



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**ENVIRONMENT & LAND COURT**  
**HCCC. NO. 58 OF 2012**

JACK KAGUU GITHAE.....PLAINTIFF

**VERSUS**

JAMES MUGO KINGA & 9 OTHERS..... DEFENDANTS

**RULING**

By a plaint dated 12th March 2012, but amended at Nairobi on 7th November 2012, the plaintiff claimed to be the legal and bonafide owner of a parcel of land measuring 200 acres excised from the property known as ***L.R. No.11306/2 Ex-Moller Farm south West of Rumuruti Township*** which originally measured 264 acres having purchased the same from the registered proprietor the late Kinga Wamwendia way back in 1986 for the sum of Kshs.600,000/= and hence automatically became the bona-fide owner for value and further took immediate possession and control.

He claims that part of the sale proceeds paid by the plaintiff went to offset a loan balance of Kshs.315,539.10 owed by the Late Kinga Wamwendia to the Settlement Fund Trustee and which was settled directly by the plaintiff on the 1st September, 1986 and thereafter the plaintiff and the late Kinga Wamwendia engaged one Mr. Kariuki Mwangi Advocate to oversee the process of transferring the suit property in favour of the plaintiff. That upon successful sale of the 200 acres of land to the plaintiff the late Kinga Wamwendia immediately commenced the sub-division exercise of ***L.R. No.11306 Ex-Moller Farm South West of Rumuruti Township*** by applying for the consent to sub-divide and attending to the formalities. On the ***12th January, 1987*** the Late Kinga Wamwendia wrote to the secretary Central Authority submitting 10 prints of the proposed sub-division. On the ***27th November, 1987*** the commissioner of lands circulated to the various stakeholders the proposed sub-division inviting for their comments. Later on the ***30th November, 1987*** the clerk of Laikipia County Council wrote to the Commissioner of Lands indicating their no objection to the proposed sub-division. Thereafter on the ***7th February, 1990*** the director of Surveys wrote to Mr. R. Omondi the Licensed Land Surveyor who dealt with the survey of the sub-division scheme giving approval to the proposed sub-division subject to the clarification of the position of the access road leading to the two resultant parcels and further forwarding a copy of the approved plan. However as at the ***4th June, 1994*** the issue of the access road had not been sorted out forcing the plaintiff to instruct Lucy Mwai & Co. Advocates to request one John Miano to re-survey the property and confirm that an access road was provided and that the plaintiff obtained his true acreage with a 2nd reminder letter being issued on the 18th March, 2000.

In the course of time the late Kinga Wamwendia also executed in the plaintiff's favour the necessary application for consent of the Land Control Board to transfer dated the 21st December, 1995. On the 20th August, 1997 the late Kinga Wamwendia obtained from the Laikipia Land Control Board the letter of consent to transfer the 200 acres parcel of land in the plaintiff's favour.

The deceased while also attending to the sub-division task and the exercise of obtaining consent to transfer contemporaneously also executed a transfer instrument on the 16th September, 1997 in the plaintiff's favour in the presence of Lucy Mwai Advocates and as at the year 2000 the pending issue of the access road had not been sorted out forcing the plaintiff to request Lucy Mwai & Co. Advocates to issue a 2nd reminder letter dated the 18th March, 2000 to John Miano to demarcate the 200 acres and confirm that an access road was provided. Unfortunately, the late Kinga Wamwendia passed away before the formal sub-division and transfer exercise could be finalized hence the plaintiff was forced to pursue the administrator of the deceased's estate with a view to completion of the pending transfer but over the years there has been little co-operation from the said administrator. To the contrary the plaintiff was rather surprised when the defendants as the administrator/beneficiaries of the estate of the late Kinga Wamwendia and with an ulterior motive belatedly began staking a claim to the plaintiff's 200 acres parcel of land yet knowingly aware that the plaintiff was the bona-fide owner of the same and further attempted to illegally and without any colour of right wrestle off possession and ultimately forcefully occupy the plaintiff's parcel of land and in the process have occasioned wanton destruction to the plaintiff's tree canopy and damaged the plaintiff's property.

The plaintiff also claims that the 1st defendant acting as the administrator/personal representative of the deceased further went ahead without the knowledge and consent of the plaintiff to convey the suit property to his co-defendants and himself via an assent registered against Grant No.1.R.20579 through which he illegally assented to the vesting in himself and his co-defendants as heir/beneficiary the entire parcel of land comprised under ***L.R. No.113306 Ex-Moller Farm South West of Rumuruti Township*** by concealing vital information to the probate court handling the succession matter of the estate of the late Kinga Wamwendia that the estate of the deceased only had a claim to the remaining 64 acres after excising the plaintiff's 200 acres parcel of land from the main parcel of land, and the defendants continue to illegally hold the plaintiff's 200 acres parcel of land as proprietor and that the defendants further continue unabated to conspire and fraudulently meddle and interfere with the lands records pertaining to the suit property and are now in the process of further sub-dividing and disposing of the suit property and illegally creating third party interests through misrepresentation and material non-disclosure thus acting to defeat the plaintiff's unregistered interest in the same yet such sales would stand as null and void ab initio. On the 28th July, 2011 the plaintiff formally lodged an official complaint with the Director of the Criminal Investigation Department, the Director of the defunct Kenya Anti-Corruption Commission, the Truth Justice & Reconciliation Commission as it then was and the chief Land Registrar protesting about an intended fraudulent sale by the defendants of his 200 acres of land comprised in ***L.R. No.113306 Ex-Moller Farm South West of Rumuruti Township***.

Furthermore, that the above notwithstanding the 2nd to 8th defendants with the tacit approval of the 1st Defendant have been illegally trespassing on the suit property whenever they felt like and harassing the plaintiff's workers thus preventing the plaintiff from fully exercising his proprietary rights and obtaining the requisite benefits arising therefrom hence the threat of the suit property being sold is now real as since the 5th March, 2012 potential buyers and speculative land agents at the behest and invitation of the defendants have been traversing the length and breadth of the plaintiff's land on reconnaissance site visits and its only a matter of time before a deal is sealed. Unfortunately, the plaintiff cannot place a caveat against the title as the land records are missing at the Nairobi Central Registry under mysterious circumstances and despite the intervention of the District Land Registrar Laikipia vide his letter dated the 6th February, 2012 to the Chief Land Registrar advising him to assist the plaintiff place a caveat against the title.

The plaintiff believes that having established that he has a prima facie absolute claim to the suit property backed up by valid, genuine and credible evidence of ownership, his claim to the same is indefeasible which gives him the right to unfettered possession, occupation, use of and quiet enjoyment of the suit property. He states that this is a unique and valuable agricultural property in which the plaintiff has invested in an eco-tourism center and with great potential for re-development and on which the plaintiff has further invested a colossal amount of money in agro-forestry and related agricultural activities and unless the defendants are restrained by this Honourable Court, the suit property is in danger of being wasted, damaged, or alienated, or wrongfully disposed by the defendants who are intent on dealing with the same exclusively and have started committing acts of waste thereon and creating third

party interests in total disregard of the plaintiff's right, title and interest thus occasioning him to suffer irreparable loss and damage.

The plaintiff further states that the continued acts of trespass and harassment of the plaintiff's workers by the defendants have occasioned the plaintiff to suffer untold loss and damage and despite demand and notice of intention to sue having been issued, the defendants are in the process of subdividing the suit property and disposing it to third parties and have further threatened to repeat the acts complained of herein and continued to trespass on the suit property and interfere with the suit property's records at the Lands Registry, unless restrained by the orders of this Honourable Court.

The plaintiff prayed for a declaration that the plaintiff is the legal and bona-fide owner of the 200 acres parcel of land comprised under the parcel of land known as L.R. No.11306 Ex-Moller Farm South West of Rumuruti Township grant No.I.R.20579.

That subsequently the assent registered on the 15th July, 2008 vesting and transferring the entire parcel of land known as L.R. No.11306 Ex-Moller Farm South West of Rumuruti Township in favour of the 1st – 8th defendants and endorsed as entry No.8 on grant No.I.R.20579 and all subsequent entries thereafter made on the aforesaid grant be declared illegal and be cancelled and/or set aside with the land register being restored to its original position prior to the registration of the said entries and the sale by the 1st – 8th defendants of the plaintiff's 200 acres parcel of land to the 9th and 10th defendants be declared null and void.

Moreover that the 1st, 9th and 10th defendants be ordered to deliver up and surrender in court the original grant No.I.R.20579 for the parcel of land known as L.R. No.11306 Ex-Moller Farm South West of Rumuruti Township and the said grant be released through the Deputy Registrar – Nyeri High Court to the Chief Land Registrar for purposes of cancellation of all the illegal entries made therein and rectification of the land register and subsequent transfer of the plaintiff's interest in the 200 acres parcel of land comprised under the parcel of land known as L.R. No.11306 Ex-Moller Farm South West of Rumuruti Township with the Deputy Registrar – Nyeri High Court being authorized to execute all deeds/instruments necessary to effectually convey and transfer in the plaintiff's favour the 200 acres parcel of land comprised under the parcel of land known as L.R. No.11306 Ex-Moller Farm South West of Rumuruti Township. The orders emanating here from be served upon the registrar of titles for compliance.

In the alternative the 1st defendant as the administrator of the estate of the late Kinga Wamwendia be compelled within a period of thirty(30) days from the date of entry of judgment to specifically perform the agreement of sale dated the 3rd July, 1986 in terms of clause 6 of the said agreement for sale and/or as stipulated in the law society conditions of sale (1989 Edition).

An order of permanent injunction do issue restraining the defendants whether by themselves, their authorized agents, servants, employees, workers or otherwise howsoever from encumbering, trespassing, wasting, alienating, selling, transferring, and/or in any other manner whatsoever dealing with or interfering with the plaintiff's ownership, use and quiet possession of the 200 acres excised from the property known as *L.R. No.11306 Ex-Moller Farm South West of Rumuruti Township* and from evicting or harassing the plaintiff or any other person claiming through the plaintiff and that the defendants be condemned to pay the costs of this suit and all incidentals thereto, and any other or further relief that this Honourable Court may deem fit to grant.

The suit was initially against the 1st to 8th defendant, Defendant No.2, 3, 4 and 8 appear to be dead though no evidence was produced to that effect. They were served by substituted service and nobody appeared on their behalf. However the 1st, 5th, 6th & 7th defendants appeared through Jesse Kariuki & Co. Advocates. They contended that the 2nd, 3rd, 4th and 8th defendant were all deceased having died before the filing of the suit, however the 2nd defendant died immediately after the filing of the suit.

The defendants deny the contents of paragraphs 6 of the amended plaint and state that at no time has the plaintiff been the “*legal and bona-fide owner*” of 200 acres out of land parcel L.R. No.11306 Ex-

Moller Farm South West of Rumuruti Township. Though a sale agreement was entered by the late Kinga Wamwendia on 3rd July, 1986 to sell the said 200 acres out of the said land to the plaintiff, the sale agreement was not effected and therefore became frustrated due to expiry of time and operation of the law. The only recourse the plaintiff has, is to seek for the refund of any purchase price paid to the late Kinga Wamwendia from the administrator of his estate.

They admit that part of the purchase price was paid to the Settlement Fund Trustee to offset a loan balance but add that the total purchase price of Kshs.600,000.00 was never paid and therefore to date a balance of Kshs.61,450.90 remains outstanding. They deny that the plaintiff took possession of the said 200 acres or at all and claim that he has never run his clinic within the said parcel of land.

According to them the late Kinga Wamwendia initiated the process of subdivision of the said property and a consent to subdivide the same was given however, as late as 18th March, the year 2000, the said subdivision had not been completed and to date the approved subdivision of the said suit land has never been completed and at no time did the late Kinga Wamwendia execute an application for the Land Board Consent to transfer, dated 21st December 1995. A report by the Director of the Criminal Investigation Department (C.I.D) filed in court on 27th of October 2012, has declared that he signature of the said application was forged.

They averred that there was no land board meeting of the Laikipia Land Control Board on 20th August, 1997. No such minutes exist in respect of such a meeting. The Chairman and the Secretary to the board has vide a letter dated 18th July, 2012 and filed in court on 23rd July, 2012 denied that there was such Land Board Consent and therefore it cannot be said to validly exist. The records at the Laikipia Lands Office showing entry number 487/97 in their records is fabricated and the same was inserted for purposes of defeating justice during the pendency of this suit. The deceased did not also sign the transfer of Land document before Lucy Mwai advocate. confirms this position.

The said Kinga Wamwendia died on 13th October, 1999. Therefore attempts to subdivide the said land in the year 2000 was illegal and unlawful as it amounted to interference with an estate of the deceased person within authority by the court.

The defendants reiterates that the plaintiff has never been in possession of the suit land and that the 1st defendant has never been approached by the plaintiff in respect of the said suit land.

The Grant of letters of Administration and the confirmation thereof vide Nairobi High Court succession cause number 1711 of 2006, was done lawfully and procedurally. If the plaintiff feels the same was not properly done, the law allows him to go back to the said court and in the said process and any orders made therein. He is put to strict proof thereof.

The 1st defendant, together with the other beneficiaries claimed that they had the right to sell the suit property to any purchaser as they held title to the same after due process. If the plaintiff had any right or interest to the said property, he would have registered the same against the title. He did not register a caveat or file any in respect of the suit property, for the period of 32 years and therefore the doctrine of laches has come into play. The plaintiff did not at any time have any overriding interest over the property as the sale agreement became null and void by operation of the law, and that he has not been in possession of the suit property and furthermore claimed not aware of any letter copied to the 1st defendant dated 28th July, 2011 or at all. In any case, the plaintiff had all the time to inhibit the title to the land to avoid any transaction if at all he had any legal claim to the suit property. He averred that the land was sold on a willing buyer and willing seller basis hence allegations of conspiracy between the defendants and the purchaser should be rejected and be dismissed with contempt as the sale of the land was above board and done within the parameters provided by the law.

The defendants claim that having lawfully sold the suit land to the 9th and 10th defendants, they do not have any claim whatsoever to the said suit land and that the 9th and 10th defendant were given full possession thereof after the execution of the sale agreement and ultimately prayed that the suit be dismissed with costs.

Defendants No.9 and 10 filed a defence on the 18/1/2013 and denied the allegation that the plaintiff is the bona fide owner of the parcel of land measuring 200 acres out of L.R. No.11306 and contended that the 9th defendant was the legal owner of the property having bought the same vide sale agreement dated 22/9/2011.

They claimed to be strangers to paragraph 7 and 8 of the amended plaint and denied that the plaintiff was in possession as there was nobody in occupation. They purchased the property known as L.R. No.11306 (Orig. No.10025/1 and 5159) from the 1st to 7th defendants after conducting an official search at the Land Registry to confirm the registered owners of the property and aver that the alleged sale agreement between the plaintiff and the deceased lapsed and has been overtaken by events and that the plaintiff having been aware of the death of the deceased should have taken legal steps immediately to ensure that his interest in the land, if any was duly registered. The 9th and 10th defendants further averred that no subdivision was ever registered on the suit premises and therefore no valid consent to transfer could have been issued on a non-existence subdivision and that subdivision is only complete upon registration of the subdivision against the original title whereupon, the original file is closed and new ones opened in terms of the new subdivision at which point the registered owner can seek consent to transfer the existing new title.

On the 5th of October 2012 Jesse Kariuki and Company Advocates for 1 – 8 defendants filed on preliminary objection whose ***gist*** was that the whole suit is incompetent, as it has been caught up by the Limitations of Actions Act (Cap 22) laws of Kenya. The suit is based on a contract of sale of land which contract cannot be enforced as it is time barred and that the plaintiff/applicant cannot claim any right or interest on the subject parcel of land in view of the provisions of the Land Control Act (Cap 302) Laws of Kenya. On the 14/6/2013, it was agreed by all parties that the preliminary objections be disposed off first by way of written submissions.

Mr. Jesse Kariuki for the 1st, 5th, 6th and 7th defendants filed submissions whose ***gravamen*** was that Section 4 of the Limitation of Action Act limits the time period for commencing action founded on contract inter alia to six years from the date on which the cause of action accrued. According to him, the plaintiff's claim is based on a purchase of two hundred acres of land from the deceased Kinga Wamwendia vide an agreement of sale dated 31/7/1986. He submitted that the cause of action accrued when the agreement was made and therefore the suit should have been filed within 6 years from the said date.

Moreover, according to paragraph 4 of the sale agreement the transaction was subject to the consent of Laikipia Land Control Board being granted and the parties undertook to lodge an application for the board consent within three months of the execution of the agreement. He argues further that acts done in furtherance of the agreement did not regularize or invalidate the clear provision of the sale agreement. He submitted further that the deceased Kinga Wamwendia died on 13/10/1999 therefore whatever assets he left behind were to be administered or became subject to the law of succession Act Cap 160 Laws of Kenya. A succession cause was filed in the estate of Kinga Wamwendia and the property was listed as an asset of the deceased which was transmitted by law to the 1st, 5th, 6th & 7th defendants. In the proceedings in succession cause No.1711 of 2006 it is worth noting that no application has been filed to revoke the grant under Section 76 of the Succession Act Cap 160.

The defendants further submitted that there was lack of consent of the Land Control Board hence the transaction was null and void.

The 9th & 10th defendants on their part through **Manegene**, while associating with the submissions of **Jessie Kariuki** added that the cause of action herein is based on breach of a sale agreement that was valid for 90 days from 3/7/1986. 26 years have lapsed since the cause of action arose and therefore the suit is statute barred. The plaintiff was aware of the death of Kinga Wamwendia but took no action to safe guard his right during the succession proceedings. He should have filed the suit promptly when the cause of action accrued.

On the consent of the land control board, she submits that no valid consent was obtained by the

plaintiff. Moreover, the 9 & 10 defendant submit that no consent can be issued without subdivision of the parcel of land. Moreover, that subdivision of the parcel also requires consent.

The plaintiff filed written submissions on 26/7/2013 and strongly submitted through **Anthony Gikaria** that it is the plaintiff's case that his suit is competent as it seeks to redress the transgression and inequities fraudulently and illegally committed against the plaintiff by the 1st – 8th defendants following the demise of their late father Kinga Wamwendia when the 1st defendant – 8th defendants as the administrator/beneficiaries of the estate of the late Kinga Wamwendia began in the year 2011 staking a claim to the plaintiff's 200 acres parcel of land comprised under L.R. No.11306 Ex-Moller Farm South West of Rumuruti Township and made several attempts to illegally wrestle off possession and ultimately forcefully occupy the plaintiff's land and in the course vandalized and occasioned wanton destruction to the plaintiff's private property, yet knowingly aware that the plaintiff was the legal and bona-fide owner. That it is therefore clear that this suit is not founded on the agreement for sale dated the 3rd July, 1986 but rather the cause of action in this suit arose out of the transgressions and inequities committed by the defendants in the year 2011 against the plaintiff and the very basis on which the plaintiff moved this honourable court in the year 2012 seeking for orders of injunction to issue against the defendants as confirmed by prayer V of the Amended Plaint dated the 7th November, 2012.

The plaintiff submitted that it is important to note that he took full possession and occupation of the suit property upon purchase of the suit property as confirmed by Clause 6 of the Agreement of sale dated the 3rd July, 1986 and therefore holds an overriding interest as bona-fide occupant who has always held lawful possession of the suit property since purchase which was way before the 1st – 8th defendants purported to sell the same to M/s Dias Property Limited (9th defendant) and Samuel Mwangi Thuita (10th defendant). That the plaintiff's rights as a person in possession and actual occupation cannot be abrogated.

It therefore follows that there is a presumption of trust between the plaintiff and the 1st – 8th defendants viz-a-viz the suit property since the plaintiff contends that he paid the agreed purchase price in full towards acquisition of the suit property and holds a beneficial interest in the same and as such it is the plaintiff's case that the 1st – 8th defendants received and are holding the suit property on his behalf and are only attempting to wrestle possession of the same from the plaintiff with a view to disenfranchising him of the same and using it exclusively to their own benefit.

He argues that it is clear that the plaintiff's suit cannot be said to be statute barred for the reason that the plaintiff has sought for specific performance of the agreement for sale dated the 3rd July, 1986 in terms of clause 6 of the said agreement as this is an alternative prayer which is mutually exclusive to the other prayers sought in the amended plaint in that in the prayer is for specific performance. It is for the plaintiff to prove his case on a balance of probabilities in both of alternative limbs of prayers sought.

“That in the alternative the 1st defendant as the administrator of the estate of the Lange Kinga Wamwendia be compelled within a period of thirty (30) days from the date of entry of judgment to specifically perform the agreement of sale dated the 3rd July, 1986 in terms of clause 6 of the said agreement for sale and/or as stipulated in the law society conditions of sale (1989 Edition)”.

He further argues that the salient question that begs this honourable court's answer is as to whether the agreement for sale dated the 3rd July, 1986 is a valid agreement and enforceable or is it void and whether the plaintiff is entitled to an order for specific performance. That since there is a consent of Land Control Board to transfer the suit land, then the subject agreement for sale being a controlled transaction cannot be said to be void for all purposes and a court of equity is in a position to compel the relevant parties for specific performance of a contract that is legal.

On whether the agreement for sale is voidable and unenforceable due to application of the provisions of the Limitation of Action act (Cap 302) Laws of Kenya. The plaintiff submits that unfortunately the defendants conveniently forget that the consent to transfer was approved by the Land Control Board for the sale transaction notwithstanding the fact that it was practically impossible to obtain the consent to transfer within the six (6) months window period stipulated under the law since the plaintiff

only purchased the 200 acres parcel of land which was to be excised of from title L.R. No.11306 Ex-Moller Farm South West of Rumuruti and which required some mandatory pre-requisites to be fulfilled by the late Kinga Wamwendia prior to the processing of the consent to transfer.

That as a matter of fact one of the first tasks that the plaintiff had to attend to on the 1st September, 1986 on behalf of the vendor was to pay part of the sale proceeds directly to the Settlement Fund Trustee to offset a loan balance of Kshs.315,539.10 owed by the late Kinga Wamwendia so as to obtain the discharge of charge and with the balance of the purchase price being subsequently liquidated in instalments and which he paid directly to the late Kinga Wamwendia, which payments were duly acknowledged.

That thereafter the late Kinga Wamwendia immediately commenced the sub-division exercise of L.R. No.11306 Ex-Moller Farm South West of Rumuruti Township by applying for the consent to sub-divide in the spirit of the practice instructions dated the 7th January, 1983 from the chief Lands Registrar and attending to the other requisite formalities.

That on the **12th January, 1987** the late Kinga Wamwendia wrote to the Secretary Central Authority submitting 10 prints of the proposed sub-division.

That on the **27th November, 1987** the commissioner of Lands circulated to the various stakeholders the proposed sub-division inviting their comments.

That on the **30th November, 1987** the clerk of Laikipia County Council wrote to the Commissioner of Lands indicating their no objection to the proposed sub-division.

That on the **7th February, 1990** the Director of Surveys wrote to Mr. R. Omondi the Licensed Land Surveyor who dealt with the survey of the sub-division scheme and gave approval to the proposed sub-division subject to the clarification of the position of the access road leading to the two resultant parcels and further forwarding a copy of the approved plan. That is is therefore safe to conclude that at this stage in time the only pending issue in regard to the sale of the suit property was that of demarcation of the access road.

That thereafter the late Kinga Wamwendia also executed in the plaintiff's favour the necessary application for the Land Control Board consent to transfer dated the 21st December, 1995 rendering in specifics the particular parcel of land intended to be transferred.

That on the 20th August, 1997 the late Kinga Wamwendia obtained from the Laikipia Land Control Board a valid consent to transfer the 200 acres parcel of land in the plaintiff's favour. That this transaction was captured and is validated as Entry No.487/97 in the Land Office Records and the said Land Control Board consent remains valid and unassailable and as is evidenced by the certified extract of the Land Board records dated the 28th July, 2012 issued by the Laikipia District Land Registrar Mrs. Beatrice W. Mwai notwithstanding the fact that the defendants have relied upon an earlier letter dated the 17th July, 2012 issued by the Land Control Board Secretary to claim that there were no minutes or records of the board meeting held on the 20th August, 1997 and which is an issue for enquiry by this honourable court at trial since the Laikipia District Land Registrar and Board Secretary cannot be seen to be reading from different scripts with the District Land Registrar validating the consent issued on the 20th August, 1997 and the Board Secretary claiming that there was no such meeting. That under the same breadth the contentious issue of the authenticity of the signatures appearing on the application for the Land Control Board Consent of transfer dated the 21st December, 1995 is another issue that will require a full enquiry by this honourable court at trial together with the validity of the transfer instrument executed on the 16th September, 1997 by the late Kinga Wamwendia in the plaintiff's favour and attested by Lucy Mwai Advocate.

That as at the 4th June, 1994 the issue of the access road had not been concluded forcing the plaintiff to instruct Lucy Mwai and co. Advocates to request one John Miano to re-survey the property and confirm that an access road was provided and that the plaintiff obtained his true acreage with a 2nd

reminder letter being issued on the 18th March, 2000.

That unfortunately the late Kinga Wamwendia passed away on the 13th October 1999 before the finalization of the transfer of the suit property in the plaintiff's favour and consequently all acts and transactions pertaining to the suit property survived the estate of the deceased. That the plaintiff lawfully continued occupying and having full possession of the suit property to the exclusion of the 64 acres which devolved upon the estate of the deceased.

This court has considered the pleadings and submission of the parties and is of the considered view that for the preliminary objection to be determined four issues need to be addressed.

1. *What is the cause of action?*
2. *What is the limitation period and has the suit been brought within time?*
3. *Was the consent of the board applied for and obtained within the law or at all?*
4. *Can the court extend the limitation period?*

On the 1st issue, this court finds that the claim is founded on contract based on an agreement for sale dated the 3/7/1986. This court does not want to belabor into the law of contract suffice is to say that an agreement for sale of land is contract and therefore governed by the law of contract Act. **Section 4 1(a) of the limitation of Actions Act** prohibits actions based on contract being commenced after expiry of six years from the date on which the cause of action accrued. The court holds that the cause of action accrued on 3/7/1986 and therefore the answer to second issue is that the suit herein was brought after the expiry of 6 years and therefore I agree with the defendants that the suit is time barred. The argument by the plaintiff that the suit seeks to redress the transgression and inequities fraudulently and illegally committed against the plaintiff by the 1st – 8th defendants does not hold as the genesis of the dispute is the agreement between Kinga Wamwendia the defendant's father and the plaintiff.

On the issue of consent of the Land Control Board, the court finds that there was no evidence of the consent of the Land Control Board allowing the late kinga Wamwendia to subdivide the land and that consequently the land was not subdivided as it remains in its original form thus **LR 11306 EX MOLLER FARM**. The plaintiff indeed describes his land as **200 acres parcel of land comprised under L.R. No.11306 Ex-Moller Farm** South West of Rumuruti township. The plaintiff gave a chronology of events beginning with the execution of the agreement on 3rd July, 1986. On 1st/9/1986 he paid part of the proceeds to Settlement Fund Trustee to offset a loan balance of Kshs.315,539.19 owned by the vendor and thereafter the vendor started the process of subdivision. The late Kinga Wamwendia made an application for consent to the Land Control Board on the 21/12/1995 referring to the specific parcel of land intended to be transferred. On the 20/8/1997 he obtained the valid consent to transfer the 200 acres parcel of land in the plaintiffs favour.

**The Land Control Act** was assented to on 11/12/1967 and commenced the following day on 12/12/1967. This is an act of parliament to provide for controlling transactions in agricultural land. Under the Act controlled transaction means one of the transaction specified in **Section 6 (1) of the Act** other than those specified in 6(3).

**Section 6 (1) (a)** and b of the Act provide that transactions affecting agricultural land that is to say:- **sale, transfer, lease, mortgage, exchange partition or other disposal of or dealing with any agricultural land** which is situated within a land control area, and the subdivision of any such agricultural land into two or more parcels to be held under separate title other than the division of an area of less than 20 acres into plots in an area to which the development and use of land (planning) Regulation 1961 (LW 516/1961) for the time being apply is void for all purposes unless the land control board for the area or division in which the land is situated has given consent in respect of the transaction in accordance with the Act.

It is worth noting that **Section 8(1)** provides that the application for consent in respect of a controlled transaction shall be made within six months of the making of the agreement for the controlled transaction by any party thereto.

This court notes the use of **mandatory** and **directory** words and holds that the language used in a statute alone is not decisive as to whether the word is mandatory or directory, regard must be had to the context, subject matter and object of the statutory provision in question, in determining whether the same is mandatory or directory. There is no universal rule as to whether mandatory enactments shall be considered **directory** only or **obligatory**. It is the duty of the court to get the real intention of the legislature, by carefully attending to the whole scope of the statute considered.

However, when it comes to formalities prescribed for making contracts or transfers the use of the word **shall** is **imperative**.

This court holds that the use of the word shall in section **8(1)** of the **Limitation of Control Act cap 302** laws of Kenya is **mandatory** and **imperative** and therefore failure to make the application within 6 months is serious breach of the provision of the law and therefore any transaction undertaken under the said provision will be a nullity. It is clear from the record that the application to the Land Control Board by Kinga Wamwendia was made on the 21/12/1995 approximately 8 years after the execution of the sale agreement. The court finds this to have been in breach of the mandatory provision of Section 8 (1) of the Act. The reasons given by the plaintiff for this delay could have been good reasons for extension of time before the death of Kinga Wamwendia. The plaintiff slept on his right by failing to move the court for extension of time pursuant to the proviso to Section 8(1) of the said Act.

Moreover, the late Kinga Wamwendia did not partition his land into two parcels of land as the plaintiff attempts to state. The claim by the plaintiff is ambiguous as he is claiming 200 acres parcel of land which was to be excised from title No.11306 Ex-Moller Farm south West of Rumuruti. The plaintiff has not shown that there was an application for consent by the late Kinga Wamwendia to excise the 200 acres and that consent was granted by the board. One would ask, for which parcel of land was the board purporting to give consent and yet the farm had not been partitioned to enable the vendor transfer 200 acres to the plaintiff. The administrator of the estate of the late Kinga Wamwendia cannot be compelled to specifically perform the agreement of sale dated the 3rd of July 1986 in terms of clause 6 of the same as the application for consent of the board was made after the expiry of the stipulated period.

The upshot of the above is that this court finds there was no valid consent to transfer the 200 acres to the plaintiff the application having been made more than 6 months after the agreement. The delay of approximately 8 years is inexcusable and failure to apply for extension of time has not been explained.

Since there is no application before court to be considered for extension of time, the preliminary objections by the defendants are upheld and the plaint is hereby struck out for having been filed out of time and that here being no valid consent of the Land Control Board. The suit is dismissed with costs.

***Dated, signed and delivered at Nyeri this 28th day of March 2014***

**A. OMBWAYO**

**JUDGE**