



**Njoroge & another v Mulei (Environment & Land Case
372 of 1994) [2022] KEELC 119 (KLR) (4 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 119 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 372 OF 1994**

A NYUKURI, J

MAY 4, 2022

BETWEEN

BERNARD NG'ANG'A NJOROGE 1ST PLAINTIFF

GABRIEL MBUGUA NJAGI 2ND PLAINTIFF

AND

GRACE JOHN MULEI DEFENDANT

JUDGMENT

1. On 24th August 1994, Njoroge Ng'ang'a Mbugua filed a Complaint dated even date, against Grace John Mulei. Subsequently, the Plaintiff died and by a Notice of Motion dated 22nd October 2012, one Teresiah Muthoni Njoroge, the administrator of the estate and widow of the deceased plaintiff sought to substitute the later. She however passed on before the application was determined. Thereafter by a notice of Motion dated 11th April 2018, Bernard Ng'ang'a Njoroge and Gabriel Mbugua Njagi sought to substitute Teresiah Muthoni Njoroge in this matter and on 24th April 2018, this court allowed the said application and granted the Plaintiffs leave to file and serve the amended complaint.
2. By further amended complaint, filed on 31st May 2018, the Plaintiffs herein averred that at all material times, their deceased father, the late Njoroge Ng'ang'a Mbugua, was the proprietor and entitled to possession of 22 acres of land in plot number 26 Kitanga Settlement Scheme whose subdivision and transfer was subject to the provisions of the *Land Control Act* Cap 302 Laws of Kenya. They further stated that in 1993, the Defendant wrongfully entered the said land and wrongfully took possession of 5 acres of the said land (hereinafter referred to as the suit property) and has trespassed and continues in the trespass thereon, denying the Plaintiffs the use and enjoyment of the said five acres thereof. Therefore, the Plaintiffs sought for the following orders;
 - a) A declaration that the defendant is not entitled to enter or use the said land



- b) An order of possession and eviction of the Defendant or any other persons claiming under the Defendant's perceived title from the Plaintiffs parcel of land measuring 5 acres in plot number 26 Kitanga Settlement Scheme.
 - c) Orders of permanent and mandatory injunction to restrain the Defendant whether by herself, her servants or agents or others whomsoever from continuing with the acts of trespass complained of or in any other manner howsoever from interfering with the Plaintiff's peaceful occupation and use of their 5 acres of land in plot number 26 Kitanga Settlement Scheme.
 - d) General damages for trespass on the Plaintiff's land.
 - e) Costs of the suit and/ with interests thereon of (d) at court rates from the date of judgment until payment in full.
 - f) Any other relief that this Honourable court may deem just to grant.
3. The defendant filed her defence dated 6th September 1994 on 8th September 1994, and on 19th September 2006, she filed an application dated 18th September 2006, where she sought to amend her defence and counterclaim in terms of an amended defence and counterclaim attached to the application, but did not prosecute the said application. In the defence on record, she stated that her late husband John Mulei purchased 3 acres from the late Benjamin Ng'ang'a, and therefore her entry on the suit land did not amount to trespass.
 4. On 14th October 2019, Professor Peter Kimuyu and Mrs. Margaret Kimuyu filed Notice of Motion of even date and sought to be joined to these proceedings as Interested Parties. The said application was allowed on 15th October 2019 and the Interested parties granted leave of 14 days to file and serve their defences together with documents and statements. They however did not file any pleadings, witness statements or documents as ordered by court.
 5. On 9th October 2019, the Defendant filed a notice of Preliminary objection against the suit on ground that all the plaintiffs are dead and that the Applicants have not obtained letters of administration to the estate of the deceased to deserve to prosecute the suit.
 6. At hearing, the Plaintiff testified on his own behalf and closed his case while the defendant was the only defence witness.

Plaintiff's case

7. The Plaintiff relied on his witness statement dated 31st May 2018 and filed in court on even date and adopted the same as his evidence in chief. He testified that his deceased father Njoroge Ng'ang'a Mbugua was proprietor and entitled to 22 acres of land in plot No. 26 Kitanga Settlement Scheme, which property is affected by the provisions of the *Land Control Act* (Cap 302) Laws of Kenya. He further stated that the defendant on a claim that her late husband John Mulei had purchased 5 acres from the late Njoroge Ng'ang'a Mbugua, trespassed on the suit land and continues in such trespass, yet the transaction between Njoroge Ng'ang'a Mbugua and John Mulei was not blessed with a consent from the Land Control Board making her entry on the land unlawful. It was his case that the sum of Kshs. 100,000/= paid to the plaintiff's late father as consideration in respect of the 5 acres was paid in to court by him upon the transaction becoming void. He also stated that the Defendant was not using the land.
8. It was the Plaintiff's case that due to the defendant's trespass, he had been deprived of the use and enjoyment of the suit property as a result of which he had suffered loss and damage. He sought for the orders stated in the further amended plaint. He produced a copy of the court deposit receipt of Kshs.



100,000/= as P-Exhibit 1, the letters of administration as P-Exhibit 2, a copy of a letter of consent from the Land Control Board as P-Exhibit 3, grant of letters of administration as P-Exhibit 4, and a copy of a court order as P-Exhibit 5.

9. In cross examination, he conceded that the suit land was purchased by the Defendant at Kshs. 100,000/=, which was paid to his father in full. He further stated that upon purchase, the defendant entered in to the suit land and that the court stopped her from using the land. It was also his testimony that although he deposited the Kshs. 100,000/= in court, there was no court order directing such deposit and that there was a third party called Professor Kimuyu who is in possession of the land, having been brought on the suit land by the Defendant. With that, the Plaintiff closed his case.

Defendant's case

10. The defendant testified as the only defence witness. She relied on her witness statement dated 7th November 2019 and filed on 8th November 2019. Her testimony was that she was the widow of John Mulei who purchased 5 acres from Samuel Njoroge Ng'ang'a at a consideration of Kshs. 100,000/=, which amount was paid in full. She further stated that the vendor refused to obtain consent from the Land Control Board and to effect transfer in respect of the suit land. She further stated that she discovered that he had sold the same land to a third party a Mr. George Mwalabu. She further testified that the Plaintiff damaged her fence worth Kshs. 17,000/=, that she never took possession of the suit property and that the land is now occupied by George Mwarabu who bought the land from Njoroge Ng'ang'a. She produced copies of the following documents as exhibits; the agreement for purchase of land dated 3rd December 1989 as D-Exhibit 1, the land purchase agreement dated 24th April 1990 as D-Exhibit 2, payment voucher for Kshs. 200,000/= dated 19th June 1990 as D-Exhibit 3, purchase of land agreement dated 7th March 1993 as D-Exhibit 4, voucher to Samwel Njoroge Ng'ang'a dated 7th January 1990 as D-Exhibit 5, document showing payment of Kshs 100,000/= dated 4th February 1990 as D-Exhibit 6, sketch map of LR NO. 26 as D-Exhibit 7, consent to transfer from Benjamin Ng'ang'a Hate to Grace John Mulei dated 28th August 1991 as D-Exhibit 8, consent to transfer from Robert Munyua Ng'ang'a to Grace John Mulei as D-Exhibit 9, certificate of death of the late John Mulei 10, letter dated 24th August 1994 to the Director of Land Adjudication and Settlement as D-Exhibit 11 , letter by the Defendant addressed to the District officer as D-Exhibit 12, letter to the Chairman Land Control Board dated 24th July 1991 as D-Exhibit 13, letter to the District Officer Land Control Board as D-Exhibit 14, letter from Office of the President dated 13th September 1994 15 , charge sheet in criminal case No. 4057 of 1994 as D-Exhibit 16 , Kenya Gazette Notice dated 26th July 1994 as D-Exhibit 17 , Grant of letters of Administration intestate for the Defendant as D-Exhibit 18, grant of letters of administration for Benjamin Nganga Hate as D-Exhibit 19.
11. In cross examination she stated that the suit land is not where her late husband was buried. It was also her testimony that she was not aware that the sum of Kshs. 100,000/= was offered to be refunded and that she had never been informed that money was deposited in court for her to be refunded. She further stated that she had sold part of the suit land to a third party, one Professor Kimuyu.
12. Parties agreed to file submissions in 14 days of the date of close of the defence case. On 28th February 2022 when this matter came up for mention to take a judgment date, only the Defendant had filed their submissions, which are dated 23rd February 2022. Although the plaintiff was granted leave of 7 days to file and serve their submissions, he did not comply.



Submissions

13. Counsel for the defendant submitted that the Defendant specifically performed the contract of purchase and was given occupation of the suit land, which she fenced, but that the land was later purportedly sold to one George Mwalabu. Counsel argued that as the Defendant had paid the purchase price in full, the suit land ought to be transferred to her name, and that the fact of deposit of Kshs. 100,000/= in court by the plaintiff was not brought to her attention. Counsel placed reliance on the case of *Henry Mwangi Gitau & Another v Margaret Wanjiru Gokdwin & Shared Jelalin Fazal & Another*, Nairobi ELC NO. 89 of 2020 for the proposition that where there is a valid enforceable contract, the court has discretion to grant specific performance, but where the contract suffers some defects, specific performance will not be ordered. Although in their submissions, the Defendant counsel referred to some amended Defence which they alleged to have filed in 2019, no such amended defence was on record, and none was brought to the attention of the court, even after the court sought to know if indeed such amended defence existed.

Analysis and Determination

14. I have considered the pleadings, evidence, submissions and all material on record. The issues that arise for consideration are as follows;
- a) Whether the Plaintiffs herein have capacity to prosecute this suit.
 - b) Whether the contract subject to the Land Control Board consent was void for want of consent;
 - c) Whether the Plaintiff is entitled to the orders sought in the Plaintiff.
15. As earlier stated in this judgment, the original plaintiff herein was Njoroge Ng'ang'a Mbugua, who passed on before this matter was set down for hearing. His wife Teresiah Muthoni Njoroge, who had obtained grant of letters of administration intestate for the estate of Njoroge Ng'ang'a Mbugua, applied to be substituted in the place of the original plaintiff but died before the application for substitution was determined. Her two sons, Benard Ng'ang'a Njoroge and Gabriel Mbugua Njagi sought to substitute Teresiah Muthoni Njoroge and were allowed to do so and granted leave to file an amended Plaintiff to reflect the substitution. Among the documents produced by the Plaintiffs are Grant of letters of Administration intestate issued to Teresiah Muthoni Njoroge in Githunguri SRM's Court Succession Cause No. 48 of 2004 issued on 11th November 2004 for the estate of Njoroge Ng'ang'a Mbugua. In addition, the Plaintiffs produced a copy of the order made on 21st July 2016 to the effect that Benard Ng'ang'a, Gabriel Ng'ang'a and Lucy Nyambura were appointed as administrators of the estate of the late Teresia Muthoni Njoroge.
16. When the Plaintiffs sought to be substituted in the place of Teresiah Muthoni Njoroge, the application was conceded to by the Defence counsel who appeared in court on 24th April 2021 and therefore the court allowed the substitution and the Plaintiffs to amend the plaintiff to reflect the substitution. That decision has not been appealed against or set aside and hence in my considered view, the Defendant is estopped from challenging the import and tenure of the said order. Besides, as the estate of the original Plaintiff had already been vested in Teresiah Muthoni Njoroge, the current plaintiffs could not seek to obtain grant of letters of administration for the original plaintiff as his legal entity had already been taken over by Teresiah Muthoni and there was nothing left for the current plaintiffs to administer and so they could only take over from Teresiah Muthoni Njoroge, which they did. In the premises therefore, and for the reasons given above, the preliminary objection must fail.



17. It is not in dispute that Njoroge Ng'ang'a Mbugua sold land measuring 5 acres to the late John Mulei, whose estate the defendant herein is an administrator. The entire consideration was paid to the former in full. Looking at the letters of consent produced by both the Plaintiffs and the Defendant, it is clear that transactions in respect of land parcel number 26 Kitanga Settlement scheme were subject to consent from the Land Control Board as provided for under the *Land Control Act* Cap 302 Laws of Kenya. In fact, the Plaintiff argues that the sale stated above was not blessed with a Land Control Board consent hence, the same was void. On the other hand, the Defendant states that she has done her part of the bargain and hence the Plaintiff should be compelled to obtain consent in respect of the suit land and subsequently have the same transferred to her. It is therefore not in dispute that the agreement between the late John Mulei and Njoroge Ng'ang'a Mbugua was subject to consent of the area Land Control Board.

18. Section 6 of the *Land Control Act* provides as follows;

Transactions affecting agricultural land

- (1) Each of the following transactions that is to say-
 - (a) The sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;
 - (b) The division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres in to plots in an area to which the Development and use of land (Planning) Regulations, 1961, (L.N. 516/1961) for the time being apply;
 - (c) The issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or cooperative society which for the time being owns agricultural land situated within a land control area,

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

- (2) For avoidance of doubt it is declared that the declaration of a trust of agricultural land situated within a land control area is a dealing in that land for the purposes of subsection (1).
- (3) This section does not apply to –
 - a) The transmission of land by virtue of the will or intestacy of a deceased person, unless that transmission would result in the division of the land into two or more parcels to be held under separate titles; or
 - b) A transaction to which the government or the Settlement Fund Trustees or (in respect of Trust land) a county council is a party.

19. Section 8 (1) of the *Land Control Act* provides as follows;

An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of 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, extent that period where it considers that there is sufficient reason so to do, upon such conditions, if any, as it may think fit.

20. It is therefore clear that transactions affecting agricultural land can only be deemed valid and complete upon consent being granted by the relevant area land control board within six months of the transaction.
21. In the case of *David Sironga Ole Tukai v Francis Arap Muge & 2 Others* [2014] e KLR, the Court of Appeal stated as follows;

The *Land Control Act* remains one of the most litigated statutes in Kenya. As a consequence, a consistent line of case law has emerged, both from this court and the High Court on the interpretation and application of various provisions of that statute.

.....The reason behind the above stringent provisions of the Act is to be found, in our view, in the rationale of the land control legislation. Before enactment in its present form, the *Land Control Act* had existed in one form or another in the colonial period. Writing on a previous version of the same law namely, the Land Control (Native Lands) Ordinance (No. 28 of 1959), the eminent Kenyan legal scholar, the late Professor HWO Okoth Ogenido, captured the purpose of the legislation thus;

The purpose of the land Control (Native Lands) Ordinance was to protect uninitiated peasants from improvident use of their rights under the new tenure system. Even though individualization was seen as necessary precondition to the planned development of the African areas, it was also appreciated that it could lead to many other problems more difficult to solve than the ones it was intended to eliminate. The royal Commission had warned, for example, that in many peasant communities' individualization had led to 'the emergence of a chronic state of indebtedness, the continued fragmentation of holdings and the unproductive accumulation and holding of land by a few individuals in circumstances of little income earning opportunity for those who have parted with the land. (See *Tenants of the Crown*, Acts Press (1991) page 74.

What is beyond doubt, the paternalistic nuances of its colonial origins notwithstanding, is the fact that the enactment of the *Land Control Act* in 1967 was informed by noble and deliberate public policy considerations. The Act seeks to regulate transactions in Agricultural land, to among other things avoid subdivision of land holdings into uneconomical units, thus undermining agricultural production; to mitigate the danger of landlessness inherent in unchecked sale and alienation of land; to control land holding by non-Kenyans etc. It is for these reasons that in considering whether to grant or refuse consent regarding dealings in agricultural land, the Land Control Board is obligated under the Act to consider, among others, such factors as the economic development of the land in question, the possibility of maintenance or improvement of standards of good husbandry; the agricultural land already owned by the proposed transferee; the fairness or unfairness of the proposed consideration or purchase price; and whether subdivision of the land in question would reduce the productivity of the land.

It is not surprising therefore that in *Wamukota v Donati* [1987] KLR 280 at page 291 Apaloo JA (as he then was) found the public policy considerations behind the *Land Control Act* unquestionable in the following terms;



I believe that sound reasons of public policy motivated the parliament of Kenya to seek to prevent the alienation of agricultural land to non Kenyans or to Kenyans without the interposition of the judgment of an independent board. Section 6 of the Act lays down the sanction for violation of the Act in absolute terms. An alienation made in transgression of the Act is ordained to be void for all purposes. Strong words indeed!

We can quote a few consistent decisions of the courts in Kenya that hitherto have given full effect to the provisions of the *Land Control Act*. In Leonard Njonjo Kariuki v Njoroge Kariuki alias Benson Njonjo CA No. 26 of 1979 this court affirmed that once the land in question was proved to be agricultural land within a controlled area, transactions affecting it were controlled transactions which in law became void in the absence of consent from the land control board. And in Karuri v Gitura [1981] KLR 247, the court concluded that the provisions of the *land Control Act* are of an imperative nature to the extent that there is no room for the application of any doctrine for equity to soften its provisions. Speaking for the court in Kariuki v Kariuki [1983] KLR 225 at p. 227, Law, JA affirmed that when a transaction is stated by the express terms of an Act of parliament to be void for all purposes for want of necessary consent, a party to that transaction cannot be guilty of fraud if he relies on the statute to argue that the transaction is void. His Lordship also added that no general damages are recoverable in respect of a transaction which is void for all purposes for want of consent and that the only remedy open to a party to a transaction which has become void under the Act is recovery of any money or consideration paid in the course of the transaction under section 7 of the Act.

22. In a long line of decisions, it has been held that where a controlled transaction is not blessed with a consent from the Land Control Board within six months of the transaction, the same remains void for all purposes and intends, and the only remedy available in the case of a purchaser in respect of a land sale transaction, is recovery of the consideration, since general damages are not recoverable under the *Land Control Act*. Therefore, the defendant is not entitled to recover any damages apart from the consideration. As there is no counterclaim on record, the question of refund does not arise.
23. In the instant suit, the late John Mulei purchased 5 acres of land to be hived from land parcel 26 Kitanga Settlement Scheme. For that transaction to have been complete, there ought to have been a consent for subdivision to hive off the purchased 5 acres from the bigger portion and another consent to have the land transferred to the purchaser or his successor in title, in this case the Defendant. As no consent was sought or obtained within the period prescribed by law being six months, the agreement dated 3rd December 1989, remained void. Therefore, the defendant cannot enter and use the suit land and, in the event, she is on the suit land, she ought to be evicted therefrom and barred from entry thereto, as her entry is premised on a void transaction.
24. Besides, the plaintiff has sought for general damages for trespass. Damages ought not only be pleaded, but they must also be proved. The Plaintiff did not state the nature of loss suffered when the plaintiff entered the suit land. In his testimony in cross examination, the Plaintiff stated that the Defendant was stopped by court from using the land. He has not stated the period to which he seeks damages for trespass. I therefore find and hold that the claim for general damages has not been proved and the same is declined.
25. In the end, I enter judgment for the Plaintiffs against the defendant in the following terms;
 - a) A declaration be and is hereby made that the defendant is not entitled to enter or use 5 acres of land in land parcel No. 26 Kitanga Settlement Scheme.



- b) An order be and is hereby issued granting the plaintiff possession and eviction of the Defendant or any other persons claiming under the Defendant's perceived title from the Plaintiffs parcel of land measuring 5 acres in plot number 26 Kitanga Settlement Scheme.
- c) Orders of permanent injunction be and are hereby issued to restrain the Defendant whether by herself, her servants or agents or others claiming through her from continuing with the acts of trespass complained of or in any other manner howsoever from interfering with the Plaintiffs' peaceful occupation and use of their 5 acres of land in plot number 26 Kitanga Settlement Scheme.

26. In view of the circumstances leading to the dispute herein, I order that each party shall bear their own costs.

27. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 4TH DAY OF MAY 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Ms Amunga for the Defendant

Mr. Langalanga for the Plaintiff

Ms Josephine Misigo – Court Assistant

