REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC APPEAL NO. 5 OF 2017

(Formerly Nairobi ELC Appeal No. 7 of 2016)

JOHN MUTHUSI MWEKE...APPELLANT

VERSUS

MOSOI P. PARKUT...RESPONDENT

JUDGEMENT

(Being an appeal from the Judgment of the Resident Magistrate's Court at Kajiado Hon. E A MBICHA made on 29th January, 2016 in Kajiado PMCC No. 323 of 2010)

Introduction

By a Memorandum of Appeal dated the 21st January, 2016 the Appellant's appeal against the whole of the Judgment delivered by Hon. E A MBICHA Resident Magistrate's Court at Kajiado on the 26th January, 2016. The genesis of this appeal is the Judgement of the Resident Magistrate Hon. E. M. Mbicha in the Kajiado PMCC No. 323 of 2010 where he decided in favour of the Respondent and dismissed the Appellant's suit in totality. In the said suit the Appellant had sought for the following orders as against the Respondent:

a) A declaration that the agreement entered into between the parties in 1990 is legally equitably valid and created a binding agreement of sale.

b) A permanent injunction restraining the Defendant either by himself, his agents, servants or in any manner however from claiming rights over or in any way dealing with or trespassing onto the Plaintiff's 38 acres of the Land and/or interfering with the Plaintiff's rights of quiet possession, occupation and enjoyment thereof.

c) Specific performance of the Agreement of sale and purchase.

d) Costs and incidental to the suit and interest at court rates.

e) Any other remedy as the Honourable Court may deem fit and applicable in the circumstances.

The Appellant being dissatisfied by the whole Judgement filed an appeal at the Environment and Land Court in Nairobi on 5th February, 2016, which was later transferred to the Kajiado Environment and Land Court.

The Memorandum of Appeal contained the following grounds;

1. THAT the learned Magistrate erred in law and in fact in failing to find and to enforce the Agreements between the parties.

2. The learned Magistrate erred in law and in fact in failing to find and to hold that limitation period for actions for contract for land matters is 12 years rather than 6 years which is applicable for general contracts.

3. The Learned Magistrate erred in law and in fact for failing to find that the running of the cause of action limitation period commenced in 1998 upon issuance of title deed to the Respondent.

4. The Learned Magistrate erred in law and in fact in failing to find that the Defendant had taken the Plaintiff to and pointed out to him land measuring 38 acres' portion of comprised in land title Kajiado/ Kaputiei Central/ 677 ('the Land') the subject matter of the agreements to the Appellant.

5. The Learned Magistrate erred in law and in fact in failing to hold and find that the Defendant could not raise issue of Land Control Board Consent to defeat the Agreement if he never applied for the Consent.

6. The Learned Magistrate erred in law and in fact in failing to find and to hold that there is no bar nor limitation to creation of prospective agreements on Land Matters.

7. The Learned Magistrate erred in law and in fact by failing to find and to hold that Land Control Board application can be sought at any time as the High Court has jurisdiction to extend time for seeking the consent.

8. The Learned Magistrate erred in law and in fact by failing to hold and find that recent High Court decision on Land Matters upon enactment of the Land Act and the new Constitution were emerging and developing jurisprudence breathing life to equitable remedies and constitutional provisions.

The Appellant prays;

a. Appeal be allowed with costs.

b. That Judgement and Decree by Honourable Mr. E A. Mbicha Resident Magistrate delivered on 26th of January, 2016 in Kajiado Principal Magistrates Court Civil Case No. 323 of 2010 be set aside and the Court do make such orders as it may deem appropriate.

c. Costs of this Appeal be awarded to the Appellant.

The Appellant filed his submission to canvass the Appeal but the Respondent failed to do so.

Submissions

In his submissions, the Appellant reiterated his claim and contended that his suit was not time barred. Further that the law of limitation cannot be applied in a vacuum. He proceeded to highlight the evidence presented and contended that the Appellant only became aware that the Respondent had been issued with a title when he filed the Tribunal Case Number TC 331/03/06 in Kajiado. Further, the Sale Agreement was silent on transfer of title and time only begun to run in 2006 when the aforementioned Tribunal delivered its Ruling on 27th July, 2006. He further submitted that the suit land was insitu in 1990 when the Sale Agreement was signed and failure to issue title is not equivalent to non-existent land. He explained that the existence or non-existence of the suit land prior to 1998 was not one of the disputes that the parties before trial court had left for the court to determine. He reiterated that parties are bound by their pleadings. He averred that the doctrine of constructive trust was applicable in this suit. He insisted that the sale was not invalid for failure to obtain consent of the Land Control Board. To buttress his averments, he relied on the following decisions: **Global Vehicles Kenya Limited V Lenana Road Motors (2015) eKLR; Independent Electoral and Boundaries Commission & Another V Stephen Mutinda Mule & 3 Others (2014) eKLR; Willy Kimutai Kitilit V Michael Kibet (2018) eKLR; Macharia Mwangi Maina & 87 Others Vs Davidson Mwangi Kagiri (2014) eKLR; and William Kipsoi Sigei Vs Kipkoech Arusei & John Tunge (2019) eKLR.**

The Respondent failed to file his submissions despite being granted leave to do so.

Analysis and Determination

Upon consideration of the materials presented in respect to the Appeal herein including the Memorandum of Appeal, Record of Appeal and parties' submissions, I have summarized the following issues for determination:

- Whether the Appellant is entitled to the thirty-eight (38) acres of land from Kajiado/ Kaputiei Central / 677 owned by the Respondent.
- Whether the Appeal is merited.

As to whether the Appellant is entitled to the thirty-eight (38) acres of land from Kajiado/ Kaputiei Central/ 677 owned by the Respondent. It is not in dispute that the Respondent is the owner of land parcel number Kajiado/ Kaputiei Central/ 677. It is further not in dispute that the Appellant occupies a portion of Kajiado/ Kaputiei Central/ 677. The Appellant in the lower court produced various hand written agreements dated the 8th June, 1990; 23rd September, 1990; 27th January, 1991; 8th June, 1991; 10th July, 1991; 11th August, 1991; 21st September, 1991; and 16th May, 1992 which he entered into with the Respondent for purchase of 38 acres of land. I note in the said Agreements, the Respondent signed and the same were witnessed. The Respondent contended in the lower court that he sold the land before he obtained his title. Further, that he was residing elsewhere and sold a different parcel of land. I wish to quote a portion of the proceedings from the lower court where the Respondent in his cross examination stated as follows:' **I gave the Plaintiff a place to farm. I gave the Plaintiff land to farm in Ulu. I have never gone to the Tribunal. I am the one who showed the Plaintiff where to settle but we did not agree on the price. I received some money from the Plaintiff. I was given Kshs. 70,000/=. The agreement was to lease land when I got title. I told them to buy land.'**

From this excerpt, it is evident the Respondent actually showed the Appellant the land but claimed he was leasing land to him, although he did not plead so in his Defense nor furnish particulars of the lease in his testimony. The Respondent further admitted that he received Kshs. 70,000 from the Appellant for land. The Learned Magistrate in his Judgement disregarded the fact that the Respondent admitted receiving the Kshs. 70,000, never disputed the handwritten agreements, never raised the issue of Limitation in his pleadings and accepted that the Appellant was on the suit land but proceeded to hold that the suit was statute barred and the Agreement was for a non-existent land. Further, that the issue of constructive trust could not arise where the Appellant failed to apply for the Consent of the Land Control Board. In respect to the dispute herein, I wish to rely on various legal provisions as highlighted hereunder:

Section 3(3) of the Law of Contract Act provides that:' **(3) No suit shall be brought upon a contract for the disposition of an interest in land unless—**

(a) the contract upon which the suit is founded—

(i) is in writing;

(ii) is signed by all the 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 subsection 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.'

While section 6 (1) (a) of the Land Control Act provides that: **'(1) Each of the following transactions that is to say—**

(a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;

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

Further, Section 38 (2) of the Land Act provides that:' **(2) Subsection (1) shall not apply to—**

(a) a contract made in the course of a public action;

(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 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.'

Section 7 of the Limitation of Actions Act stipulates thus: '**An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.'**

These provisions require a suit to claim land to be instituted within twelve years. In the Appeal herein, the fulcrum of the suit revolves around claim for land. However, I note the Agreement which were produced as exhibits were executed in 1990 up to 16th May, 1992. I note the Defendant entered into the Agreement while he had not obtained his Certificate of Title. Insofar as the Learned Magistrate insisted that the Land was non-existent, I opine that it was not his preserve to challenge this, yet the Respondent had admitted allocating the Appellant the portion to occupy. It is trite law that in instances where the subject of a contract involves land, time will only begin to run once the vendor obtains a Certificate of Title. In this instance, I find that time begun to run on 17th July, 1998 when the Respondent acquired his title for land parcel number Kajiado/ Kaputiei Central/ 677 which is the suit land herein.

In the current scenario, I note the Learned Magistrate held that the suit was statute barred but I beg to disagree as the provisions of the Limitations of Actions Act cannot be read in isolation. Further, the Appellant was already on the suit land by the time the Respondent was acquiring the title as well as filing this suit. He further proceeded to find that there was no constructive trust as the Appellant never obtained consent of the Land Control Board yet the suit land is agricultural. The Appellant had even produced proceedings from the Land Disputes Tribunal where the Respondent had been directed to effect transfer of the thirty-eight (38) acres of land to him. However, the said Award was not adopted as the Land Disputes Tribunal Act had been repealed. Further, that is what led to the institution of this suit.

In Court of Appeal decision of **Willy Kimutai Kitilit v Michael Kibet [2018] eKLR**, it held that:

'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……………………………….**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.'**

Further in the case of **Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri [2014] eKLR** the Court of Appeal observed that**: 'a constructive trust is based on "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 the respondent 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'

In relying on the two Court of Appeal decisions, I find that since the Respondent had received the purchase price from the Appellant and allowed him to occupy a portion of the suit land that he had pointed out to him; insofar as there was no consent of the Land Control Board, there was an element of part performance which the Respondent did not deny. It is my considered view that since the year 1990 when the Appellant entered the suit land to date, an element of trust was created, which became an overriding interest over the said land. Insofar as the Appellant failed to obtain the necessary Consent from the Land Control Board within the required period of six (6) months, to enable him transfer the suit land into his names; I hold that the transaction is not void but enforceable by virtue of the doctrine of constructive trust which is a Constitutional principle and he is entitled to have the said thirty-eight (38) acres registered in his name. Based on the evidence analyzed above, I find that the Learned Magistrate erred in Law and Fact in failing to find and to enforce the Agreements between the parties and proceeded to hold that limitation period for actions for contract for land matters is 6 years instead of 12 years and time only begun to run in 1998 upon issuance of title deed to the Respondent. I further find that the Learned Magistrate erred in law and in fact in failing to find that it is actually the Respondent who took the Appellant and pointed out to him land measuring 38 acres' portion of comprised in land title Kajiado/ Kaputiei Central/ 677. The Learned Magistrate further erred in law and in fact in failing to hold and find that the Respondent could not raise issue of Land Control Board Consent to defeat the Agreement if he never applied for the same. I suffice to say that the Learned Magistrate by disregarding the set precedents from the Court of Appeal on constructive trust which is an equitable remedy erred in law and in fact in failing to uphold the Appellant's occupation in the suit land.

It is against the foregoing that I find the Appeal merited and will allow it. I will proceed to set aside the Judgment of the Lower Court and make the following final orders:

i. That Judgement and Decree by Honourable Mr. E A. Mbicha Resident Magistrate delivered on 26th of January, 2016 in Kajiado Principal Magistrates Court Civil Case No. 323 of 2010 be and is hereby set aside.

ii. The Respondent be and is hereby directed to effect transfer of the thirty-eight (38) acres of land out of land parcel number Kajiado/ Kaputiei Central/ 677 to the Appellant, within the next 90 days from the date hereof, failure of which the Deputy Registrar, Environment and Land Court Kajiado will execute the said Transfer Forms.

iii. The costs of the Appeal are awarded to the Appellant.

Dated Signed and Delivered in Kajiado this 26th Day of November, 2020.

CHRISTINE OCHIENG

JUDGE

While the design, structure and metadata of the Case Search database are licensed by Kenya Law under a Creative Commons Attribution-ShareAlike 4.0 International, the texts of the judicial opinions contained in it are in the public domain and are free from any copyright restrictions. Read our Privacy Policy | Disclaimer