REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT KERICHO

ELC APPEAL NO. 002 OF 2020

LILIAN MOSONIK..1st APPELLANT

JOSIAH MOSONIK..2nd APPELLANT

VERSUS

THE MANAGEMENT COMMITTEE

OF AGC RIVERSIDE CHURCH........................RESPONDENT

Being an Appeal against the Judgment of the Hon. S. M Mokua Chief Magistrate at Kericho Chief Magistrate 's Court delivered on 2nd December 2020 In CMC ELC No. 46 of 2018

JUDGEMENT

1. What is before me for determination is an Appeal arising from a matter which was heard and decided by *Hon. S. M Mokua Chief Magistrate at the Kericho Chief Magistrate 's Court in CMC ELC No. 46 of 2018 PMCC No. 16 of 2018* in which the Appellants herein were the Defendants while the Respondent was the Plaintiff. The learned trial Magistrate , upon taking the evidence of both parties, delivered his judgment *on the 2nd December 2020 wherein he found that the Plaintiff had proved its case on a balance of probabilities, and confirmed the injunctive orders against the Defendants, with costs to the Plaintiff.*

2. The Defendants/Appellants, being dissatisfied with the judgment of the trial Magistrate immediately filed their Memorandum of Appeal on the 14th December 2020. Subsequently they filed their application by way of Notice of Motion dated the 1st July 20121 seeking stay of execution of the decree which application was by consent, dispensed with the orders of status quo, pending the outcome of the judgment herein.

3. The Appellant's then filed their Record of Appeal on the *6th May 2021* wherein t*he grounds relied upon in their Memorandum of Appeal include;*

i. That the learned trial Magistrate erred in law and in fact in finding that the Appellants had locus standi to be sued in the contract.

ii. That the learned trial Magistrate erred in law and in fact by failing to note that the Respondent had no locus standi to seek the orders sought in the suit against the Appellants.

iii. That the learned trial Magistrate erred in law and in fact by finding that the contract between the deceased registered owner and the Respondent was not void for want of Land Control Board consent.

iv. That the learned trial Magistrate erred in law and in fact by failing to consider that the contract between the deceased, as a registered owner was statute barred.

v. That the learned trial Magistrate erred in law and in fact by finding that the Plaintiff had purchased the land parcel Kericho/Silibwet/1778, without rendering both parties to the contract a right of hearing.

vi. That the learned trial Magistrate erred in law and in fact by finding that the Respondent's claim met the threshold for granting injunctive orders.

vii. That the learned trial Magistrate erred in law and in fact by considering the Respondent's arguments as the gospel truth.

4. The Appellants thus sought for the following reliefs:

i. The Appeal be allowed.

ii. The judgment made by the Honorable S. M Mokua, CM and delivered on 2nd December 2020 be set side and a proper finding been made

iii. Costs be provided for.

5. The Court admitted the Appeal and issued its directions on 14th October 2021 to the effect that the same be disposed of by way of written submissions. Parties complied.

The Appellants' written submissions.

6. The Appellants, in their written submissions dated 19th November 2021 gave a brief history on the facts as submitted at the trial court to the effect that the Respondent herein had filed suit on 14th April 2016 seeking orders of injunction against them, restraining them from interfering with the Respondent's quiet possession of the portion of land measuring 100 feet by 100 feet comprised in Kericho/Silibwet/1778 and for costs of the suit.

7. The suit was based on the allegation that although the Respondent had purchased the said section of the suit parcel from its registered owner at a cost of Ksh 500,000/, monies which had been paid in full by installments, the transfer of the parcel of land had not been effected.

8. The Appellants had however contended that there had not been a sale agreement but rather, that the suit land had been leased by the one Pauline Chemalel Henstridge to the Respondent at a monthly rent of Ksh 900/= wherein the Respondent had paid a lump sum of Ksh 10,800/= for the whole year. That the Respondent dutifully paid the monthly rent and proceeded to build a temporary structure on the land from where they had carried out their church services until September 2012 when Pauline Chemalel Henstridge passed away. That was when the Respondent stopped remitting the monthly rent. That upon inquiry why they had defaulted, the Respondent's representatives claimed that they had purchased the said portion of land despite there having been no proof of the transaction laid bare to the beneficiaries of the said suit land which had been held in trust for them by the deceased Pauline Chemalel Henstridge.

9. The Appellant's combined submissions on grounds No. 1, 2 and 5 of their Memorandum of Appeal, in regard to the parties capacity to be sued and to sue, was that there was no dispute that the deceased Pauline Chemalel Henstridge was the registered proprietor to the suit parcel of land No. Kericho/Silibwet/1778 and that she had subsequently passed away on 1st September 2012. That the rightful person(s) to be sued therefore would have been her legal administrator(s). That the trial court had erred therefore in concluding that there had been purchase of part of the suit property, without calling a legal representative of the estate of the deceased proprietor. The fact that the Appellants were beneficiaries of the estate of the deceased did not cloth them with the authority to defend the suit on behalf of the deceased.

10. That since the suit land had been registered to the deceased, the rightful person to bring any action touching on the same would have been the legal representative(s) of the estate of deceased Pauline Chemalel Henstridge and as such, the Respondent herein lacked the locus standi to file any suit against the Appellants. That the Respondent herein had not sought for grant of letters of administration and neither did the Appellants hold the letters of administration to the estate of the registered owner of the suit parcel of land, now deceased. Reliance was placed on the provisions of Sections 45(1), 79 and 82(a) of the Law of Succession Act, Section 2 of the Civil Procedure Act and on the decided case in **Re Estate of John Gakunga Njoroge [2015] eKLR** to buttress their submissions.

11. On the issues raised in the 3rd ground of their Memorandum of Appeal, the Appellants' submitted that although it had been the Respondent's case that they had first entered into the sale agreement on 24th November 2008 and that the last payment had to have been made on or before the end of January 2009, yet from the exhibits herein produced in court, the last payment had been made way after the agreed date. Further that there had been no consent obtained from the Land Control Board and the explanation offered by the trial Magistrate that the registered owner had been unwell, had not been tendered in by any party in their evidence. This was in contravention of the provisions of Section 6(1) of the Land Control Act.

12. Secondly that by the trial court relying on the case of **Willy Kimutai Kitilit vs Michael Kibet [2018] eKLR** to find that the doctrine of constructive trust and proprietary estoppel could apply to agreements rendered void for lack of Land Control Board consent, was misplaced since the Respondent had not pleaded or tendered evidence seeking a declaration of either a constructive trust or proprietary estoppel. The court should therefore not have relied on the above case to validate an already voided agreement. The Appellants' further relied on the provisions of Section 8 of the Land Control Act to submit that the Respondent did not apply for consent within six months and neither had they made any application seeking for extension of time. The alleged sale agreement was therefore null and void.

13. The applicants also submitted that since the Respondent's claim was based on a contract for sale of land made for the year running from 2008 to 2009 and further since the final payment had been made on 14th August 2009, the suit filed herein which was based on the contract, was statute barred the same having been instituted in the year 2016 which was a period of over six years after the contract had been made. That the issue of limitation of time was not a matter of procedural technicality which could be overlooked. Reliance was placed on the provisions of Section 4(a) of the Limitation of Actions Act as well as on the decided case in Richard **Toroitich vs Mike K Lelmet & 3 Others [2014] eKLR.**

14. And finally on the issue as to whether the Respondent's claim had met the threshold for granting injunctive orders, the Appellants relied on the decided case in **Giella vs.Cassman Brown [1973] EA 358 and Nguruman Limited vs Jan Bonde Nielsen & 2 Others [2014] eKLR** to submit that the Respondent had failed to demonstrate that they had a genuine and arguable case as the claim on how they had purchased the suit property was questionable, the agreements produced as evidence were inconsistent with the testimony adduced, the alleged

payment of the purchase price in full had not been proved and the sale agreements herein produced failed to add up to the alleged sum of Ksh 500,000/=. Lastly that the final agreement dated 14th August 2009 had not been signed by the registered owner. That further the suit property having formed part of the estate of the deceased and the parties having not obtained the letters of administration, it could not be said that the Respondent had established a prima facie case.

15. That the Respondent had further failed to demonstrate that indeed they were in occupation of the alleged land measuring 100 by 100 feet and that they would suffer irreparable damages if orders of injunction were not granted.

16. Lastly, the Appellants faulted the trial learned Magistrate for failing to interrogate the evidence tendered by the Respondent to establish its veracity but instead took the same as the gospel truth thus overlooking the glaring inconsistency therein.

The Respondent's submissions.

17. In opposition to the Appellants' Appeal, the Respondent via their undated submissions filed on 17th November 2021 submitted that the issue of locus standi had been addressed by the trial court wherein the court had noted that despite the Respondent having cited the Appellants to take up the letters of administration, and the Appellants having deliberately avoided to do so for reason that they were beneficiaries of the land, the court had found that if the Appellants' were not claiming the suit land in their capacity as legal representatives of the registered owner, then they were trespassers to the portion of land occupied by the Respondent. The court had then found that the Respondent was entitled to the orders to protect its interest in land against the aggression since the Appellants' interest could not be ascertained. The Appellants had been found to be trespassers.

18. That the trial learned Magistrate had considered both the import of the provision of Sections 6 of the Land Control Board as well as the holding in the **Willy Kimutai** case (supra) wherein it was held that lack of consent of Land Control Board did not preclude the court from giving effect to the equitable principles in particular the doctrine of constructive trust. That when a transaction relating to an interest in land was voided and unenforceable for lack of consent of the Land Control Board, the doctrine of equitable constructive trust and proprietary estoppel superseded the Land Control Act and were applicable.

19. On the issue of limitation of time, the Respondent submitted that it had been common ground that they had occupied the disputed portion of the land since the year 2007 after purchasing the same and being put into possession by its registered proprietor. That since there had been the performance of the contract, limitation of time did not arise. The Appellants having been sued for trespass, the cause of action arose each day the trespass continued and thus time would not run in that regard. Reference was made to the **Nguruman Limited vs Shompole Group Ranch & 3 Others [2007] eKLR**. The Respondent's submission was that there was no error in the court's finding as it had taken into account all the issues in controversy as herein above enumerated.

20. That the court granted the order of injunction after taking into account the requirements of Order 40 of the Civil Procedure Rules, the conditions set out in the famous case of **Giella vs. Cassman Brown** (supra) and the evidence as adduced in court. The court further took into account the fact that the Appellants had been sued for trespass, and held that unless the injunctive orders were granted, the Respondents stood to suffer irreparable injury which could not be adequately compensated by damages. The court further found that the Respondent had proved their case on a balance of probability and granted the orders herein supported.

Determination

21. I have considered the record, the Judgment by the learned trial Magistrate, the written submissions by Counsel for the parties as well as the applicable law. Conscious of my duty as the first Appellate Court in this matter, I have to reconsider the evidence, assess it and make my own conclusions on the evidence. ***(See Seascapes Ltd v. Development Finance Company of Kenya Ltd [2009] KLR, 384).***

22. I also remind myself that this Court will not normally interfere with a finding of fact by the trial Court unless it is based on no evidence or on a misapprehension of the evidence or the Magistrate is shown demonstrably to have acted on wrong principle in reaching the findings he did. **(*See Ephantus Mwangi & Another v Duncan Mwangi Wambugu [1982-88] 1 KAR 278).***

23. By a Plaint dated 4th April 2016, the Respondent herein had sought for;

> i. An order of injunction restraining the Defendants by themselves, agents, servants, employees or otherwise from interfering with the Plaintiff's quiet possession of the portion of land measuring 100 feet by 100 feet comprised in LR No. Kericho/Silibwet/1778
>
> ii. Costs of the suit and interest
>
> iii. Any other relief that the Court may deem fit and just to grant.

24. The Appellants, who shall be referred to as ''Defendants'' in the trial court proceedings filed their defence dated the 9th August 2018 which was amended on the 20th June 2018, to the effect that the Respondent, who shall be referred to as ''Plaintiffs'' in the trial court proceedings, had not acquired any proprietary rights from the alleged transaction and therefore could not allege to enforce any rights over part of parcel of land LR No. Kericho/Silibwet/1778 which was still registered to the deceased Pauline Chemalel Henstridge. That the portion of the suit land had been leased to the Plaintiff by the deceased and therefore the Respondent ought to have sued the personal representative of the estate of the deceased Pauline Chemalel Henstridge and not the Defendants, in order to enforce their rights, which was the vehemently denied.

25. The matter had proceeded for hearing before the trial Magistrate on 22nd January 2019 wherein one Richard Kiprono Bett, a member and treasurer of AGC Riverside Church had testified on behalf of the Plaintiff/Respondent. His evidence had been that they had sued the

Defendants (Appellants) for causing disturbance. That the church had purchased the land measuring 100 by 100 feet comprised of Parcel No. Kericho/Silibwet/1778 in the year 2008 and 2009, from Pauline Chemalel Henstridge (herein referred to as the "deceased") wherein they had been in occupation since 2007. That the sale agreement had been reduced into writing between the church on one part and the deceased on the other on the 28th November 2008 wherein he had signed the said agreement as a member and committee member. That they had started paying for the land in the year 2008. He had then marked the agreement for identification as PMFI 1(a).

26. The witness further stated that they had agreed on Ksh 500,000/= as the sale price wherein upon signing the agreement, they had made a down payment of Kshs 100,000/= wherein the next instalment was made on 23rd December 2008 for Kshs 100,000/= as per the second agreement which was marked as PMFI l (b). That on the 27th February 2009, they made yet another written agreement for the payment of Kshs 50,000/= as per the agreement herein marked PMFI l(c) and a further payment was made on 7th April 2009 wherein they had paid Kshs 160,000/= as per the agreement PMFI (d). That the final payment had been made on the 11th September 2009 of Kshs 90,000/= as per the agreement PMFI 1(e).

27. It was his evidence that upon paying the full amount of the purchasers sought to purchase another portion but the Defendants had objected and it was at this point that they had sought from the deceased for documents to the piece of land they had purchased.

28. Thereafter, the deceased had called a meeting on 20th August 2012 at the Assistant Chief's compound which meeting had been chaired by the village elder. The deceased had confirmed that she had sold land to the church and further sought to sell a further portion to enable her complete building her rental houses. That it had been at that meeting that the 1st Defendant, having previously interrupted church meetings, apologized stating that she had now learned that the Plaintiff had purchased the land in issue.

29. His evidence was that after the demise of the vendor, they had requested the family to file a Succession Cause, which request had been turned down forcing them to file a Citation as per the documents herein produced as Pf exh 3. That the Defendants neither responded to nor took out Letters of Administration. The witness sought that the court grants them an injunction against the Defendant.

30. During his cross-examination, the witness confirmed that the church had a Constitution and also had the right to acquire property. That although they ought to have had the minutes for the purchase of land, he had not availed the same but this did not invalidate the transaction. He also confirmed that they did not require any authority from their headquarters as they had enough funds to purchase the land. That the agreement was signed by Daniel Mosonik who was a son to the deceased vendor and whose name was hand written unlike the names of the other witness. His reason was that the said Daniel Mosonik had joined them after the agreement had been typed. He also confirmed that they had not attached copies of the identity cards to the agreements and that his name had been hand written and altered.

31. The witness also confirmed that although in the last agreement, the name of the vendor had been inserted by hand, yet he did not remember the reason because the vendor had been present and that was why she had thump printed the agreement. He also confirmed that there had been another payments of Kshs 13,000/= which had been part of the last payment of Kshs 90,000/= he had earlier on mentioned: this money had been paid to the vendor upon request to pay her 'fundis'.

32. The witness was categorical that the documents he had relied on did not contradict each other and that in total they had paid Kshs 500,000/= the agreed purchase price. He also confirmed that the land they were buying was registered to the deceased. That the village elder had presided over the meeting although the name of the vendor did not appear in the list of the persons who were present at the meeting held at the Assistant Chief's office. That the last payment was made on 14th August 2009 and that the thumb print was not clear on the copies. That they had started using the land in the year 2007 wherein they had paid Kshs 10,800/= as rent for one year and the same was recorded by the deceased in a petty cash voucher.

33. He denied that all along they were tenants, but confirmed that they did not have a consent from the Land Control Board and neither had the Defendants been issued with a Grant after the Citation which was still pending in court. He confirmed that the Plaintiff was yet to be given ownership of the land.

34. In re-examination, he stated that the land in issue did not fall within agricultural area and that they had sued the Defendant because they did not need a Grant to do so.

35. The next witness, Joel Arap Towett testified as PW2 to the effect that he was the village elder in Bomet Township location. That in August 2012 he had been summoned to the Chief's office as there been a dispute between the family of Pauline and AGC Riverside. That he had presided over the meeting which was attended to by about 20 elders, the family, the Defendants and others persons. That at the meeting, the deceased, who was the mother to the Defendant, had stated that she had sold 2 points of land to AGC Riverside for which she had wanted the elders to witness and that she was willing to transfer the aforesaid land.

36. The witness testified that what had emerged during the meeting was that the deceased's children had not been involved during the sale thereof and that was why at some point in time the 1st Defendant had caused some commotion at the church by hurling stones at the roof. This issue was deliberated on and the 1st Defendant apologized.

37. Thereafter the deceased's children asked for the title deed to the land wherein it emerged that the same was in the custody of one Mr. Koske who agreed to return it. The witness produced the minutes of the meeting dated 20th August 2012 as Pf exhibit 2.

38. On being cross examined, the witness reiterated that he had been the one who had recorded the minutes. That members present raised/asked questions and there were responses. That he had not been shown any documents but had considered all that he had recorded to be true. That although he had recorded the names of those who were present, he must have forgotten to include the name of Pauline who did not sign the minutes although she had been present.

39. Reuben Kipkemoi Chirchir testified as PW3 to the effect that he was a pastor and a nurse. That they had purchased part of land measuring 100 by I00 feet from Kericho/Silibwet/1778 wherein he had executed an agreement to that effect. The total purchase price was Kshs.500,000/= which had been paid in installments. That the 1st agreement herein produced as Pf exh l (a) had been entered into on the 21st November 2008. He also produced a copy of payment made on 23rd December 2008 as Pf exh l (b).

40. The witness further testified that there had been an acknowledgment made on the 26th February 2009, which he produced as Pf exh l (c). The receipts of the installments of 7th April 2009 where all the parties signed were also produced as Pf exh 1 (d).

41. On cross-examination, the witness confirmed that he had entered into the agreement around the year 2007 with Pauline who had allowed them to start utilizing the property. He also confirmed that the first installment had been paid in the year 2008 and that they had initially rented the premises before purchasing it.

42. The witness was referred to a payment voucher which he could not remember but stated that it had been issued by the church. He also could not recall having seen a tenancy agreement. He confirmed that the land had been in the name of the deceased who had passed on in the year 2012 before the Land Control Board consent could be secured. That he had participated in the sale agreement and that although his name appeared on the agreement, yet his identity card number was missing. He also confirmed that although there had been certain witnesses' identity numbers appearing on the agreement, there had been a mismatch. The witness further confirmed that he had been aware of the citation filed in respect of the estate of the deceased who had granted them permission to utilize the land as she had been their land lady. The Plaintiff thus closed its case.

The defence case.

43. The first defence witness, Lillian Chepngetich Mosonik adopted the statement she had filed in court as her evidence and sought that the court do also adopt the list of documents herein she had filed as defence exhibit 1-9 before proceeding to testify that the Plaintiff had leased land from them and therefore their suit should be dismissed.

44. During the cross examination, the defence witness testified that she was with her late mother in law and there had been a lease agreement. That although the Plaintiff had come on the land in 2017(sic) yet they had leased it in the year 2018(sic) wherein they had started making payments. That they had paid rent for the years 2018(sic) and 2019(sic), the receipts which she had availed to the court.

45. The witness corrected herself to the effect that the Plaintiffs had entered the Land in the year 2007and that they used to pay cash and that by the time the deceased passed on in the year 2012, she had not asked the Plaintiff to move out. That the issue arose when the Plaintiff decided not to pay the rent to which they had asked them move out of the land. She also confirmed that a caution had been registered on the land by her husband in the year 2009 because the deceased, who died at the age of 68 years was old. She confirmed that they had never filed suit to evict the Plaintiff from the land.

46. When the witness was re-examined, she confirmed that the lease was with effect from the year 2007 and that the Plaintiff church was still on the land. That after the dispute arose because of the failure of the Plaintiff to pay rent, a letter had been sent to one Richard on behalf of the Plaintiff notifying them of the Defendants' position.

47. The second defence witness Joseph Kipngeno Mosonik adopted the statement he had recorded, as his evidence wherein upon cross examination, he confirmed that he had been a witness to the lease agreement where his mother Pauline had leased but the land to AGC (Plaintiff). That the arrangement had not been reduced into writing, but the church which came onto the land in the year 2007, used to pay rent on monthly basis upto the year 2009. He also confirmed that his mother did not complain about the land which was neither surveyed nor purchased and that the same was still in his late mother's name. That once he realized the Plaintiffs' intention, he had lodged a caution on the land.

48. The third witness John Ruto, a neighbor to both DW1 and DW. 2 confirmed that they had been in occupation of the land which belonged to their mother since 1966. That although the Plaintiff church had rented the land, yet he did not know how long they have been on the land which they still occupied.

49. He confirmed that he had not witnessed the arrangement between the Plaintiff and Pauline but that he had been informed of the same by the late Pauline.

50. The fourth defence witness Bornes Chemutai Kitur confirmed that she was the 1st Defendant's mother and that the Plaintiff had leased the suit land although she did not know when. That currently, the Plaintiff did not conduct its services on the land. She adopted her statement as filed, and proceeded to testify that at some point, some pastors from the church had approached her and implored her to ask the 1st Defendant to sell the land to them.

51. The last defence witness, Esther Kimeto, a neighbor to the Defendants testified that the deceased did not sell the suit land to the Plaintiff who had since purchased land elsewhere. The defence then closed its case.

52. Having considered the pleadings, the evidence on record and the submissions filed, it is not in contention that indeed the suit land herein being parcel No. Kericho/Silibwet/1778 was registered to one Pauline Chemalel Henstridge (herein referred to as the deceased) and that during her lifetime, in the year 2007, she had given possession of the same to the Respondent herein who took occupation of part of the land measuring 100 by I00 feet comprised in the said suit land.

53. That after the death of Pauline Chemalel Henstridge in the month of September 2012, there a rose a dispute between the parties herein wherein the Respondent filed suit in the year 2016 against the Appellants claiming that they had trespassed on their (Respondents') share of

land measuring 100 by I00 feet which they had purchased from the deceased at a cost of Ksh 500,000/=.

54. The Appellants in their defence, refuted the claim made by the Respondent stating that the Respondent had taken possession of the land as a tenant having entered into a lease agreement with the deceased at a monthly rent of Ksh 900/= wherein the Respondent had paid a lump sum of Ksh 10,800/= for the whole year. That the Respondent had dutifully paid the monthly rent and had proceeded to build a temporary structure on the land from where they had carried out their church services until September 2012 after the deceased's death that they had stopped remitting the monthly rent.

55. What is in contention however is whether the Respondent herein lawfully and legally purchased the land measuring 100 by I00 feet comprised in land No. Kericho/Silibwet/1778 which land was registered to one Pauline Chemalel Henstridge (deceased) and therefore the Appellants herein were in trespass, or whether the Respondent was mere tenant on the said land.

56. After making the finding in the area of contention herein above, the court shall then make a determination on the following issues that have risen.

i. Whether the Respondent is in possession and/or in occupation of the suit land as a tenant or its purchaser.

ii. Whether the sale agreement of 24th November 2008 was null and void for lack of the Land Control Board consent.

iii. Whether possession/occupation *of land confers a right to maintain a suit for trespass against anyone who interferes with it.*

iv. *Whether a party a needs to prove* locus standi in a suit for trespass

v. Whether the Appellant's Appeal is merited.

57. In order to make a finding as to whether or not the Respondent is in possession and/or occupation of the suit land as a tenant or its purchaser, I have considered both the oral evidence as well as the documentary evidence herein produced to find out whether the sale agreements entered into by the deceased and the Respondent herein was valid or not. I first considered the minutes of the meeting held by the assistant chief Chepngaina sub location on the 20th August 2012 herein produced as Pf exh 2, wherein the deceased Pauline Chemalel Henstridge was in attendance and had confirmed having sold two plots of land to the Respondent for Ksh 500,000/=.

58. **Section 3(3)** of the **Law of Contract Act** provides as follows;

3(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:

59. I have thus considered the agreements between the deceased Pauline Chemalel Henstridge and the Respondent herein produced as Pf exh l (a) made on the 21st November 2008, Pf exh l (b) made on 23rd December 2008, Pf exh l (c) made on 26th February 2009 and Pf exh l (d) herein made on 7th April 2009 wherein a total sum of Ksh 410,000/= was paid by the Respondent to the deceased leaving a balance of Ksh 90,000/=. I find that the sale agreement herein conformed to the requisite of a valid contract as per the law herein above stated and was therefore a valid Sale Agreement enforceable by the parties. The deceased being the proprietor of parcel No. Kericho/Silibwet/1778 had title to pass to the Respondent who I find took possession and were in occupation of the suit land as purchasers and not as tenants, as alleged by the Appellants whose defence was destroyed by the sale agreements.

60. It has been argued that the sale agreement of 24th November 2008 between the deceased and the Respondent herein was null and void for lack of the Land Control Board Consent. It is in evidence that the proprietor of the suit land herein had passed on in the year 2012 before the Land Control Board consent could be secured.

61. Parcel No. Kericho/Silibwet/1778 was registered on 25th June 1998 under the repealed *Registered Lands Act (Cap 300 of the Laws of Kenya), which had provided that* any dealing with the land thereof required consent of the Land Control Board and the failure to procure the said consent rendered the agreement void.

62. Section 8 of the Land Control Act provides as follows:

(1) 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 party thereto:

Provided that the High Court may, notwithstanding that the period of six months may have expired, extend that period where it considers that there is sufficient reason so to do, upon such conditions, if any, as it may think fit.

63. 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 (read Environment and Land 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.

64. Section 9 (2) stipulates that;

Where an application for the consent of a Land Control Board has been refused, then the agreement for a controlled transaction shall become void—

(a) on the expiry of the time limited for Appeal under section 11; or

(b) where an Appeal is entered under section 11 and dismissed, on the expiry of the time limited for Appeal under section 13; or

(c) where a further Appeal is entered under section 13 and dismissed, on that dismissal.

65. Looking at the provisions of Section 9(2) of the Land Control Act, it is not the failure to secure the consent from the Land Control Board that makes an agreement null and void, but rather it is the where an application for the consent of the Land Control Board has been refused, that makes an agreement for a controlled transaction void.

66. A look at the proceedings in the trial court as well as the exhibits produced therein, I find that there was no evidence adduced to confirm that either the deceased or the Respondent had applied for consent to the Land Control Board within six months of the making of the agreement, whereby the application had been rejected. It cannot therefor be said that their agreement became void by virtue of there having been no consent obtained.

67. The Court of Appeal, on the import of failure to obtain the consent in the case of **Willy Kimutai Kitilit v Michael Kibet [2018] eKLR** held as follows:

'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)).'

68. In this particular case however, I cannot authoritatively find and hold that the transaction between the Appellant and the Respondent was not voided for want of consent of the Land Control Board there having been no evidence that the same was not sought for and denied and further for reasons that this is not a case where the claim is on ownership of the suit land but rather on trespass.

69. The Respondent/Plaintiff's case in the trial court had been based on the fact that the Church having been put in occupation of the land by its proprietor the deceased, was entitled sue the Appellants/Defendants for trespass. It has been argued by the Appellant herein that since the suit land was registered to the deceased and that no letters of administration to her estate had been granted to either parties, and further that since it was trite law that the estate of deceased person can only be represented in any legal proceedings by a person who is duly authorized to do so on behalf of the estate, only a person who had been issued grant of letters of administration had capacity to represent the estate of a deceased person, neither parties had the locus standi to sue or be sued.

70. I have gained sight of the claim herein filed in the trial Magistrate 's Court wherein the Respondent had sued the Appellants for being trespassers and therefore had sought for orders of injunction for trespass against the Appellants restraining them from interfering with the Respondent's quiet possession of the portion of land measuring 100 feet by 100 feet comprised in LR No. Kericho/Silibwet/1778.

71. Trespass has been defined by the **10th Edition of Black's Law Dictionary** as;

"an unlawful act committed against the person or property of another; especially wrongful entry on another's real property.''

72. *Section 3 (1)* **of the Trespass Act, also defines trespass as follows;**

"Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence."

73. Locus standi on the other hand signifies the right of an individual to be heard in court proceedings. To have locus to sue in a court of law, a party must have a sufficient interest in the matter in issue.

74. I find that pursuant to the sale agreement herein produced as Pf exh l (a) made on the 21st November 2008, the Respondent were already in possession and actual occupation of the suit land wherein they had constructed their Church with the knowledge of the deceased proprietor who made no inquiry as she already knew of their existence thereon.

75. *Section 10* **of the of the Trespass Act further provides that**

'Proceedings for an offence under this Act may be instituted by the occupier of private land or the owner of a fence, as the case may be'

76. This means that in order to file suit for trespass one need not necessarily be the proprietor of owner of the suit premises, but the mere occupation of the same is sufficient to file suit for trespass. It has also been held that as long as an alleged trespasser continues in unlawful occupation of another's land such occupation constitutes a continuing trespass which is actionable from day to day so long as the trespasser remains on the land

77. **Indeed the Court of Appeal in the case of Nguruman Limited vs Shompole Group Ranch & 3 Others [2007] eKLR, while c** *iting Clerk and Lindsel on Torts 16th Edition, paragraphs 23-01 held that :*

> "*Every continuance of a trespass is a fresh trespass of which a new cause of action arises from day to day as long as the trespass continues*".

78. To this effect therefore, where the injury being caused to the property is a continuing one and has not stopped, the suit is not statute barred (see **Kulwant Singh Chadha v Kenya Airport Authority& 2 Others [2017] eKLR**

79. In this case, the Respondent having been in possession of the suit land was entitled to claim occupation of the land in question which it had been put into possession by the deceased pending, its registration as the absolute proprietor of the same, against the Appellants who were trespassers as necessary remedy to vindicate and give effect to its rights of occupation as by the sale agreement with the deceased.

80. **Winfield and Jolowicz** state in their book **"Tort" (12th Edition @ p. 361):**

> "*Possession in fact confers no actual right of property, but a possessor may nevertheless maintain trespass against anyone who interferes who cannot himself show that he has the right to recover possession immediately. A stranger cannot rely in his defence upon another person's right to possess (the "jus tertii") unless he can prove that he acted with that person's authority. Even wrongful possession, such as that acquired by a squatter, will, in principle, be protected except against the owner of the land or someone acting lawfully on his behalf.*"

81. This position was accepted by the court of Appeal in the case of **Samuel Mwangi vs Jeremiah M'itobu [2012] eKLR**. In the instant matter, the Respondent was not seeking for ownership of the land but for injunction against the Appellant for trespass and therefore the issue of lack of locus standi does not arise. This ground, like the previous one must fail.

82. I cannot fault the trial Magistrate's holding. I find that the Appeal herein is unmerited and proceed to dismiss it with costs to the Respondent.

It is ordered.

Dated and delivered via Microsoft Teams at Kericho this 25th day of January 2022.

M.C. OUNDO

<u>ENVIRONMENT & LAND – JUDGE</u>