



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 98 OF 2013 (OS)

[Formerly Eldoret Hccc No. 118 of 2005]

YOHANA WEKUNDA NAMIRANDA.....PLAINTIFF

VERSUS

KEFA LIHANDA ALEGO.....DEFENDANT

JUDGMENT

1. The Plaintiff, **Yohana Wekunda Namiranda**, sued the Defendant, **Kefa Lihanda Alego**, through the Plaint dated 13th December, 2005 seeking for a declaration that the Plaintiff is the legal owner of **Kakamega/Mautuma/482**, and that the Defendant has unlawfully encroached and trespassed onto it; general damages for trespass and unlawful encroachment onto the parcel; order of eviction; permanent injunction; costs and interests. The Plaintiff avers that he acquired land parcel Kakamega/Mautuma/482, the suit land, in 1965 and took possession in the same year. That on or about 15th February, 2005 he ploughed 4½ acres of the 8-hectare land. That on or about 7th March, 2005, the Defendant entered onto the suit land and started preparing to erect a structure. That when the Plaintiff went to make inquiry, the Defendant fought him. That the Plaintiff went to report to the police but was arrested with his son, locked in the cells for four days and charged with grievous harm in **Eldoret Chief Magistrate Criminal Case No. 1806 of 2005**. That on or about 16th March 2005, the Defendant again entered onto the suit land, reploughed 2 acres of the 4½ acres earlier ploughed by the Plaintiff on 15th February, 2005 and planted thereon, claiming that the two acres belonged to him. That in August, 2005, the Defendant tried to erect a structure on the land but the Plaintiff stopped him. That though he had never had any dealing with the Defendant over the suit land, the Defendant caused the parcel he claimed to be surveyed on or about 4th November, 2005 hence depriving the Plaintiff peaceful enjoyment of his land and hence this suit.

2. The Plaintiff's claim is opposed by the Defendant through the Defence and Counterclaim dated 14th May, 2014. He avers that his late father, **James Lihanda Alego**, purchased two acres of land parcel Kakamega/Mautuma/482, the suit land, at Kshs.94,000 whose payment the Plaintiff acknowledged. That his late father and the Plaintiff applied for Land Control Board's consent on the 29th July, 2004, which was granted on the 15th October, 2004. That the Plaintiff then signed the transfer forms and his late father and family has had possession of the land until 2005 when the Plaintiff attacked him. That the Plaintiff was charged in **Criminal Case No. 1806 of 2005** that was still pending in Court. That the two acres he had ploughed was his and that is where he had gone to erect a structure as the administrator of his father's estate. That the two acres his late father had bought from the Plaintiff had been surveyed in 1996, and this suit is an abuse of the Court's process, and the Plaintiff is not entitled to the prayers sought.

3. The Defendant in his Counterclaim avers that he sues on his own behalf and as administrator of the estate of his late father, James Lihanda Alego. He avers that he occupies two acres designated as **Kakamega/Mautuma 482/2618** which the Plaintiff trespassed onto in 2005 and unlawfully occupied. That the Plaintiff has refused to give him title to the land even though he had been fully paid for it, had obtained Land Control Board consent and had signed the transfer forms. That the Plaintiff should be restrained from the two-acre parcel. The Defendant therefore prays for the Plaintiff's suit to be dismissed with costs; order of specific performances of the agreement dated 4th April, 1994 between the Plaintiff and the Defendant's father be issued; eviction order against the Plaintiff from the Defendant's father's two acres portion; permanent injunction from the two-acre portion and costs.

4. The Plaintiff opposed the Defendant's counterclaim through the Reply to Defence and Defence to Counterclaim dated 10th July, 2014. The Plaintiff denies ever selling land to James Lihanda Alego or signing any conveyancing documents. That the two acres that the Defendant claim, and which were part of the 4½ acres he had ploughed belonged to him. That the criminal case was not pending but had been determined in his favour. He disputed that the Defendant was the administrator of the estate of the late James Lihanda Alego. That he has never had any dealing with the Defendant or his father. That he had not appeared before the Land Control Board or signed any conveyancing documents. The Plaintiff prays for the Defendant's defence and Counterclaim to be struck out and or be dismissed with costs, and judgment be entered in his favour as prayed in the Plaint.

5. The Plaintiff testified as PW1 adopting his statements dated 27th March, 2015 and 13th March, 2020 as his evidence in chief. He testified that he is the registered proprietor of land parcel Kakamega/Mautuma/482 and produced a certified copy of the title and certificate of official Search as exhibits. He denied that the land has ever been subdivided. He added that on 4th October, 1993, he entered into a sale agreement

with one James Lihanda Alego to sell him two acres at Shs.94,000. The purchaser paid only Shs.43,000 and was to take possession upon paying the balance of Shs.51,000 which he never paid. He produced the agreement as exhibit and denied signing any other agreement as claimed by the Defendant. That the Defendant later erected a structure in the middle of his maize shamba at night. He denied applying for Land Control Board consent to subdivide the land, obtaining the consent to transfer the land to **Christina Muhonja Odongo** or signing the transfer form. That when he sold the two acres to James Lihanda Alego, he did not have the title deed as it had not been discharged by Settlement Fund Trustees. That he had in 1993 planted boundary marks for the portions of the land he had sold and allowed those who had fully paid the purchase price to take possession. He denied that James Lihanda Alego and or the Defendant had taken possession of the two acres portion and cultivated it from 1993 to 2007. That he has since processed titles for three other buyers who had fully paid for their parcels.

6. The Defendant testified as **DW1** and called **Timothy Andei Obiero** who testified as **DW2**. He adopted his statement dated 7th March, 2016. He told the Court that he is a son to James Lihanda Alego who died on the 21st August, 2003 and that he has been appointed the administrator of his estate. That his late father had bought two acres of land from the Plaintiff in 1993 and that the balance of purchase price of Shs.51,000 was paid through the agreement dated 4th April, 1994 which was marked for identification. The Defendant told the Court that his late father took possession of the land in 1993 and that one Christine Muhonja, a daughter to his father's brother, started cultivating it. That when he later went to cultivate for his maize crop, the Plaintiff attacked him and he was arrested and charged for assault but acquitted under **Section 210 of Criminal Procedure Code**. That the Plaintiff then got *ex parte* judgment in this case and took possession of the portion. That he had cultivated the land until 2008. He produced the transfer form signed by his late father and the Plaintiff as exhibit. That the two-acre portion bought by his late father had been allocated reference Kakamega/Mautuma/2618 after subdivision but the transfer could not be registered as the Plaintiff had not surrendered the original title deed. That Christine, who was cultivating the two-acres portion, died between 2006 and 2007. That he had started erecting a house on the land in 2008. That he did not attend the Land Control Board, and could not tell whether his father had done so. That he did not see the Plaintiff sign the application for Land Control Board and that he only signed the document when it was taken to him. That he could not tell who deleted the name of Christine on the document and inserted his instead. That he got the transfer form from Christine and could not tell who had made the alterations thereon. That he did not sign the transfer form and could not tell whether his late father had signed it. He denied inserting his name on the transfer document. That he is the one who had given his late father the money to buy the two acres land. That he has not obtained a certificate of Search for Kakamega/Mautuma/2618. DW2 adopted his statement dated 5th March, 2020. He produced the sale agreement he wrote dated 4th April, 1994, under which the Defendant's father bought two acres from the Plaintiff. He told the Court that the two acres were surveyed locally and the purchaser took possession. That when the Defendant came later to erect a house, he was attacked by the Plaintiff's children. It was his testimony that among those who signed the 4th April, 1994 agreement was Fredrick Juma, a son to the Plaintiff. He agreed writing the sale agreements dated 4th October, 1993 and 4th April, 1994. That he does not know when the balance of purchase price of Kshs.51,000 was paid as he only knew of the payment of Kshs.94,000 made on 4th April, 1994.

7. The learned Counsel for the Plaintiff and the Defendant filed their written submissions dated the 23rd November, 2020 and 9th December, 2020 respectively.

A. The Plaintiff's submissions;

- That he has proved he is the registered owner of the suit land which fact has been confirmed by both DW1 and DW2.
- That he has proved that the Defendant unlawfully entered onto the suit land in 2005 and the Defendant has conceded erecting a structure thereon without his approval.
- That as the balance of the purchase price noted in the sale agreement of 4th October, 1993 had not been paid and he had not given James Lihanda Alego possession of the land. That the acts of the Defendant of 2005 amounted to trespass which is defined in **Clerk & Lindsell on Torts 18th Edition at page 923** and **Section 3(1) of the Trespass Act Chapter 294 of Laws of Kenya**.
- That the second agreement dated 4th April, 1994 was a fake one manufactured for the sole aim of covering the breach of the agreement dated 4th October, 1993 and was not signed by DW2. The learned Counsel referred to the case of **Gitwany Investment Ltd Vs Tajmal Ltd & 3 Others, Nairobi Hccc No. 114 of 2002** that was cited in the case of **Augustine Kiprono Koskei & 8 Others Vs Pentecostal Evangelism Fellowship of Africa & Another**, where the Court relied in the words of the Court of Appeal in **Wreck Motors Enterprises Vs Commissioner of Land C. A. No. 71 of 1997**, where it was held that ***"...like equity keeps teaching us first in time prevails...It must prevail because without cancellation..., it retains its sanctity."***
- That though the Defendant claimed one Christine Muhonja had occupied the two acres for over twelve years from 1993 to 2008, he failed to call her husband, **Mr. Francis Odanga** to testify and confirm that. That the Court should therefore find that the Defendant, his late father and or Christine, their representative had not been on the two acres portion except in 2005.
- That even if the late James Lihanda Alego had acquired any interest over the two-acre portion, the Defendant had no right to the same before 2006 when he obtained the grant of administration and his entry onto the land in 2005 amounted to trespass.
- That the Defendant's claim in the counterclaim for specific performance of the contract dated 4th April, 1994 is defective, bad in law, statute time barred and unenforceable. That the counterclaim was not accompanied by a verifying affidavit as required of a suit and a cross suit by **Order 4 Rule 1(2) of the Civil Procedure Rules**. That again, the counterclaim was filed on 14th May, 2014 which was about twenty years from the date of the alleged contract dated 4th April, 1994. That the counterclaim is therefore barred by **Section 4(1) and (7) of the Limitation of Actions Act Chapter 22 of Laws of Kenya**, and should be dismissed with costs. The learned Counsel relied on this Court's decision in the case of **Abraham Gina Adams (Suing as the administrator of the Estate of the late Geoffrey Adams Ogwa) Vs James Ouma Natolio [2015] eKLR**.

· That as between the agreements dated 4th October, 1993 and 4th April, 1994, the former is the genuine one. That any other agreement that could have been prepared after that of 4th October, 1993 over the same transaction would have been an acknowledgment document for the balance of Kshs.51,000 and not another agreement for sale of the same land.

· That the application for Land Control Board consent, the letter of consent and the transfer document relied upon by the Defendant and which the Plaintiff disputed, should be disregarded as the Defendant failed to call the relevant witnesses to confirm their genuineness. That further, as the suit land was agricultural land and no consent was obtained from the Land Control Board, the agreement of sale between the Plaintiff and the late James Lihanda Alego became void, and what the Defendant should have pursued is refund of the money paid for the estate's benefits. The Counsel referred again to the decision in the case of **Abraham Gina Adams (supra) at page 8 paragraph 9.**

· The learned Counsel submitted that the Plaintiff should be granted prayers (b), (d) and (e) as prayers (a) and (c) are superfluous and have been abandoned. The Counsel also submits that the Defendant's Counterclaim should be dismissed with costs.

B. Defendant's submissions:

· That the Plaintiff is not a truthful witness as his evidence is at variance with his pleadings. That parties are bound by their pleadings. The learned Counsel referred to the High Court decision of **EW O (Suing as the next friend of a minor COW) Vs Chairman, Board of Governors, Agoro Yombe Secondary School [2018] eKLR**, which cited with approval, the Supreme Court of Malawi decision on the matter in **Malawi Railways Ltd Vs Nyasulu [1998] MWS 3.**

· That as the Plaintiff sued the Defendant for trespass, he cannot turn around and claim the Defendant was a buyer without pleading so. The learned Counsel cited the case of **Daniel Otieno Migore Vs South Nyanza Sugar Co. Ltd [2018] eKLR**. That the Plaintiff cannot base this claim on trespass and seek eviction order and then lead evidence that the Defendant is not in possession. That such evidence should be rejected.

· That the Defendant has tendered evidence to show that he was a bona fide purchaser for value who was in possession of the two acres of land and cannot therefore have been a trespasser. The Counsel referred to the cases of **Macharia Mwangi Maina & 87 Others Vs Davidson Mwangi Kagiri [2014] eKLR, paragraph 15, Michael Githinji Kimotho Vs Nicholas Murathia Mugo Civil Appeal No. 53 of 1995, and Mwangi & Another Vs Mwangi [1986] KLR 328.**

· That as the two agreements were not controverted, they are deemed as admitted. The learned Counsel cited the decision in the case of **Chief Land Registrar & 4 Others Vs Nathan Tirop Koech & 4 Others [2018] eKLR**, where the Court referred to the dicta in **Mwinyi Hamisi Appeal Vs Attorney General, Civil Appeal No. 125 of 1997** and **Sections 97 (1) and 100 of the Evidence Act** and held that the **"Registration of surrender is evidence of surrender andno oral evidence is admissible to contradict or vary the contents of the documentary evidence indicating surrender."**

· That in view of the fact that the Plaintiff was obligated to plead by **Order 2 Rule 4 of the Civil Procedure Rules**, he is not allowed to raise at the submissions level defects in pleadings, absence of land control board consents, limitation and failure to complete sale as they were not raised in the defence to counterclaim or reply to defence.

· That as the Defendant was in possession of the two-acre portion by the time the Plaintiff became the registered proprietor of the suit land on 8th September, 2005, then the Plaintiff became a trustee for the Defendant who remained in possession by virtue of the sale agreements of 4th April, 1994 and 4th October, 1993 and no subsequent events could change or defeat the trust. The learned Counsel relied on the decision in the case of **Macharia Mwangi & 87 Others Vs Davidson Mwangi Kagiri (supra)** and submitted that the trust created is still enforceable and the Plaintiff is bound to subdivide the suit land and transfer the two acres to the Defendant who is the legitimate owner.

· That the failure by the Plaintiff to call **Fredrick Juma** who is his son, and a witness to the agreement dated 4th April, 1994 and 4th October, 1993 connotes that he had something to hide and the declaration prayer in his plaint should fail. That the Plaintiff is not entitled to damages, as the Defendant as the administrator of the estate of the late James Lihanda Alego, had a right to the two acres and the Plaintiff was his trustee. The Counsel referred to the case of **Isaack M'inanga Kiebia Vs Isaaya Theuri M'lintari & Another [2018] eKLR.**

· That a purchaser for value is not a trespasser and cannot be liable for damages which in any case have not been proved.

· That the eviction of the Defendant from the suit land after the ex parte judgment was unlawful in view of the decision in the case of **Gusii Mwalimu Investment Company Ltd Vs Mwalimu Hotel Kisii Ltd, C. A. Civil Appeal No. 160 of 1995 (unreported) at page 10** on the need for a landlord to obtain an order from a competent Court or statutory tribunal to take possession where the tenant has not consented to vacate. That the Court should therefore **"ex debito justice reinstate the Defendant"** onto the two acres portion.

· That the Plaintiff is not entitled to a permanent injunction order over the two-acre parcel claimed by the Defendant.

· That the Defendant has demonstrated the sale of the two-acre land under the agreement of 4th April, 1994 and the Plaintiff cannot be allowed to raise any defence to the claim that was not pleaded in respect of the specific performance prayer. The learned Counsel cited the decisions in the case of **Reliable Electricals Engineers Ltd Vs Mantrac Kenya Ltd [2006] eKLR** and **Willy Kimutai Kitilit Vs Michael Kibet [2018] eKLR.**

· That the Defendant has proved his claim in the counterclaim and is entitled to all the prayers sought thereon.

· That on the Plaintiff act of raising the issue of there not being a verifying affidavit filed with the counterclaim, the learned Counsel submitted that the matter should have been raised in the defence and taken up at the earliest opportunity as a preliminary objection as required by **Order 2 Rule (4) of Civil Procedure Rules**. That in any case and in compliance with **Order 7 Rule 5 of the Civil Procedure Rules**, an affidavit had been filed in the suit with the counterclaim. The learned Counsel cited the High Court decision in the case of **Senate of the Republic of Kenya & 4 Others Vs. Speaker of the National Assembly & Another; Attorney General & 7 Others (Interested Parties) [2020] eKLR, paragraph 82 and 87**, where the Court held inter-alia that “*over and above this rule, Article 159(2)(d) of the Constitution prods this Court to exercise its judicial authority bearing in mind, amongst other principles that justice shall be administered without undue regard to procedural technicalities. Failure to file a Notice of Appointment of Advocate, in our humble view, would be such a procedural technicality.*” The learned Counsel also cited the case of **Karl Wehner Claasen Vs Commissioner of Lands & 4 Others [2019] eKLR** on the import of **Rule 3 (8) of the Practice and Procedure Rules** and **Article 159 (2) (d) of the Constitution**.

· That as the issue of limitation of the Defendant’s counterclaim was not raised in the pleadings, it cannot be raised through submissions in view of **Order 4 Rule 4 of the Civil Procedure Rules**. That in any case as the title to the suit land was issued on 8th September 2005, the suit filed on 14th December 2005, application for leave to file defence and counterclaim made in 2008 and the same filed in 2014 which is only nine years from the date of the title deed, then limitation should not arise. The Counsel cited the cases of **Mohammed Abdikadir Mohammed Vs Sammy Kagiri & Another [2016] eKLR**, **Stephen Onyango Achola & Another Vs Edward Hongo Sule & Another [2004] eKLR** and **Benson Kibugi Rigii Vs Anselimy Aerodi Abenjira [2008] eKLR** that limitation must be specifically pleaded to be raised in a case.

· The learned Counsel submitted that in view of the provision of **Section 175 of the Agriculture Act Chapter 318 of Laws of Kenya**, the period the land was registered under the Settlement Fund Trustees does not count for purposes of limitation. The learned Counsel referred to the cases of **Gitu Vs Ndungu & 2 Others [2001] eKLR** in which the decision in **Boniface Oredo Vs Wabomba Mukile Civil Appeal No. 170 of 1989 (unreported)** was cited and **Kennedy Nyamumbo Sese Vs Settlement Fund Trustee & 2 Others [2017] eKLR**, in support of the submission that time does not run against the government, and a suit by Settlement Fund Trustees cannot be defeated by the defence of limitation.

· That as the Plaintiff has failed to prove his claim, the same should be dismissed and the counterclaim by the Defendant be allowed.

8. The following are the issues for the Court’s determinations;

(a) Who between the Plaintiff and Defendant has proved his claim to the standard required of balance of probabilities.

(b) Whether the agreement dated 4th April, 1994 was independent of or in furtherance to that dated 4th October, 1993.

(c) Who pays the costs in the main suit and counterclaim.

9. The Court has considered the parties pleadings, evidence tendered by **PW1**, **DW1** and **DW2**, written submissions by the two learned Counsel, the superior Court’s decisions thereon and come to the following findings;

(a) That though the Plaintiff had not acknowledged the existence of any land sale agreement between him and the late father to the Defendant over the suit land in his plaint or Reply to the Defence and Defence to the counterclaim, it is certain from the evidence tendered by both sides, and the pleadings by the Defendant that they had such a transaction. That the transaction had been reduced in writing for the parties by **Timothy Angehi Obiero** who testified as **DW2**.

(b) That during the hearing, the Plaintiff acknowledged having entered into the land sale agreement dated 4th October, 1993. The agreement is in Swahili and does not make a reference to any specific parcel of land. That under the said agreement the Vendor (**PW1**) acknowledges receipt of Kshs.43,000 of the total purchase price of Kshs.94,000 from the purchaser (**late father to Defendant**). The agreement further indicates that the balance of Kshs.51,000 was to be paid later. The agreement has the names, signatures and Identity Card numbers of the Vendor and purchaser. The four witnesses named and signatures are also there. They are **Joash Otwere Busaka**, **Timothy Angehi Obiero**, **Fredrick Juma** and **Christine Odonga**. That the Defendant relied on the agreement dated 4th April, 1994 that has a heading of “**PLOT 482**”. The names, signatures and identity card numbers of the Vendor, purchaser plus the names and signatures of the witnesses are on the document which is also in Swahili. The witnesses are the same as in the earlier document dated 4th October, 1993 but there is another name of Joseph Wanyama at the lower part. The agreement dated 4th April, 1994 does not make reference to the one dated 4th October, 1993. That in the later agreement dated 4th April, 1994, the Vendor acknowledges receipt of the total purchase price of Kshs.94,000. The Plaintiff has disputed the existence of the agreement dated 4th April, 1994 terming it a forgery. He has also disputed applying for the Land Control Board consent and signing the conveyancy (transfer) documents that the Defendant relied upon.

(c) That having considered the testimonies of **PW1**, **DW1** and **DW2**, it is apparent the Plaintiff (**PW1**) and Timothy Angehi Obiero (**DW2**) were among those present and signed the land sale agreement dated 4th October, 1993. That the testimony adduced by **DW2** that he is the one who wrote the said agreement has not been disputed and or rebutted by the Plaintiff. That **DW2** further testified that he wrote and witnessed the agreement dated 4th April, 1994 which the Defendant relies on to show his late father had fully paid the purchase price of Kshs.94,000. That both agreement have the same witnesses including **Fredrick Juma** who was reported by **DW2** to be a son of the Plaintiff. That though the Plaintiff denied knowledge of, and signing the agreement dated 4th April 1994, he did not take any steps to have the document submitted to a professional document examiner to confirm that the signatures therein attributed to him and **Fredrick Juma (his son)** were forgeries. He also did not call his son (**Fredrick Juma**) to come and testify on the sale agreement dated 4th April, 1994. On the other hand, the Defendant who was not involved in the two agreements has called **DW2** who not only confirmed writing the two agreements, but also that the Plaintiff and his son were among those who signed the

two agreements. That from the foregoing, the Court finds that the Plaintiff signed the two agreements dated 4th October, 1993 and 4th April, 1994. That further, the agreement dated 4th April, 1994 that has details of the parcel number from which the two acres would come from was the culmination of the parties confirmation that the whole purchase price had been paid and acknowledged.

(d) That though the Plaintiff disputed having given the Defendant's father possession of the two acres of land, the testimonies of the Defendant and DW2 confirm that the land was used by one Christine upto her death. That it was thereafter that the Defendant went to the land to erect a house and the Plaintiff objected. That the disputes that followed culminated in a criminal case and the filing of this suit. That the Court has no reasons not to believe DW2 who has confirmed that the Defendant's family had possession of the suit land from the date of the sale agreement in the absence of any evidence to the contrary.

(e) The Defendant's position is that the two acres his late father had bought from the Plaintiff had been surveyed and registered as Kakamega/Mautuma/2618. That the consent to transfer the land had been obtained and Plaintiff had executed the transfer form. That however, the title deed had not been issued to the purchaser as the Plaintiff had declined to surrender the original title to the Land Registrar. That in support of that contention, the Defendant produced copies of the application for Land Control Board consent, letter of consent and transfer form. The Plaintiff denied having signed the application for consent, the transfer form and obtaining the consent as alleged. He also denied subdividing his land to excise two acres for the Defendant's father as alleged. The Court has perused the said documents and noted the application for consent of Land Control Board for subdivision of land parcel Kakamega/Mautuma/482 into nine portions of various sizes. The form is however not signed below the name of the applicant, but has a stamp of 20th May, 2004 by the Land Adjudication and Settlement Officer's affixed at the front left top corner. There is no application form for consent to transfer upon which the letter of consent dated 29th July, 2004 could have been based. The letter of consent to transfer has no parcel number as the land is only described as "**Kakamega/Mautuma**" and indicates the land was to be transferred to Christina Muhonja Odanga. The transfer form is undated though allegedly witnessed by the District Commissioner, Lugari District. That as the Defendant disclosed that he had received the said documents from Christine and had not witnessed their being made and could not confirm whether his late father had attended the Land Control Board, and in view of the fact that the Plaintiff has disowned them, the Court finds that the Defendant has failed to prove their genuineness. That in any case as the Grant of Letter of Administration Intestate issued in **Kakamega High Court Succession Cause No. 481 of 2006**, and produced by the Defendant as exhibit indicates his father had passed on the 21st August, 2003 then he could not have participated in the meeting of the Land Control Board of 29th July, 2004 when the letter of consent to transfer was issued or the meeting for consent to subdivide sought under the application received by the Land Adjudication and Settlement Officer on 20th May, 2004.

(f) That further to the findings above, and noting that the person in possession of the suit land is the Plaintiff, and further noting that the consent of the Land Control Board was not obtained within six months from the dates of the agreements dated 4th October, 1993 and 4th April, 1994 as required under **Sections 6 and 8 of Land Control Act**, the court finds the sale agreement between the Plaintiff and the Defendant's father have become void. That in terms of **Section 7 of the said Act**, the monies paid under a void voided agreement is recoverable. That as the Court has found the agreements dated 4th October, 1993 and 4th April, 1994 are genuine and that under them the Plaintiff received a total of Kshs.94,000, the Court is of the considered view that the same should be returned to the Defendant, who is the administrator of his late father's estate with interest at court's rate from 4th October, 1994 when the six months from 4th April, 1994 lapsed.

(g) That the Defendant did not plead the particulars trust in his pleading and the Court need not pronounce itself on a prayer not specifically sought for.

(h) That the prayer for specific performance though pleaded cannot be granted as possession of the two acres by the Defendant's father (purchaser) was disputed and not established.

(i) That the prayers of eviction and injunction sought herein by the parties cannot be granted in view of the finding in **(f)** above where the Court has found only the order of recovery of purchase price paid would be issued.

(j) That as between the Plaintiff and Defendant, who each had a claim against the other, the Court awards the costs to the Defendant.

10. That flowing from the foregoing, the Court finds and orders as follows;

(a) That the Plaintiff has failed to prove his claim against the Defendant on a balance of probabilities. The Plaintiff's claim is dismissed with costs.

(b) That the Defendant having proved that his late father had paid Kshs.94,000 (**Ninety-Four Thousands**) to the Plaintiff as purchase price under the now void sale agreements, the Court finds that though he has failed in the other prayers in the counterclaim, he is entitled to recovery of the money paid for the benefit of his late father's estate. The Court therefore orders the Plaintiff do refund to the Defendant, who is the administrator of his late father's estate, Kshs.94,000 with interests at Court's rate from 4th October, 1994 till payment in full. The Plaintiff will also pay half the Defendant's costs in the counterclaim. It is so ordered.

Delivered virtually and dated at Eldoret this 24th day of March, 2021.

S. M. KIBUNJA

JUDGE

In the presence of:

Plaintiff: Absent.

Defendant: Absent.

Counsel: Mr. Magare for Defendant.

Court Assistant: Christine

and the Judgment is to be transmitted digitally by the Deputy Registrar to the Counsel on record through their e-mail addresses.