



REPUBLIC OF KENYA



**Kagai v Kariuki & 2 others (Environment & Land Case 139 of 2018)
[2023] KEELC 17024 (KLR) (23 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 17024 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 139 OF 2018
EK WABWOTO, J
MARCH 23, 2023**

BETWEEN

LUCY NGUGI KAGAI PLAINTIFF

AND

JOSEPH NJUGUNA KARIUKI 1ST DEFENDANT

REGISTRAR OF LANDS, NAIROBI COUNTY 2ND DEFENDANT

THE ATTORNEY GENERAL 3RD DEFENDANT

JUDGMENT

1. The Plaintiff in her Amended Plaint dated 1st November 2019 sought for the following reliefs against the Defendants: -
 - i. A declaration that the purported sub-division of L.R. No. Dagoreti/Riruta/1115 as well as the subsequent registration, of Title No. Dagoreti/Riruta/3882 in the 1st Defendant's name was fraudulent, illegal, null and void for all purposes.
 - ii. An order that the 2nd Defendant cancels the 1st Defendant's title and his name be removed as the proprietor of the Land parcel title No. Dagoretti/Riruta/3882
 - iii. An order that the Plaintiff be registered as the proprietor of the land parcel title No. Dagoretti/Riruta/3882 and issued with a title deed to that effect.
 - iv. A permanent injunction restraining the 1st Defendant by himself, his servants, agents, representatives or any other party claiming title under him from harassing, from entering, remaining, trespassing or in any other manner



interfering with the Plaintiff's peaceful possession of title No. Dagoretti/Riruta/3882

- v. Costs of the suit.
2. The suit was contested by 1st Defendant through written statement of Defence and Counterclaim dated 22nd October 2018 and also Preliminary Objection dated 22nd October 2018.
3. There were no pleadings filed by the 2nd and 3rd Defendant neither did they participate in the said proceedings.

Plaintiff's case

4. It was the Plaintiff's case that her deceased husband Joseph Kagai purchased land known as Dagoretti/Riruta/3882 from three brothers, Mwathi Njoroge, Miringu Njoroge and Kariuki Njoroge. The deceased was granted a copy of an approved subdivision by the then Nairobi County City Council indicating the section purchased as "E" being the share owned by Mwathi Njoroge. The deceased took possession of the land and together with the Plaintiff they developed the premises extensively constructing the matrimonial home and bedsitters and one bedroom extensions for commercial purposes.
5. The Plaintiff averred that she is aware on her own personal knowledge and from documents in her possession that the facts that relate to the purchase of the property are as follows: -
 - a. Vide a Sale Agreement dated 9th June 1991, the Plaintiff's late husband Joseph Kagai Machua purchased from Mwathi Njoroge, Miringu Njoroge and Kariuki Njoroge 0.32 acres out of L.R. No. Dagoretti/Riruta/1115.
 - b. While the Sale Agreement dated 9th June 1991 was between the three joint properties Mwathi Njoroge, Miringu Njoroge and Kariuki Njoroge of Title No. Dagoretti/Riruta/1115, it was at all times understood by all the parties that Mwathi Njoroge was the one selling his share of the joint property to the Plaintiff's late husband.
 - c. On the same 9th June 1991, Mwathi Njoroge pointed out to the Plaintiff's late husband and the Plaintiff the portion of Title No. Dagoretti/Riruta/1115 that he was purchasing, including the beacons demarcating the limit of the parcel as they were in the process of sub-dividing the property.
 - d. The Plaintiff's late husband was given a copy of an Approval for Sub-division from the Director of City Planning and Architecture dated 18th August 1987 and a copy of the Approved Proposed Sub-division Map and it was indicated to them that the plot they were purchasing was indicated as "E"
 - e. The Plaintiff and her late husband immediately took possession of the said sub plot "E" and started living there, constructed their matrimonial home on the property, engaged in farming activities and constructed bedsitters and one-bedroom extension thereupon.
 - f. It was a term of the said Agreement that the said Mwathi Njoroge, Miringu Njoroge and Kariuki Njoroge would ensure the subdivision of the said property and deliver the transfer documents to the purchaser, the Plaintiff's late husband on or before 31st August 1991.



- g. By 1994, despite their actual occupation of the property, the vendors had still not sub-divided the property and transferred the 0.32 acres to the Plaintiff's late husband which compelled him to file Civil Suit No. 8155 of 1994 seeking orders compelling the vendors to transfer his share of the property to his name.
- h. In response the suit filed by the Plaintiff's late husband, the vendors filed their statements of defence admitting to the sale of 0.1 hectares out of Title No. Dagoretti/Riruta/1115 being Mwathi Njoroge's share to the Plaintiff's late husband as per the Sale Agreement dated 9th June 1991 and the full payment of the purchase price to him.
 - i. All the parties thereto thereafter agreed to settle the matter amicably and several meeting were held by the Riruta Chief. Vide an Agreement dated 10th August 1994, it was formally and mutually agreed by all parties thereto that the Original Title deed for Title No. Dagoretti/Riruta/1115 which was in the custody of the sub-division of the parcel of land and the eventual issuance of individual title for all the parties concerned. The Riruta Area Chief further wrote a letter to the said M/s K. Mwaura & Co. Advocates requiring them to release the original Title Deed for Title No: Dagoretti/Riruta/115 for sub-division and eventual issuance of new titles.
 - j. The said Civil Suit No. 8155 of 1994 filed by the Plaintiff's late husband was in that way amicably settled between the parties and the Plaintiff's late husband was left to pursue the release of the original title deed.
- 6. The Plaintiff and her late husband consequently instructed their then advocates M/s Kimondo Gachoka & Co. Advocates to follow up on the release of the Original Title Deed for Title No: Dagoretti/Riruta/1115 and the rest of the completion documents from the said M/s K. Mwaura & Co. Advocates to enable the transfer of the parcel into the Plaintiff's late husband's name.
- 7. Vide their letter dated 23rd May 2015, M/s K. Mwaura & Co. Advocates indicated that the Original Title Deed for Title No. Dagoretti/Riruta/1115 was lost while in their custody, their advocate Ms. Lilian Wakiya Mwaura had sworn a Statutory Declaration in that respect for the purposes of requiring the Land Registrar to issue a new Title Deed and a Gazette Notice had been issued in The Kenya Gazette dated 25th July 1995 for the issuance of a new Title deed.
- 8. In light of the loss of the Original Title Deed for Title No. Dagoretti/Riruta/1115, the Plaintiff and her late husband had no alternative but to await the issuance of a new title deed to enable them complete the transfer of the sub-divided property into the Plaintiff's late husband's name.
- 9. The Plaintiff and her late husband continued pursuing the issuance of the completion documents to ensure that they would be ready to complete the purchase on notification by M/s K. Mwaura & Co. Advocates that a new title had been issued to replace the missing one.
- 10. The Plaintiff and her late husband were able to acquire from M/s K. Mwaura & Co. Advocates acting on behalf of the vendors the Transfer forms, the Application for Land Control Board Consent and the Letter of Consent from the Dagoretti Land Control Board for the Transfer of the property in favour of the Plaintiff's late husband's name.



11. In 1995, the Plaintiff and her late husband were informed that a third party was trying to acquire the title for sub-plot "E". Despite the misplacement of the Original Title Deed for Title No: Dagoretti/Riruta/1115 they were still understandably concerned by this information and vide a letter dated 10th November 1995, the Plaintiff's late husband wrote to the Director of City Planning informing him that he was the sole purchaser of sub-plot "E"
12. In 2008, the 1st Defendant herein trespassed onto the suit property, the said sub-plot "E" claiming that he had purchased the property. Concerned by his claim, the Plaintiff's late husband instructed his then advocates M/s Kimondo Gachokoa & Co. Advocates to lodge a caution on the entire Title No. Dagoretti/Riruta/1115 as the Title had still not been replaced which was done on 11th May 1998.
13. The Plaintiff also averred that the 1st Defendant could not pass good title as he acquired title for Dagoretti/Riruta/3882 through fraudulent, illegal and corrupt means particulars of fraud which were pleaded at paragraph 29 of her amended plaint. The Plaintiff also pleaded particulars of fraud on the part of the 2nd Defendant which were particularized at paragraph 31 of the amended plaint.
14. During the hearing of the case, the Plaintiff, Lucy Ngugi Kagai, testified as the sole Plaintiff's witness. She relied on her witness statement dated 16th May 2022 and also her bundle of documents as her evidence in chief. She added that when the 1st Defendant trespassed into the suit property in 1998 together with her late husband she filed Civil Suit No. 7452 of 1998 seeking to stop the trespass and illegal construction by the 1st Defendant and a court order was issued on 10th September 1998 restraining the 1st Defendant herein from constructing on her share of L.R. No. Dagoretti/Riruta/1115.
15. It was also her testimony that the original title deed for Dagoretti/Riruta/1115 which had been misplaced was traced by M/s K. Mwaura & Co. Advocates and was released to their then Advocates then letter surrendered to her late husband which she still has in her possession and was produced as PExh No. 26. She also stated that her husband had lodged a caution at the Lands registry in 1998 to protect their interest in the suit property. According to her the said caution was never withdrawn.
16. She further stated that she continues to stay in the land owing to interim orders which were issued on 6th September 2018. She urged the court to grant her the prayers sought in her amended plaint.
17. When she was cross-examined, she stated that the Sale Agreement is dated 4th June 1991. She also stated that the consent was undated though it was issued on 4th November 1992 which application was lodged on 3rd November 1992. She stated that she started staying in the land in 1998 and she also knew of another title in 1998.
18. When asked about the suit filed in 1998, she stated that she could not remember what response was made by the 1st Defendant.
19. She also stated that she came to the land earlier than the 1st Defendant. She conceded to not having any court orders for the 1994 and 1998 cases. She also stated that the 1st Defendant had filed a suit for an eviction which was dismissed.

The 1st Defendant's case

20. It was the 1st Defendant's case that on 8th September 1986, he entered into a sale agreement with one Mwathi Njoroge for a consideration of Kshs 50,000/- for the transfer of 0.25 acres of land out of his share in land parcel number Dagoretti/Riruta/1115 jointly owned with Mirungu Njoroge and Kariuki Njoroge in equal and undivided shares.



21. The 1st Defendant also averred that the sale agreement dated 9th June 1991 did not have all the signatures of all the vendors and no evidence was tendered as proof that the Plaintiff's late husband was allotted plot "E" as the same was not mentioned in the purported agreement.
22. He denied knowledge of a parcel of land measuring 0.32 acres out of land parcel No. Dagoretti/Riruta/1115. He also averred that there was no consent order or decree in Nairobi PMCC No. 8155 of 1994.
23. It was also Defendant's case that he legally acquired the necessary documents for the subdivision including an order from the court lifting the caution put by the Plaintiff's husband on Title No. Dagoretti/Riruta/115 to enable exercise of the 0.26 acres. That the Land Registrar put a gazette Notice to the effect that the original title No. Dagoretti/Riruta/1115 was lost and any interested party could raise an objection within the stipulated time to oppose the issuance of another title and since no objection was raised, the Registrar in compliance with the court order went ahead and issued another title.
24. The 1st Defendant also objected to the suit on the grounds that it was time barred since the Plaintiff admitted that she got notice of the issuance of the title deed in 2003 and she did not challenge the suit for more than 15 years.
25. The 1st Defendant prayed for dismissal of the suit and also sought the following orders in his counterclaim dated 22nd October 2018: -
 - a. The Plaintiff suit be dismissed and the costs of the suit be awarded to the 1st defendant.
 - b. A declaration that the Defendant is the bonafide owner of Title No. Dagoretti/Riruta/3882.
 - c. A permanent injunction restraining the Plaintiff by himself, his servants, agents, representatives or any other party claiming title under her from harassing, remaining, entering, trespassing or in any manner interfering with the 1st Defendants peaceful possession of Title No. Dagoretti/Riruta/3882.
 - d. The Plaintiff, her heirs and succession be issued with an order to vacate Title No. Dagoretti/Riruta/3882.
26. During hearing, he relied on his witness statement and bundle of documents dated 22nd October 2018 as his evidence in chief.
27. On cross-examination, he stated that he has stayed in the property from 1988 and the Plaintiff found her there. He also stated that he bought the land in 1986 from Mwathi Njoroge. He also stated that there were initially 3 vendors and Mwathi Njoroge sold him his share. He also stated that the other two did not participate in the agreement.
28. He stated that he took possession in 1988 though he finished making payments in 1992. He also stated that the late Plaintiff's husband had declined to sign the transfer and that is why he sued him in court.
29. When asked about the title, he stated that he had not seen it before. He also stated that he had sued Joseph Kagai the late husband to the Plaintiff in 2003 and the case was dismissed but later filed an appeal which was withdrawn after Joseph Kagai passed away. He also stated that he has not put a permanent house because of the pending cases and that his house is within the said property though not fenced because they agreed to do so.



30. When cross-examined about the title, he stated that he has the original title in his possession after the mother title was lost.

The case of the 2nd and 3rd Defendant.

31. The 2nd and 3rd Defendant never participated in the proceedings. Neither did they file any pleadings.

Plaintiff's submissions

32. The Plaintiff filed her written submissions dated 31st October 2022. In the opening paragraph of her submissions, she gave a brief background of the dispute and facts of the case. She also proceeded to outline what according to her were the issues not in dispute. These included the following:

- a. That the Plaintiff and her deceased husband have lived in the suit property continuously and uninterruptedly since 1991.
- b. That the Plaintiff and her husband developed a matrimonial home and rental properties in the suit property.
- c. That the 1st Defendant has only erected a semi-permanent house on the disputed property.
- d. That the Plaintiff's then advocate misplaced the Original Title for L.R. Dagoretti/Riruta/1115 and later found it in her custody prompting its surrender to the Plaintiff.
- e. That the Plaintiff has submitted an Original mother title for LR Dagoretti/Riruta/115 to the court as an exhibit.
- f. That the Defendant has failed to submit an original titled deed for Dagoretti/Riruta 3882 to the court as an exhibit despite attaching a copy of the same in his bundle of documents.
- g. That the 2nd Defendant herein, through his internal memo dated 27th January 2015, categorically stated that the Title for Dagoretti/Riruta 3882 was obtained unlawfully as the Original Title was never surrendered for cancellation.
- h. That the 1st Defendant filed 4 separate suits attempting to defeat the Plaintiff's proprietary interest in the suit property, all attempts which have failed.
- i. That the Plaintiff has suffered harassment and threats of eviction during his stay in the suit property.

33. The Plaintiff framed the following five issues for determination: -

- a. Whether the 1st Defendant acquired the title deed dated 30th September 1998 illegally, procedurally or through a corrupt scheme.
- b. When did the 1st Defendant occupy the suit property?
- c. What are the consequences of the 1st Defendant's acquisition of a title deed for the suit property within no notice to the Plaintiff's husband who had lodged a caution restricting further dealings on the parcel of land?



- d. What are the consequences of the 1st Defendant failure to produce in court the original title for Dagoretti/Riruta/3882?
 - e. What are the consequences of a categorical memo by the 2nd Defendant, the Land Registrar, Nairobi terming the 1st Defendants acquisition of title for Dagoretti/Riruta/3882 as irregular?
34. The Plaintiff also submitted on the 1st Defendant's Preliminary Objection raised under Section 8 (1) of the [Land Control Act](#) and Section 7 of the [Limitation of Actions Act](#). Counsel for the Plaintiff submitted that the land in question had been constitutently under litigation between the Plaintiff and the 1st Defendant since 1992 hence under the Rule of Subjudice, the Plaintiff had to wait until 2018 when all the cases were dismissed before she filed this suit. It was also submitted that the Plaintiff purchased the suit property from 3 brothers namely Mwathi Njoroge, Miringu Njoroge and Kariuki Njoroge. The Plaintiff is a beneficiary of the estate of her late husband who inherited the land after Certificate of Confirmation of Grant were issued in December 2018 and therefore the Plaintiff took legal ownership of the property in 2018 and hence that is when the counting of the years under Section 7 of the [Limitation of Actions Act](#) commenced. That was the same year that the suit was filed.
35. On the aspect of the Land Control Board, the Plaintiff submitted that she applied for a Land Control Board Consent after the lapse of six (6) months after purchasing the suit property. It was submitted that the delay cannot be ground for a Preliminary Objection in this suit. The impugned consent failed in its purpose of processing a title deed in the name of the Plaintiff due to the loss of the mother title deed which was later recovered.
36. It was also submitted that the 1st Defendant had attached a sale agreement dated 13th April 1987 and a Land Board consent dated 5th October 1988 indicating the application date to be 16th October 1988. Unlike the Plaintiff who did not get a title deed for the property, the 1st Defendant mysteriously got a title deed from such a defective Land Control Board Consent. The Plaintiff submitted that while she did not obtain a title deed from a Land Control Board Consent filed out of time, it was strange that the 1st Defendant did.
37. Reliance was made to the Court of Appeal case of Willy Kimutai Kitilit v Michael Kibet [2018] eKLR the court held as follows:

“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.

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 hare void and enforceable for lack of consent of the Land Control Board especially whether 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.”

38. The court was urged to dismiss the Preliminary Objection raised by 1st Defendant.
39. In her submissions and while referring to Section 28 of the *Land Registration Act* No. 3 of 2012, the Plaintiff outlined the particulars of the 1st Defendant’s acquisition of the title through illegality and a corrupt scheme. It was submitted that the 1st Defendant colluded with the 2nd Defendant and acquired a title as a result of subdivision of a mother title without surrender and cancellation of the original title, the 1st Defendant colluded with the 2nd Defendant and acquired a title as a resultant of a subdivision when the Plaintiff had effectively lodged a caution on the said property with no notification as to the lifting of the caution and that the 1st Defendant conspired and acquired the title deed dated 30th September 1998. The fast defendant conspired and acquired the title deed dated 30th of September 1998, while at all material times he was well aware that the Plaintiff’s late husband had occupied the property for six years as the proprietary.
40. Reference was also made to the case of *Hubert L. Maritim and 2 Others v Margaret J Kamar & 5 Others* in [2016] eKLR.
41. In respect to when did the first defendant occupy the suit property it was submitted that contrary to the first defendant’s allegations that he moved to the suit property in 1991, the plaintiff justified under oath that the first defendant moved to the suit property in 1998. Counsel for the Plaintiff submitted that the first defendant moved to the suit property 7 years after the Plaintiff had occupied it and this was the reason why the 1st Defendant ended up erecting a small structure at the property.
42. It was also submitted that in Civil Suit Number 9553 of 1992 the 1st Defendant sued only sued Mwathi Njoroge one of the brothers who jointly owned the land. According to the Plaintiff this was peculiar because the 1st Defendant ought to have known that the Plaintiff was in occupation of the land. The reason why he saw no use of suing the Plaintiff as a co-defendant is because he had not occupied the land by himself.
43. It was also submitted that it was clear that the 1st Defendant occupied the suit property in 1998 and that his claims that he occupied the property in 1991 are falsified and targeted to win the court to find that he moved into the suit property almost at the same time as the Plaintiff.
44. On what is the consequence of the 1st Defendant’s failure to produce to the court the original title deed for the suit property, the Plaintiff submitted that failure to produce the same by the 1st Defendant denied the court and the plaintiff an opportunity to interrogate its validity and especially where its validity was under challenge as was the case herein.
45. On the other issue of was the consequence of the memo by the land registrar terming the 1st Defendant’s acquisition of title for the suit property as irregular, it was submitted that on this basis the title deed dated 30th of September 1998 is invalid as it was obtained through fraud and a corrupt scheme.
46. On the other aspect being what was the consequence of the 1st Defendant acquisition of a title deed for the suit property without notice to the plaintiff’s husband who had lodged a caution restricting further dealings on the land, the Plaintiff referred to a number of cases where the court stated that the essence of a caution is to forbid the registration of dispositions in land because. Therefore, according to the Plaintiff, the acquisition of the title deed by the 1st Defendant in total violation of the caveat placed on the land led to conclusion of an illegality and a corrupt scheme in the acquisition of the title by the 1st Defendant.



The 1st Defendant's submissions

47. The 1st Defendant filed written submissions dated 9th January 2023. Counsel outlined the following issues for determination by the court;
- a. What is the cause of action as per the amended plaint.
 - b. Whether the preliminary objection raised by the 1st Defendant herein is merited.
 - c. Whether the title held by the 1st Defendant is regular and legal.
 - d. Whether the claim by the Plaintiff is merited.
 - e. What is the fate of the 1st Defendant's counter claim.
 - f. Who bears the costs of the suit.
48. On the cause of action, counsel submitted that the same can be deduced easily from the amended plaint as being fraud and illegal acquisition of the title. It was submitted that pursuant to Section 7 of the Limitations of Actions Act, the Plaintiff's specific cause of action being an action to recover land is time barred. 12 years had lapsed since from the date of the cause of action.
49. On the aspect of Section 8(1) of the *Land Control Act*, counsel submitted that the application for Land Control Board Consent was applied for and issued outside the statutory timelines and hence the agreement is null and void. Buttressing his argument, the following cases were sighted in support; Githu vs Katibi [1990] eKLR, Jack Kaguu Githae vs James Mugo Kinga & 9 Others, Nyeri HCCC No. 58 of 2012, Katana Mranja Angore vs Ezekiel K. Masha, Malindi ELC No. 92 of 2013, Charles Gitonga Gakuu v Evans Kenneth Thiongo, Nyeri ELC No. 2005 of 2012 and Gatere Njamunyu vs Joseph Njue Nyagah, Nairobi Court of Appeal Civil Appeal No. 20 of 1982.
50. On the legality of the 1st Defendant's title, counsel submitted that the 1st Defendant had a valid sale agreement dated 15th April 1987 for the purchase of Sub Plot "E" upon which he paid Ksh 50,000/- On the aspect of the Land Control Board Consent, counsel submitted that the same was obtained. This was pursuant to the vesting order issued on 31st January 1994 wherein the court directed the Executive Officer to execute the application after the vendor Mwathi Njoroge had declined to attend the Land Control Board Consent.
51. It was also submitted that the Plaintiff had not proved the particulars of fraud that were pleaded and she did not call the Land Registrar to support her case.
52. In respect to the 1st Defendant's counterclaim, it was submitted that the same had been proven by the 1st Defendant on a balance of probability and the reliefs sought ought to be granted.

Analysis and Determination

53. I have considered the pleadings and the evidence on record. I have also considered the written submissions and the authorities cited. The issues for determination are: -
- i. Whether the Plaintiff's suit is time barred.
 - ii. What is the effect of failure to obtain the Land Control Board. consent on the transaction between the parties in respect to the suit premises.
 - iii. Who is the genuine and lawful owner of L.R No. Dagoretti/Riruta/3882.



- iv. Whether the Plaintiff is entitled to the reliefs sought.
- v. Whether the 1st defendant is entitled to the reliefs sought in its counter-claim.
- vi. What orders should issue as regards the costs of the suit and the counterclaim.

Issue No. 1 Whether the Plaintiff’s suit is time barred.

54. The 1st Defendant filed a notice of preliminary objection to the effect that this court had no jurisdiction to hear the suit on the basis that the same was time barred contrary to Section 7 of the *Limitation of Actions Act*. The 1st Defendant also reiterated the same in his submission. Pursuant to the ruling delivered on 30th August 2018, the court directed that the issues raised in 1st Defendant’s notice of preliminary objection be addressed during trial.
55. The Plaintiff opposed the said preliminary objection and argued that the issues relating to the suit property had been consistently litigated in various other suits since 1992 and the Plaintiff only filed this suit in 2018 after the 1st Defendant had withdrawn another suit against the Plaintiff in 2017. It was also argued that the Plaintiff could not file another suit to avoid the same being struck out on account of being sub judice.
56. During trial, it was the Plaintiff’s evidence that she was informed that there was someone else who had laid claim to their land in 1995 and her late husband had even lodged a caution at the lands registry in 1998 since they were staying in the land.
57. A perusal of the Plaintiff’s amended plaint dated 1st November 2019 which was initially filed on 26th March 2018 prior to the said amendment states at paragraph 28 as follows;
- Paragraph 28
- “ The Plaintiff avers that on or around 20th March 2018 and again on 22nd March 2018, several gentlemen were walking around and surveying the suit property and on inquiring, they informed the Plaintiff that they intended to purchase the same from the 1st Defendant”
- Paragraph 29
- “ The Plaintiff avers that the 1st Defendant herein cannot pass good title as he only acquired title No. Dagoretti/Riruta/3882 through fraudulent, illegal and corrupt means”
58. The Plaintiff subsequently pleaded the particulars of fraud as against the 1st and 2nd Defendants.
59. Section 7 of the *Limitation of Actions Act* Cap 22 of the Laws of Kenya provides that 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 if it first accrued to some person through whom he claims against that person. However, where fraud is pleaded, time does not start to run until when such fraud was discovered as is stated under Section 26 of the *Limitation of Actions Act*.
60. Section 26 of the *Limitation of Actions Act* provides as follows: -
- “ Where, in the case of an action for which a period of limitation is prescribed, either—the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent;
- or the right of action is concealed by the fraud of any such person as aforesaid; or the action is for relief from the consequences of a mistake, the period of limitation does not begin to run



until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it.”

61. Going by the above provision, it is trite law that in circumstances where fraud is pleaded, time does not start to run until when such fraud was discovered. In the case of *Justus Tureti Obara v Peter Kopeitai* [2014] eKLR the Court held:-

“I am in agreement with the Plaintiff’s submission that the Plaintiff’s claim is for the recovery of the suit property from the defendant and as such the limitation period for such a claim is 12 years as provided for in Section 7 of the *Limitation of Actions Act*, Cap. 22, Laws of Kenya. I would wish to point out further that the Plaintiff’s case although for recovery of land is based on fraud. The proviso to section 26 (a) of the *Limitation of Actions Act*, Cap. 22, Laws of Kenya provides that where an action is based on the fraud of the defendant or his agent, the period of limitation does not begin to run until the Plaintiff has discovered the fraud or could with reasonable diligence have discovered it”.

62. In the instant case, while the Plaintiff pleaded particulars of fraud it was her case that there were several suits filed between the parties that existed between 1992 upto 2017 when the 1st Defendant withdrew the last case and hence therefore she could not have filed the current suit since the same would have been stuck out as being subjudice. In his pleadings and testimony, the 1st Defendant equally acknowledged the existence of the said suits and further confirmed withdrawing the appeal in relation to the latest suit after the death of the Plaintiff’s husband.
63. That notwithstanding it is also worth noting that this court holds the position that the current suit as filed by the Plaintiff was triggered by the events pleaded at paragraph 28 of the amended plaint wherein some persons who intended to purchase the suit property allegedly from the 1st Defendant were seen surveying and walking around the suit property. The said events occurred on 20th and 22nd March 2018 which prompted the filing of the suit 26th March 2018. At that time the Plaintiff also filed a certificate of urgency together with a notice of motion wherein she sought injunctive orders against the 1st Defendant. The court having considered the said application granted injunctive orders against the 1st Defendant.
64. In view of the foregoing and having considered the totality of the evidence adduced and pleadings filed by both parties the court is unable to accede to the contention by the 1st Defendant that the suit is time barred.

Issue No. 2 What is the effect of failure to apply for and obtain the Land Control Board within the stipulated timelines.

65. The 1st Defendant’s also raised a notice of preliminary objection to the effect that the suit was filed contrary to Section 8 (1) of the *Land Control Act*. The said provision stipulates as follows;

“An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate Land Control Board within six months of the making of the agreement for the controlled transaction by any part thereto”.

66. The 1st Defendant submitted that by the Plaintiff’s own admission, the agreement for the sale of the land was entered into between the plaintiff’s spouse and the seller in 1991 and that the application for Land Control Board consent which was produced before court was applied for and issued outside the statutory timelines and hence therefore the said transaction was void.



67. The Plaintiff in response to the said issue argued that in the said transaction, the Plaintiff applied for the Land Control Board Consent after the lapse of six months after purchasing the property and that the delay cannot be a ground for a preliminary objection in a suit. The Plaintiff also argued that the 1st Defendant himself has attached a sale agreement dated 13th April 1987 and a Land Control Board Consent dated 5th October 1988 indicating the Application date to be 16th October 1988. Unlike the Plaintiff who did not get a title deed for the property, the 1st Defendant mysteriously got a title deed from what was termed by the Plaintiff a defective Land Control Board Consent. The Plaintiff ultimately did not obtain a title deed from a Land Control Board Consent filed out of time, the 1st Defendant did.
68. The Plaintiff also cited the decision of the Court of Appeal in the case of *Willy Kimutai Kitilit v Michael Kibet* (supra) wherein the Court stated;

“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.

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 whether 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.”

69. It is indeed clear that provisions in relation to the Land Control Board have been considered extensively by various courts, the Court of Appeal recently in the case of *Aliaza v Saul* (Civil Appeal 134 of 2017) [2022] KECA 583 (KLR) (24 June 2022) (Judgment) stated as follows;

“31. I recognise that there is some conflict in the jurisprudence regarding the validity of a transaction for the sale of land where no consent from the Land Control Board has been obtained. I believe, however, that the reasoning and holdings in *Macharia Mwangi Maina, William Kipsoi Sigei v Kipkoech Arusei & another and Kiplagat Kotut v Rose Jebor Kipngok* best capture the spirit of the *Land Control Act* when interpreted through the prism of *the Constitution* of Kenya 2010, particularly section 7 of the Transitional and Consequential Provisions contained in the Sixth Schedule of *the Constitution*. I should observe at this point that these constitutional provisions were not cited and were therefore not the subject of consideration before the Court in the *Ole Tukai* decision.

32. As was recognized by this Court in the *Macharia Mwangi Maina* case, the *Land Control Act* is an old legislation, enacted in 1967. The public



policy considerations underpinning the Act were well articulated in the Ole Tukai decision where this Court observed as follows: “What is beyond doubt, the paternalistic nuances of its colonial origins notwithstanding, is the fact that the enactment of the Land Control Act in 1967 was informed by noble and deliberate public policy considerations. The Act seeks to regulate transactions in agricultural land, to among other things avoid sub-division of land holdings into uneconomical units, thus undermining agricultural production; to mitigate the danger of landlessness inherent in unchecked sale and alienation of land; to control land holding by non Kenyans, etc. It is for these reasons that in considering whether to grant or refuse consent regarding dealings in agricultural land, the land control board is obliged under the Act to consider, among others, such factors as the economic development of the land in question, the possibility of maintenance or improvement of standards of good husbandry; the agricultural land already owned by the proposed transferee; the fairness or unfairness of the proposed consideration or purchase price; and whether subdivision of the land in question would reduce the productivity of the land.” (Emphasis added).

The Court further stated;

“40.from the time the appellant entered the first of the two parcels of the suit land in 2002 and into the subsequent portion that he purchased in 2004, a constructive trust in his favour was created in respect of the land. Such trust, as was found by the court in the case of *Macharia Mwangi Maina*, became an overriding interest over the suit land. The failure on the part of the respondent to obtain the necessary consent from the Land Control Board within the required period of six (6) months to enable the appellant transfer the suit land into his name does not render the transaction void. Equity and fairness, the guiding principles in Article 10 of the Constitution, require that the Land Control Act is read and interpreted in a manner that does not aid a wrongdoer, but renders justice to a party in the position of the appellant.

“41. Contrary to the submission by the respondent, in the face of these constitutional provisions, the fact that the appellant had not pleaded a constructive trust in his counterclaim does not preclude this Court from inferring such a trust. Moreover, in his written submissions dated 30th August 2016, the appellant raised the issue of an implied or constructive trust having arisen in his favour. The respondent did not address this issue in his submissions dated 26th September 2016. I take the view, on the authority of the decisions in *Odd Jobs v Mubia* [1970] EA 476 and, among other decisions, *Ann Wairimu Wanjohi v James Wambiru Mukabi* [2021] eKLR that though unpleaded, the issue of a constructive or implied trust was left for the determination of the trial court.”

70. Having considered the foregoing and further being guided by the said decisions of the Court of Appeal, I am unable to uphold the 1st Defendant’s objection to the effect that failure to apply for the Land Control Board Consent within the six months period rendered the Plaintiff’s agreement void.



Issue No. 3 Who is the genuine and lawful owner of L.R No. Dagoretti/Riruta/3882.

71. Both the Plaintiff and 1st defendant have laid claim to the suit property Title No. Dagoretti/Riruta/3882. It was the Plaintiff's testimony that the said property was subdivided from Dagoretti/Riruta/1115 upon which she inherited her late husband's share. She also stated that she had been in possession of the said property since 9th June 1991 and has extensively developed the same by constructing their matrimonial home, bedsitters and one bedroom extensions for commercial purposes. The Plaintiff also pleaded fraud on the part of the 1st and 2nd Defendant.
72. In *Munyu Maina v Hiram Gathiha Maina*(supra) the Court of Appeal stated that:
- “We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”
73. In *Daudi Kiptugen v Commissioner of Lands & 4 Others* [2015] eKLR the court stated that:
- “...the acquisition of title cannot be construed only in the end result; the process of acquisition is material. It follows that if a document of title was not acquired through a proper process, the title itself cannot be a good title. If this were not the position then all one would need to do is to manufacture a Lease or a Certificate of title at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein.”
74. In *Nairobi High Court Civil Suit No. 1024 of 2005(O.S), Milankumar Shah & 2 others v The City Council of Nairobi & another*, the court stated as follows:
- “We hold that the registration of title to land is absolute and indefeasible to the extent firstly that the creation of such title was in accord with the applicable law and secondly where it is demonstrated to a degree higher than the balance of probability that such registration was not procured through fraud and misrepresentation to which the person or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law, and the public interest”.
75. In the instant case, the 1st Defendant stated that he purchased the property pursuant to a sale agreement dated 15th April 1987 and subsequently obtained its title on 30th September 1998 after the caution lodged by the late Plaintiff's husband had been removed by a court order. In respect to this issue, the Plaintiff testified that her late husband was never consulted prior to the removal of the caution lodged by him yet he were already in occupation of the suit property. Even though the 1st Defendant testified that the same was removed pursuant to a court order issued in respect to Civil Case No. 9553 of 1992, the Plaintiff nor her late husband were not parties to the case.
76. In respect to the taking of possession of the suit property, the Plaintiff in her cross examination stated that she started staying in the property in 1998 while the 1st Defendant when cross-examined stated that he had stayed in the suit property since 1988.



77. During trial, the 1st Defendant also provided evidence to the effect that while he obtained his title on 30th September 1998, he was not able to surrender the mother title because the same had been misplaced and he subsequently produced a gazette notice showing the same.
78. While both parties claimed to have bought the suit property from Mwathi Njoroge, during trial, the 1st Defendant produced a sale agreement dated 15th April 1987 while the Plaintiff produced a sale agreement dated 19th June 1991 from Mwathi Njoroge, Miringu Njoroge and Kariuki Njoroge. Mwathi Njoroge acknowledged receipt of the purchase price of Ksh 50,000/ that was paid by the 1st Defendant in respect to the sale agreement. This acknowledged was made in his defense dated 31st August 1993 that was filed in respect to Civil Suit No. 9553 of 1992 Joseph Njuguna Kariuki v Mwathi Njoroge. Paragraph 3 of the said defence stated as follows;
- “ The Defendant admit that the Plaintiff has cleared the whole of the purchase price but deny that the Defendant has refused to transfer the parcel of land to the Plaintiff”
79. He also acknowledged receipt of Ksh 16,000/- as part of the purchase price in respect to the sale agreement made with the Plaintiff. It therefore follows that having sold the said property to the 1st Defendant in 1987, unless the sale agreement was rescinded, the said property could not have been available for sale to another party in 1991. Both the Plaintiff and the 1st Defendant herein have a right to own property. While a certificate of title shows that the holder of the same is the indefeasible owner of land in question, it is not in doubt the 1st Defendant acquired the said property earlier than the Plaintiff and further he is currently in occupation of the same.
80. In view of the foregoing and having carefully considered the evidence that was tendered herein and further having traced the root of the 1st Defendant’s title it is the finding of this court that the 1st Defendant is the bonafide and lawful owner of Dagorreti/Riruta/3882.

Issue No. 4 Whether the Plaintiff is entitled to the reliefs sought.

81. The Plaintiff sought for several reliefs in her amended Plaint. However, having made a finding that the 1st Defendant is the genuine and lawful proprietor of the suit property, the plaintiff’s claim against the 1st defendant fails and as such the reliefs sought in her plaint cannot be granted.

Issue No. 5 Whether the 1st defendant is entitled to the reliefs sought in his counter-claim.

82. In the counterclaim, the 1st Defendant had sought for several orders. The 1st Defendant adduced evidence in support of the counterclaim and this court having found that the 1st Defendant is the genuine and lawful owner of the suit property, it follows therefore that the 1st Defendant is entitled to the prayers sought in the counterclaim.

Issue No. 6 What orders should issue as to the costs of the suit and counterclaim.

83. On the issue of costs, although costs of an action or proceedings are at the discretion of the Court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap. 21). However, considering the circumstances of this case, I direct that each party bears own costs of these proceedings.

Final orders.

84. In the end, the suit by the Plaintiff and the Counterclaim by the 1st Defendant are disposed as follows: -



- a. The Plaintiff's suit is dismissed.
- b. A declaration is hereby issued that the 1st Defendant is the bonafide owner of Title No. Dagorreti/Riruta/3882.
- c. A permanent injunction is hereby issued restraining the Plaintiff by herself, servants, agents, representative and any other party claiming title under her from harassing, remaining, entering, trespassing or in any other manner interfering with the 1st Defendant's peaceful possession of Title No. Dagorreti/Riruta/3882.
- d. Prayer (c) above shall be subject to a grace period of 180 days from the date of this judgment.
- e. Each party to bear own costs of the suit and counterclaim.

Judgment accordingly.

Dated, Signed and Delivered at Nairobi this 23rd Day of March 2023.

E.K. WABWOTO

JUDGE

In the presence of:

Mr. Munyeri for the Plaintiff.

Mr. Kibathi for 1st Defendant.

N/A for the 2nd and 3rd Defendants.

Court Assistant: Caroline Nafuna.

