



Tom O K'opere T/A T.O. K'Opere & Company Advocates v SIS Dominic Savio Akoth for & On Behalf of Fransiscan Sisters of Saint Joseph (Asumbi) Registered Trustees & another; Were & 3 others (Interested Parties) (as administrators by Limited Grant ad Litem of the Estate of the Late Richard Omany (Deceased)) (Environment & Land Case 220 of 2012) [2022] KEELC 3350 (KLR) (6 May 2022) (Judgment)

Neutral citation: [2022] KEELC 3350 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 220 OF 2012**

A OMBWAYO, J

MAY 6, 2022

BETWEEN

TOM O K'OPERE T/A T.O. K'OPERE & COMPANY ADVOCATES APPLICANT

AND

**SIS DOMINIC SAVIO AKOTH FOR & ON BEHALF OF FRANSISCAN SISTERS OF SAINT JOSEPH (ASUMBI) REGISTERED TRUSTEES 1ST RESPONDENT
CONSOLATA OMANYA & BERTHA OMANYA FOR & ON BEHALF OF THE ESTATE OF THE LATE RICHARD OMANYA (DECEASED). 2ND RESPONDENT**

AND

**DOROTHY ANNE ADHIAMBO WERE INTERESTED PARTY
SARAH CAROLINE AKINYI OMANYA INTERESTED PARTY
RUTH HELLEN OMANYA INTERESTED PARTY
JANET AWUOR OMANYA INTERESTED PARTY
AS ADMINISTRATORS BY LIMITED GRANT AD LITEM OF THE ESTATE OF THE LATE RICHARD OMANYA (DECEASED)**



JUDGMENT

Brief Facts

1. Tom O K'opere T/A T O. K'opere Advocates, the Applicant herein approached this court by way of Originating Summons under Order 34 Rules 1,2,3,4,5,6 and 8 of the [Civil Procedure Rules,2010](#) and Section 1A,1B and 3A of the [Civil Procedure Act](#) seeking for the following questions to be determined:
 1. That this Honourable Court do hereby determine through this Interpleader who as between the 1st Respondent and the 2nd Respondent the documents of Title No West Kasipul/Kodera Karabach/599 should be released to which documents of title were deposited in court on November 19, 11 and currently being held by the Deputy Registrar of High Court of Kenya at Nairobi Civil Appeals Division in H C C A 461 of 2021 pursuant to the Orders of this Honourable Court (Mr Justice David Onyancha) given on November 28, 11 and the Ruling delivered on March 21, 12.
 2. That this Honourable Court do determine who between the 1st and 2nd Respondents should pay the Plaintiff/Applicant Advocates Costs/Fees incurred in this Transaction from December 2004 to date and the costs of this Interpleader Proceedings to be agreed and/or taxed before release of the Title Documents from Court.
 3. That this Honourable Court do make such further or other orders as may be just and expedient herein.
2. The Application was based on grounds that the Applicant received the Documents of Title of the suit property from National Bank of Kenya as chargee through Legacy Auctioneers on April 29, 05 on instructions and pursuant to arrangements entered into by the 1st and 2nd Respondents prior to an auction sale conducted on December 07, 04. That the Applicant has and claims no interest in the Title Documents which is the subject matter of the dispute herein between the two Respondents except for the Legal Fees, Costs and Changes incurred from December 2004 until the date of determination of the se Interpleader Proceedings.
3. The Documents of Title previously held by the Applicant for over 6 years were deposited for safety custody with the Honourable Court on November 29, 11 in H.C.C.A 461/2011 pursuant to the orders of Court (Hon. Mr. Justice D. Onyancha) given on November 28, 11. That the Applicant has not colluded with any of the Respondents who claim interest in the suit property and on March 16, 11, the 1st Respondent who claims interest in the property filed a Complaint against the Applicant as Advocate in the Disciplinary Committee of the Law Society of Kenya (Disciplinary Cause No. 26 of 2011) prompting the Plaintiff/Advocate to release the Title Documents held by him to the 2nd Respondents after the filing of the Complaint by the 1st Respondent.
4. The release was based on the Advocate's interpretation of section 6,8 and 22 of the [Land Control Act](#) Cap 302 since the transaction between the Respondents and the Chargee bank including the Auction of the suit property did not have consent from the Land Control Board rendering the entire transactions null and void and since the 2nd Respondent agreed to refund the 1st Respondent any money paid over the said transaction less rent for occupation of the suit property for the period in question. That the Disciplinary Committee of the Law Society of Kenya after hearing the complaint reached a conclusion and Judgment that whereas there was a dispute between the Respondents as to who is entitled to the release of the documents of title and whereas the issue of sections 6,8 and 22 of the



Land Control Act was going to be central in that determination, the Plaintiff/ Applicant was wrong in realizing the documents to the 2nd Respondent as that amounted to preferring one client to another and the same constituted a Professional Misconduct for which the Disciplinary Committee convicted the Advocate on September 1211.

5. It was stated that the Plaintiff/Applicant immediately retrieved the title documents from the 2nd Respondent and lodged an Appeal against the conviction in HCCA 461 of 2011 and the Application for Stay of Mitigation and Sentence by the Disciplinary Committee of the Law Society of Kenya. That after hearing the Application for stay, the court ordered that the Plaintiff/Applicant do deposit the disputed title documents for safe custody in court which the Applicant/ Plaintiff did and the court proceeded to deliver a Ruling dismissing the Application for stay but directed that the title documents and the Appeal file remain under safe custody of the Deputy Registrar until the Appeal is heard and determined or otherwise ordered.
6. That the hearing of the Appeal will only determine whether the conviction of the Plaintiff/Applicant by the Disciplinary Committee was right or wrong but will not determine who between the Respondents is entitled to the release of the title documents as clearly observed in the Judgment of the Disciplinary Committee. It was further stated that the 2nd Respondent has never been a party to the Disciplinary Proceedings of the Appeal and the only way this dispute can be resolved is by hearing both Respondents in this Interpleader proceedings and determine who between the two parties is entitled to the release of the title documents.
7. That once the court determines who between the Respondents is entitled to the release of the title documents, the court shall also determine who is liable to pay the Plaintiff/Applicant's legal fees, costs and charges incurred from December 2004 until the release of the title documents.

The Applicant/Plaintiff's Case

8. The Application was supported by the Affidavit of Tom Oduo K'opere who stated that he started acting for the late Richard Omany Adongo the registered owner of land parcel number West Kasipul/ Kodera Karabach/599 on March 22, 1999 as per his clients register and this was when National Bank of Kenya Nakuru Branch served him with a letter of default to service the loan pursuant to a charge registered on the title on August 02, 90 for Kshs 300,000/=. That the property measures approximately 19.5 Hectares on which stood a school on the far East corner (Woodlands Secondary School) which was being ran by the deceased but collapsed and was converted into a Health Centre. That on the deceased homestead was located at the Far West Corner and an SDA church on the Far South corner and the rest of the property comprised of maize farms and bushes.
9. That his instructions from the deceased were to intercede with the bank to grant the deceased more time following the collapse of the school to turn the premises into a health facility to enable him generate money to repay the loan. That the deceased briefly ran the health center on the premises but later on leased the same to a group of Catholic Sisters from Mosochi and Asumbi to run the Health Centre at a rental pending resolution of the issue of sale with the bank.
10. It was the Plaintiff/Applicant's case that in 2003, the said tenants approached the deceased with an intention to buy the portion of the land on which the health facility was developed measuring about 5 acres including open fields therein at a price of Kshs.3,000,000/=. That he approached the bank with a proposal to allow sub-division but the bank was at that time demanding Kshs. 17 million which was more than the value of the entire land together with all developments and therefore this transaction could not proceed further. It was stated that in 2003, the deceased had lost his 4 sons started ailing



and was hospitalized in Kisumu from July 2003 after the death of his surviving son and eventually the deceased who died on November the same year.

11. It was further stated that the deceased left a widow Consolata Omany, a daughter in law and 4 daughters. That in April 2004, the complainant continued to pay rent for the premises which they were occupying to the family of the deceased at the rate of Kshs 2,000/= per month and the same was received by the widow and the daughter of the deceased who were staying at home. That the Chargee through Legacy Auctioneers served the deceased widow with a 45 days redemption notice to sell the property to recover Kshs 17,975,805.35 as the open market value of the property was given as Kshs 3,300,000/= and a forced sale value of Kshs 1,900,000/= and the sale was advertised on November 29, 04 upon expiry of the Statutory Notices.
12. That in October/November 2004, the deceased widow and daughter in law approached him that they held discussions with Sister Dominic and Sister Maria and they had agreed to have the property salvaged rather than the Sisters pay the original Kshs. 3,000,000/= agreed with the deceased for the portion they were occupying and he should assist them spend less money, acquire the portion and let the family remain with the rest of the land where the homestead and farms stands plus the portion donated by the deceased to the SDA Church. That they held two joint meetings between the family members and the Sisters and agreed that he should contact the bank and the Auctioneers to arrange the for a smooth redemption .That they ran into problems because no Grant of Letters of Administration had been obtained for the deceased estate hence the need to arrange the intended auction and have the bank execute the necessary transfer by charge and Applications for consent to the Land Control Board to subdivide the Land and subdivide the Land and Transfer the agreed portions to the respective parties.
13. That the Agreement was reached between him and the two Catholic sisters. That he personally on behalf of the family approached a Surveyor Mr Don Nyagweth who he commissioned as the bidding agent and mutations were drawn. The he gave the Surveyor Kshs 100,000/= to pay as bidding fee to the Auctioneer and thereafter he would give the name of the Sisters as his nominees in whose names the Transfer documents would be released to facilitate the arrangement after the Auction which was scheduled for December 07, 04.He went to state that he gave Mrs Consolata & Bertha Omany his bank details which they shared with the sisters and on December 07, 04, the Auction was conducted and the Surveyor was the only bidder who had registered and obtained a bidding number by paying the bidding fee of Kshs 100,000/= to the Auctioneer. A second bidder was disqualified for lack of bidding number and there being no other bidder, the first and only bid of Kshs 1,500,000/= from Don Nyagweth who was declared the winner and being below the reserve price of Kshs 1,900,000/= the Auctioneer advised that the bank must give approval and the family should signify no objection so that they don't sue the bank for selling the property at an under value.
14. That he gave a commitment of no objection to the bank through the Auctioneer on behalf of the family and paid the deposit of 25% of the Auction Sale price of Kshs 375,000/= with instructions that the bidding agent Don Nyagweth had nominated Franciscan Sisters of St. Joseph's Asumbi as the nominees for the sale and he personally witnessed the Signature of Sister Dorothy and Sister Paul who were brought by Sister Dominic to Nairobi at the Catholic Bookshop Holy Family Basilica further stated that he was the one who paid the Auctioneer Kshs 275,000/= on December 07, 04 in addition to the Bidding Fees of Kshs 100,000/= which had already paid on advance for the bidder Don Nyagweth before the date of the Auction an on December 08, 04 after the sisters executed the Auction papers in his presence, they advised their Kisii Office to transfer to his account Kshs 375,000/= which constituted a refund of the sum he had paid to the Auctioneer.
15. The balance of the Auction sale price of Kshs 1,125,000/= was later paid in February 2005 into his account and the title documents together with Application for Land Board Consent released to him by



- the Auctioneer by his letter dated April 26, 05 which he received on April 29, 05. That at the beginning of May 2005, he called Mrs. Consolata & Bertha Omany to immediately liaise with Sister Dominic whom they had been dealing with so that they go to his office for a meeting with the Surveyor in order to agree on the mutations and subdivision papers, sign the Application for Consent from Land Control Board, Mutation fees and also arrange the requisite stamp duty and agree on Surveyors fees and registration fees for the entire transaction and they failed to go to his office as advised.
16. In June 2005, he was informed by Mrs Consolata that the Sisters came to the land with a totally different surveyor from Rangwe and not Don Nyagweth and the new surveyor came with totally new sketches from the one they had agreed upon and demanded to be given the title documents by the widow who informed them to contact him. It was stated that he immediately contacted Don Nyagweth and Mrs. Bertha Omany after sensing there was a problem as the Sisters had reneged on the Agreement and Mr Don Nyagweth started harassing him for his payment towards the services he had rendered including 3 trips to Nairobi, attending the Auction, travelling to Nakuru and doing sketches and mutations which he retained until or unless he was paid.
 17. That he requested to meet with the parties and before he could meet with them, he received a letter from Muniafu Ondari & Co Advocates (Miss) Muniafu dated October 4, 05 on behalf of the Sisters where he called her to his office for a meeting on November 01, 05 and he briefed her of the history of the matter as set out in the letter of November 07, 05 as clarified by his letter of November 11, 05 and proposal to have a joint meeting with clients on November 25 and 26, 2005. That the intended meeting with clients never took place and they exchanged several letters and held several meetings with Miss Muniafu. The Catholic Sisters moved to other Advocates M/S Mose & Mose Advocates and M/S Kiage & Co Advocates between October 2005 and April 2011 all of whom they exchanged letters. That they severally agreed that the dispute be taken to Arbitration and he even indicated that since he was acting for the deceased family and was a party to the initial negotiations and agreements, he would be a witness to the transaction and even pointed out to the complainants Advocates the technical legal problems as a result of section 6,8 and 22 of the [Land Control Act](#) Cap 302 but the said Advocates persisted in pursuing him instead of the family or finding a better way to resolve the problem.
 18. He stated that despite the deceased's family willingness to refund the sums paid by the Sisters if no agreement could be arrived at and since the title was still in the name of the Late Richard Omany, the complainants filed a complaint against him on March 1611 with the Disciplinary Committee of the Law Society of Kenya, he decided to release the documents the family by a letter dated April 7, 2011. That his decision to release the documents to the family was based on his interpretation of the law that there was no valid transaction concluded by the parties on which consent could be obtained under section 6 and 8 of the [Land Control Act](#) and if he continued or acted in any way to further a void transaction, he would be perpetuating an offence under section 22 of the [Land Control Act](#).
 19. He further stated that his interpretation of the Law and the effect of the above sections of the [Land Control Act](#) was that the Sisters having failed to move with speed and comply with the provisions of the Act, the intended transaction became void and invalid after the expiry of 6 months and their entitlement was only for a refund of the sum paid on behalf of the deceased estate which the family instructed him that they were willing to pay back to the Sisters. That he has never heard any direct money transactions with the Sisters and it is them who agreed with the family of the deceased and only he only gave details of his accounts to the deceased widow who passed the details to them and they deposited the balance of the purchase price directly into his client's account which he in turn remitted the same to the charges through the Auctioneer before the title documents were released to him.
 20. It was stated that there was no letter of instructions to him from the Catholic Sisters and not a single communication except for the meetings with the deceased family member and the said sisters who



never paid him or Mr. Don Nyawgeth any fee for professional work done or time spent in the entire transaction. That he filed his Replying papers to the complaint against him filed by the 1st Respondent but the committee after hearing both parties decided that whereas there was an issue as to who of the Respondents was entitled to release the documents and whereas the issue of section 6,8 and 22 of the Land Control Act was central to such determination at the right forum, he was wrong in preferring one client to another by realizing the title documents to the deceased family and the Committee convicted him accordingly for professional misconduct.

21. That he filed an Appeal in the High Court against the conviction and applied for Stay of Mitigation and Sentence and simultaneously retrieved back the title documents from the family of the deceased and after the court heard the application, it was ordered that the title documents be deposited in court and a ruling was delivered dismissing the stay application and directed that the documents and file remain under custody of the Deputy Registrar pending the hearing and determination of the Appeal. That as clearly observed in the Judgment of the Disciplinary Committee, the issue of who is entitled to release of the title documents and interpretation of the effects of section 6,8 and 22 of the Land Control Act can only be made by this court in an interpleader proceeding where both parties are heard since the Respondents have never been heard as they are parties to the Complaint before the Disciplinary Committee or the Appeal.
22. That he has no interest or claim on the title documents of the suit property and has not colluded with any party save for his clear interpretation of the law and decision made purely based on the cited legal provisions for which he took full responsibility and made sure he retrieved the documents and deposited the same in court to mitigate likely loss to any of the parties until this court determines who is entitled to the documents between the two Respondents.

1st Respondent's case

23. The 1st Respondent filed a Replying Affidavit which was sworn by Sr Dominic Savio Akoth who deposed and stated that the suit property was put up for auction by the National Bank of Kenya by way of Advertisement in the Daily Nation which described the property as "Title Number West Kasipul/Kodera Karabach/599 Rachuonyo District" and the said advertisement described the property to accommodate one Woodland SDA Church and one Woodland Health Centre measuring 19.5 Ha developed with an old permanent bungalow house comprising 5 bedrooms, an outbuilding (nursing home school) accommodating 12 rooms, all registered under the name of Richard Omany Adongo(deceased).
24. That together with her colleague Sr Scholastica Anyango they facilitated its purchase on behalf of her congregation, the Franciscan Sisters of St Joseph (Asumbi) on December 4, 2004 at Oyugis market at the price of Kshs 1,500,000/= where she paid the bidding fee of all the piece of land described in the advertisement and which summed up to about 48 acres and the money was paid to the Plaintiff/Applicant's bank account in Barclays Bank. That after payment of the required sums, they were issued with a certificate of sale by Legacy Auctioneering Services.
25. She stated that they initially paid a deposit of 35% of the purchase price amounting to Kshs 525,000/= then later on paid the remaining 65% of Kshs. 975,000/= and after payment, the charge, National Bank of Kenya prepared a transfer in favour and name of her congregation together with the certificate of sale duly executed. That upon completion of the purchase price, the said documents were forwarded to the Plaintiff/Applicant's firm who they had instructed to act on their behalf to enable them complete the transaction. That she is not aware of any legally binding agreement between themselves, the Franciscan Sisters of St. Joseph (Asumbi) and the deceased family as far as the suit property is concerned and when



- the documents were sent to the Plaintiff/Applicant, it was for the sole reason of effecting transfer in their names.
26. She further stated that her congregation appointed a surveyor, Mr. Silas Chenjo to act on their behalf and he surveyed the suit property together with another surveyor appointed by the second Respondent, Mr. Don Nyagweth who together established the boundaries of the suit property, placing beacons in place after which a survey sketch plan was given to them. That the 2nd Respondent has no proprietary interest in the suit property the same having been lost at the fall of the hammer at the auction. That the 2nd Respondent's rights to the land can no longer be sustained because the 1st Respondent paid the full purchase price of the suit property and a valid contract between the bank materialized at the fall of the hammer when the 1st Respondent emerged as the highest bidder and paid the requisite amount which was for redemption of the loan amount that had been advanced to the deceased.
 27. It was stated that the 2nd Respondents claim to the suit property must fail because the deceased having failed to redeem his property having been in default of his obligations under the charge with the bank, lost all his rights to the bonafide purchasers of the same when the chargee exercised its power of sale at auction. That they ran the Health Center at the suit property and pay a monthly rent and had sought to purchase the portion upon which the center lay but this did not materialize as the suit had been charged by the deceased to the bank. That even if there was to be a discussion between the Respondents, the same would not be enforceable as the 2nd Respondents did not provide any consideration and up to date have still not provided any consideration.
 28. That the Plaintiff/Applicant being accustomed with the law and procedure relating to conveyance was in a better position to advise the Respondents on the legal implications of paying the sum of Kshs 3,000,000/= for the suit property to the 2nd Respondents who had no legal rights over the suit property the same having been charged and the chargee threatening to exercise its statutory power of sale in default of payment. That the charge over the suit property was a result of a contract between the bank and the deceased and the Plaintiff/Applicant could not purport to have the suit property redeemed by them as they were not privy to the contract.
 29. It was stated that there was an agent who bid on behalf of the sisters and that deposit of Kshs 100,000/= was paid by herself but the alleged agreement that the said monies would be provided by her congregation on behalf of the family defeats logic as there was no consideration on the part of the 2nd Respondents that would warrant them to claim any portion of the suit property. That the 2nd Respondents had lost proprietary interest in the suit property when the deceased failed to redeem his property and she confirmed that she brought Sister Dorothy and Sister Paul to execute the auction documents on behalf of the congregation and refunded the Plaintiff/Applicant Kshs 375,000/= being a refund of the deposit of the Auction sale and the balance of Kshs 1,125,000/= was paid to the Plaintiff/Applicant in February 2005.
 30. It is the 1st Respondent's case that they had purchased the suit property and paid value for the same and had sought for a surveyor and the congregation was under no obligation to use the services of Don Nyagweth and since they had acquired the full rights to the property, it was proper to deal with the property as they wish. That if there was any agreement between themselves and the 2nd Respondents, the same is not enforceable at law and the 2nd Respondents have no claim to the property. That the Plaintiff/Applicant cannot purport to say that the transaction between the chargee and the congregation is void for lack of consent from the Land Control Board because they had entrusted him with the responsibility of ensuring that transfer is effected and all necessary requirements of the law were met in order for them to obtain good title to the suit property because he was an advocate.



31. It was stated that the Plaintiff/Applicant having preferred the 2nd Respondents to the 1st Respondent despite the fact that the congregation had purchased the suit property, the Plaintiff/Applicant unlawfully released the completion documents to the 2nd Respondents and purported to claim that the consent from the Land Control Board had not been obtained. That failure to complete the transaction was orchestrated by the Plaintiff/Applicant who failed to protect their interests and that his misconduct was premeditated with the intention to deprive them of their title to the suit property and his acts were calculated to divide their interests with the 2nd Respondents who had lost interest in the suit property.
32. That the Plaintiff/Applicant failed in his duty to act without favour and was found guilty by the Advocates Disciplinary Committee and he is currently awaiting sentence and even if this transaction failed, the 2nd Respondents would still be busy bodies in this suit as the suit property would automatically revert to the chargee to which the deceased's proprietary interests in the suit property were lost when the deceased failed to redeem his property. In response to the fact the transaction between the Congregation and the Chargee was null and void because she purportedly lacked authority to enter into contract, the 1st Respondent stated that she was acting as an agent of her Congregation and as correctly pointed out by the Plaintiff/Applicant in paragraph 17 of the Replying Affidavit, the contract was executed by the duly registered trustees of her congregation namely Sister Dorothy and Sister Pauline.
33. She reiterated that the 2nd Respondents have no claim as the deceased lost proprietary interests in the suit property as it does not form part of the estate of the deceased. On the question as to whether the agent who bided on behalf of the Congregation was remunerated for their services is irrelevant in this case as it is misconceived as almost a decade after the said transaction, the said agent has not made any demand for them for the payment of the same and even if they were to do so, it would not be appropriate forum to entertain such demand.
34. That her congregation paid the full purchase price of the suit property and the 2nd Respondents haven't even an iota of rights to claim title and are occupying the same unlawfully. That on behalf of her Congregation she prayed that the court do direct its mind to the interests of justice, find in favour and order the release of the title documents to them as they have paid the full value of the suit land and that failure to obtain the Land Control Board consent was occasioned by the mischievous, mala fide and dishonorable acts of the Plaintiff/Applicant who was entrusted to act in their interests. It was stated that the Plaintiff/Applicant be condemned to bear the cost of this suit for contesting matters which they know they have no valid claim to and for occupying her Congregation's property unlawfully. She further prayed that the court do issue further orders to the 2nd Respondents to vacate the suit property and give vacant possession to the 1st Respondent with immediate effect.

2nd Respondents Case

35. The 2nd Respondents herein filed Replying Affidavit to the Application where Mrs Bertha Omanyia deposed and stated that the Applicant is an Advocate of the High Court of Kenya who used to handle her late father-in-law's legal affairs when he was alive and the suit property in on which the homestead stands is still occupied by her mother-in-law. That the suit property is fully developed and cultivated on by her mother-in-law who depends on it for livelihood.
36. She stated that the National Bank of Kenya wanted to exercise its statutory rights of sale as charges and as the intended Administrators of the estate of the deceased held discussions with two nuns named Sister Maria and Sister Dominic of the Franciscan Sisters of Saint Joseph (Asumbi) requested to buy the 5 acre portion that the Congregation was occupying and paying rent at the time leaving the deceased's



- estate with its homestead, farms and school. That they thereafter discussed this arrangement with the Applicant and requested him to follow up on discussions with the 1st Respondent and the bank to redeem, sell, subdivide and transfer the property and since both Respondents had their respective interests in the suit property, an agent was appointed to act for both parties and purchase the same at an auction with both Respondents as nominees after the sale which was done.
37. They mutually agreed and appointed an agent, a surveyor named Mr. Don Nyagweth who was to carry out the subdivision to be lodged together with the consent of the area Land Control Board and lodged for registration soon after the auction. That it was further agreed that only the names of the Sisters would be indicated on the transfer forms since the deceased's family had not taken out letters of administration. It was stated that on behalf of the deceased's estate, the Applicant paid the bidding fees as well as the auction reserve /sale price which was to be refunded by the 1st Respondents as their consideration for purchase of 15 acres leaving the deceased's estate with 30 acres and further 2 acres where the Woodlands SDA Church has been in occupation having been donated by the deceased and 1 acre would be left for access roads after subdivision.
 38. She stated that the Auctioneer later released the title documents to the Plaintiff/Applicant as the Advocate for both parties together with the Land Control Board consent and sometimes in June 2005, the 1st Respondent seem to have had change of heart in a radically shocking way when as they had agreed to meet and finalize the process of subdivision, transfer and registration, they introduced a new surveyor from Rangwe rather than the agent they had used in the auction who came demanding release of the title documents to him and had compiled different sketches from what they had agreed on. That since the documents were retained by the Plaintiff/Applicant, at Nairobi, she referred them to him and the Plaintiff/Applicant later called her since there was no progress on the matter yet the agent/surveyor was demanding his fees.
 39. She stated that she indicated to him that the Sisters seem to have changed their mind on the whole arrangement, sale or transaction and the Advocate advised her to request them to join her in a meeting with all interested parties which she did but the meeting never took place and the next advise from the Applicant is that they had made a demand from their lawyers backtracking on the issue of the auction. The Lawyers agreed to meet but eventually there was no amicable solution and it emerged that the 1st Respondent are desirous of taking up the whole property to themselves yet the suit property is still in her father-in-law's name.
 40. She stated that the discussions and arrangements on subdivision and transfer were always verbal and they had reached a common understanding on both sides and did not expect the 1st Respondent to change their positions since they expected them to act in a Godly manner all through. That they could not have agreed to transfer the whole piece of land to the 1st Respondent as part of it had been pledged for donation and is occupied by SDA Woodlands Church. That her mother-in-law resides on the said piece of land and cultivates it for a living and disposing the whole land would be unconscionable thing as it would amount to unlawfully disinheriting her and denying her a livelihood.
 41. That the conduct of the 1st Respondent was unexpected and she is seized of the correspondence between the 1st Respondent and the Plaintiff/Applicant and as per the 1st Respondent's letter of August 8, 2008, it appeared that Sister Dominic with whom they transacted had no authority to enter into any of the Agreements on its behalf hence the change of heart and the present quagmire. That as per the letter dated October 26, 2009, the person with the capacity to contract is Sister Pauline Mary the Superior General but was not a party to the transaction. That there is no clear, unequivocal contract between the parties or even a meeting of minds hence the consideration paid does not pass and the same can be refunded.



42. She further stated that the Land Control Board Consent has since lapsed and is not valid and therefore the suit property cannot be transferred. That there has not been iota of good faith on the part of the Plaintiff/Applicant as they purport to have had an agent bod for the property at the auction where they alleged that they were to benefit from the suit property of land and they have not demonstrated that they had paid him for his services even after he managed to have the property purchased from the bank and they have also stopped paying rent. The 1st Respondent's claim to the whole parcel is absurd since if that was the case, they would not have in any way bothered to be involved in the whole transaction.
43. It is the 2nd Respondent's case that it is only fair, reasonable and prudent that the title documents be released to them as legal representatives of the deceased to enable them distribute the property in question as per the verbal agreement and in the alternative to refund the 1st Respondent the sum of Kshs. 1,500,000/=. That the costs of the suit should be borne by the 1st Respondent and they are ready and willing to meet the Advocate's costs of the auction as well as the surveyor/agent bidding at the auction.

Interested Parties Case

44. The Interested Parties herein filed a Notice of Motion Application on December 16, 2020 seeking to be enjoined as Interested Parties to the suit as they were the only surviving children of the late Richard Omanyia Odongo. The Application was heard on January 28 2021 where the court allowed the Application and the court directed the Interested Parties to file and serve Affidavits and their submissions.
45. Dorothy Anne Adhiambo Were filed a Replying Affidavit on behalf of the Interested Parties where she deposed and stated that the Interested Parties herein are daughters and the only surviving children of the late Richard Omanyia Odongo who died intestate and their mother and the only wife to the deceased, Isdora Akeyo Omanyia died on December 24, 1993 before the death of their father.
46. She stated that at the time of their father's death, he was the registered owner of land parcel number West Kasipul/Kodera Karabach/599 which measures 48 acres and the land is where the deceased's home sits and it is where the deceased, their mother and their deceased siblings and other family members were buried. She stated that the deceased had charged the land to National Bank of Kenya Limited to secure a loan of Kshs. 300,000/ which she has since established that National Bank of Kenya Limited had abandoned its rights to recover the loan secured by the charge over the suit property by the sale of property and had opted to file a suit to recover that very debt. The bank prosecuted the suit being Nakuru High Court Civil Case No 203 of 1994 and obtained Judgment and decree and even executed.
47. It is the Interested Parties case that from the documents issued by the bank's agent M/s Legacy Auctioneering Services, it is clear that the bank knew that the deceased was dead by the time it purported to sell the property and the documents that were used to justify the sale of the property were served on Consolata Ambuya, one of the 2nd Respondent herein who is falsely calling herself Omanyia so as to project herself as being the widow of the deceased. That it is evident from the statement of Sr Dominic Savio, Bertha 'Omanyia' aka Bertha Auma Dondo had long separated his late brother Col Robert Omanyia by the time the bank purported to sell the property and she left their family.
48. The 1st Interested Party stated neither of the 2nd Respondents held a grant of letters of administration in respect of the deceased at the time the property was purportedly sold to the 1st Respondent or had mandate to deal with the affairs of the estate of the deceased. That contrary to what is stated in the Affidavit in support of the Originating Summons, the Plaintiff has never been the deceased lawyer at least not in connection with the subject matter and that the Plaintiff is related to the deceased by reason



- of being the son of the deceased's wife's blood brother (brother-in-law) and is therefore their maternal cousin.
49. She stated that the Plaintiff knows Consolata Ambuya Nyamori is not the widow to the deceased and he is aware that Bertha Dondo has for the longest time been separated from their late brother Col. Robert Omany and is therefore not part of their family. She further stated that a public auction is supposed to be an open event in which the auctioneer invited the best bid possible so as to safeguard the interests of both the chargor and the charge and it is clear from the Affidavit of the Plaintiff that the auction was not a public auction as everything had been pre-arranged with Carlius Nyagweth being curiously and inexplicably used to purport to place a bid to purchase the property at a price that was way below its market value and the forced market value. That the Plaintiff, the Defendants, the Auctioneer and the bank already all knew in advance the price at which the property would be sold and the identity of the buyer.
50. It is stated that the Plaintiff knew Consolata Abuya Nyamori and Bertha Dondo did not hold a grant of letters of administration in respect of the estate of the deceased and he also knew that the Interested Parties were the only surviving children of the deceased and people purporting to act for the estate of the deceased did not hold a grant of representation. That it is clear that the foundation upon which the 1st and 2nd Respondents claim rights to the suit property is constitutionally and legally flawed and there is no need to investigate the circumstances in which the property belonging to the deceased person was sold at less than half of its value after serving a stranger with realization notices at a time when the bank was holding a judgment against the deceased.
51. She stated that they have filed a Succession Cause being No HCFPA 1 of 2021 so as to obtain a grant of representation in respect of the deceased as the suit property is in the name of the deceased which was part of his estate by the time he passed on the charge in favour of the bank notwithstanding and is cited as part of the estate of the deceased in succession cause that they have filed. It is the Interested Parties case that this cause is limited in scope as it excludes the estate of the deceased in the request for a determination of who between the Respondents ought to be given the documents that were released by the bank as it presupposes that there was a lawful and valid sale in which the interest of the estate of the deceased in the property was relinquished wholly or in part.
52. The 1st Interested Party stated that it is only in the Succession Cause that the court seized of the matter will be able to make a finding whether or not the suit property forms part of the estate of the deceased by investigating the legality of the sale and that any person who has any claim to the suit property will have liberty to file an objection to the Petition that they have filed and to demonstrate his or her right to administer the estate or have a share of the estate, whether as part of the deceased 's family or as a purchaser and all parties involved in one way or the other in the process will have a chance to put their respective cases forward.
53. It is the Interested Parties prayer that the documents which already been submitted in court should continue to be held in court as ordered in Nairobi Civil Appeals Division in HCCA No 461 of 2011 pending the determination of the Succession Cause and the Plaintiff be allowed to pursue his Appeal against his conviction by the Disciplinary Committee of the Law Society of Kenya in Cause No 26 of 2011.

Plaintiff/Applicant's Submissions

54. The Plaintiff/Applicant filed his submissions on December 18, 2020 where he gave a brief background of the case and submitted that the Respondents discussed and reached an agreement and arrangement on their own before coming to an Advocate to facilitate the transactions. That when the bank released



- the title and transfer documents through Legacy Auctioneers, the bank executed an Application for Consent from the Land Control Board for purposes of Applying for consent to transfer under section 6 of the [Land Control Act](#) and following the disagreement between the parties, the Application was not made.
55. The Plaintiff/Applicant in his submission stated that the Application was to be made within 6 months as required under section 8 of the [Land Control Act](#) but the 1st Respondent declined to execute the consent forms on account that the Advocate do release the completion documents to Mr. Silas Chienjo who was not a party to the agreement. He stated that by virtue of section 22 of the [Land Control Act](#), he could not further the transaction on the property under section 6 of the Act without a valid consent from the Land Control Board as the same would constitute an offence punishable by Law.
56. Failure of the Respondents to agree implored the Advocate to deposit the title documents in court after the Disciplinary Committee held that the Advocate owed a professional duty to both the Respondents. That his actions was based on his interpretation of section 6,8 and 22 of the [Land Control Act](#) which the Disciplinary Committee stated that it was beyond its jurisdiction and can only be determined by the court.
57. The Plaintiff submitted that he has discharged his obligation under Order 34 Rule 2 of the [Civil Procedure Rules](#) and relied in the case of [Prime Bank Ltd vs Assumption Sisters of Nairobi Registered Trustees & 2 Others](#) (2018) eKLR.

1st Respondent's Submissions

58. The 1st Respondent filed its Submissions on July 22, 2021 where it outlined a brief background of the case and raised the following issues for determination:
- a. Did the public auction conducted on December 7, 2004 extinguish the estate of the deceased's interest in the suit property?
 - b. Is a purported unwritten agreement capable of conferring and or disposing of an interest in the suit property?
 - c. Was the suit property ever part of the estate of the deceased?
 - d. Can the estate of the deceased lawfully challenge validity of the public auction more than 16 years after occurred?
 - e. Does failure to obtain Land Control Board Consent by the Applicant render the transfer of the suit property void or voidable?
59. On the 1st issue, it was submitted that the sale auction that was conducted on December 7, 2004 has not been challenged by the estate of the deceased and what the Applicant is seeking is to vary the outcome of the auction by introducing extraneous issues that were not in the part of the auction. That section 77 (4) of the Registered Lands Act (now repealed) which was the applicable as the date of auction the interest of the charger as described therein shall pass to and vest in the transferee freed and discharged from all liability on account of the charge or on account of any other encumbrance to which the charge has priority. It was submitted that an interpleader action under order 34 of the Civil Procedure Rules is not the appropriate procedure to challenge the outcome of a sale by public auction.
60. On the 2nd issue of whether the purported unwritten agreement is capable of conferring and or disposing of an interest in the suit property, the 1st Respondent relied on section 3(3) of the [Law of Contract Act](#) and the case of [Daudi Ledama Morintat vs Mary Christine Karie & 2 Others](#) (2017)



eKLR where the Plaintiff made an admission that there was no agreement that was in writing yet the foundation of the suit is the said oral agreement. That the said agreement having not been in writing contravened section 3 (3) of the Laws of Contrate Act and could not be relied upon to sustain the suit by the Plaintiff.

61. On the issue of whether the suit property was ever part of the estate if the deceased, it the 1st Respondent relied on the provision of section 45 of the Law of section Act and submitted that the suit property was charged on 2nd August 1990 by the deceased to National Bank of Kenya to secure sums advanced to him and as the time of his demise, the suit property was not part of his estate. The 1st Respondent placed reliance in the case of Re Estate of Owino Rachier (Deceased) (2019) eKLR, Re Estate of Job Ndunda Muthike (Deceased) (2018) eKLR and Benson Mutuma Muriungi vs C.E.O Kenya Police Sacco & Another (2016) eKLR.
62. On the issue of whether the estate of the deceased can lawfully challenge validity of the public auction more than 16 years after it occurred, the 1st Respondent relied on section 7,9 and 16 of the Limitations of Actions Act and submitted that any claim by the estate of the deceased as alluded by the Interested Parties is statute barred.
63. Lastly on the issue of whether failure to obtain Land Control Board Consent by the Applicant renders the transfer of the suit property void or voidable; it was submitted that it is the Applicant's professional responsibility to obtain the Land Control Board Consent to transfer the suit property to the 1st Respondent. That due to the obvious conflict of interest, the Applicant neglected and refused to obtain the consent and he now wants to use his own professional failure as an excuse for his inability to transfer the suit property to the 1st Respondent. The 1st Respondent relied on section 8 of the Land Control Act and the case of Isaac Ngatia v Paul Kaiga Githui (2017) eKLR.
64. It was the 1st Respondent's submission that the title documents with respect to land parcel number West Kasipul /Kodera Karabach/599 be released to them.

2nd Respondents Submissions

65. The 2nd Respondents herein filed their written submissions on January 27, 2021 and raised a number of issues for determination as discussed below:
 - i. Whether the Applicant acted as the Advocate for both Respondents at the time of the auction.
66. The 2nd Respondents stated that the 1st Respondent had previously engaged in negotiations with the deceased prior to his death on purchase of a 5 acre portion of the suit property which they still occupy to date. That the 2nd Respondents being the beneficiaries of the estate were unable to proceed with the sale on account that they had not taken out letters of administration. That the Applicant has confirmed that prior to the deceased's death, he had been instructed to negotiate for more time with the bank to enable him source for funds to pay off the loan. It was confirmed that the Advocate acted for both Respondents at the time of auction as stated in the Affidavits.
 - ii. Whether the 1st Respondent by admission did not purchase the whole suit property.

It was stated that the 1st Respondent did not bid for the whole property and as per the Witness Statement of Sr. Dominic Sano, she admitted that they were not bidding for the whole property.
 - iii. Whether the 1st Respondent's Replying Affidavit and Witness Statement are self contradictory hence not credible.



67. It was stated that the 1st Respondent in their Replying Affidavit allege to have bought the whole suit property and in the witness statement they admit that they were to leave out the homestead and graves as the deceased, his children and his first wife are buried on the suit property.
68. It was concluded by the 2nd Respondent that the only credible evidence is that of the Applicant, the 2nd Respondents and the Surveyor which are not only aligned but credible to the extent that they are categorical, concise, precis and reasonable. It was the 2nd Respondent's prayer that the costs of the suit be borne by the 1st Respondent and the matter be determined in their favour.

Interested Parties Submissions

69. The Interested Parties herein filed their submissions on January 8, 2021 where they submitted that the foundation upon which the 1st and 2nd Respondents claim rights to the suit property is constitutionally and legally flawed and there is need to investigate the circumstances in which the property belonging to a deceased person was sold at less than half of its value after serving a stranger with realization notices at a time when the bank was holding a judgment against the deceased.
70. Section 58 of the *Civil Procedure Act* provides that interpleader proceedings are brought by a person who claims no interest in the property other than costs or charges. That the foundation of the Applicant's claim to the right to bring these proceedings is that he was counsel to the deceased and it is clear that the purported auction commenced after the death of the deceased and it is therefore obvious that the Applicant did not obtain instructions from the deceased at the time. That people who the Applicant claims to have given him instructions could not lawfully issue any such instructions as they did not hold grant of letters of representation in respect of the estate of the deceased and if the court finds that the Applicant was not lawfully instructed, then there could be no basis for bringing an interpleader application on that foundation.
71. It was submitted that the manner in which the principal parties to this cause went about the matter constitutes the offence of intermeddling under section 45 of the *Law of Succession Act*. That it is only in the Succession Cause that the court seized of the matter will be able to make a finding whether or not the suit property forms part of the estate of the deceased by investigating the legality of the sale. That the interpleader proceedings cannot be pursued any further and the court should direct the parties to join the succession proceedings.
70. It was further submitted that prayer 1 of the Application has been overtaken by events and the court would be making an order in vain because the Applicant no longer has the documents and prayer 2 of the Application does not make any legal sense at all and is lacking in seriousness as an Advocate cannot come to court to be told who ought to pay his fees. That the Application has no merit and should be dismissed and in order to guard against any prejudice that the Applicant risks suffering on account of his conviction by the Disciplinary Committee, he can proceed and pursue an Appeal. Since the title documents are already in court, they can remain in court until the conclusion of the succession cause as it will determine who has the entitlement to the property.

Analysis and Determination

71. This court has looked into the pleadings, Affidavits and submissions of the parties and is of the view that the following issues need to be determined:
 - a. Whether the Applicant/ Plaintiff acted in good faith.
 - b. Whether the public auction is valid.



- c. Whether the Applicant/Plaintiff and the Respondents acted contrary to section 45 of the *Law of Succession Act*.
- d. Who are the beneficiaries to the estate of the deceased.
- e. Whether the 1st Respondent purchased who or part of the suit property.
- f. Whether there was a valid consent from the Land Control Board.
- g. Whether the Applicant/Plaintiff is entitled to costs/fees incurred in the transaction.

Whether the Applicant/Plaintiff acted in good faith

72. This court has looked into evidence on record and is of the view that the Applicant/Plaintiff did not act in good faith as he did not perform his duties in a professional manner. At the point when the Respondents approached him with regards to the issue of the bank's right of statutory power of sale, the Applicant/Plaintiff did not advise the Respondents to put what they agreed in writing. The Applicant/Plaintiff together with the Respondents held joint meetings but has failed to produce minutes regarding them agreeing to contact the bank and auctioneers on sale of the suit property.
73. The Applicant/Plaintiff misled the 2nd Respondent by advising them to agree and have the property of the deceased sold knowing very well that the 2nd Respondents have to obtain Grant of Letters of Administration. Even though the Applicant/Plaintiff agreed to have an agent act on behalf of the Respondents knowing very well that the agent Mr. Don Nyagweth who also happens to be a surveyor lacked capacity to enter into a contract on behalf of the 2nd Respondents.

Whether the public auction is valid

74. Section 74 of the Registered Land Act (now repealed) stipulates as follows:

“74. (1) If default is made in payment of the principal sum or of any interest or any other periodical payment or of any part thereof, or in the performance or observance of any agreement expressed or implied in any charge, and continues for one month, the chargee may serve on the chargor notice in writing to pay the money owing or to perform and observe the agreement, as the case may be.

- (2) If the chargor does not comply, within three months of the date of service, with a notice served on him under sub-section (1), the chargee may -

- (a) appoint a receiver of the income of the charged property; or
- (b) sell the charged property:

Provided that a chargee who has appointed a receiver may not exercise the power of sale unless the chargor fails to comply, within three months of the date of service, with a further notice served on him under that subsection.

- (3) The chargee shall be entitled to sue for the money secured by the charge in the following cases only-

- a. where the chargor is bound to repay the same;
- (b) where, by any cause other than the wrongful act of the chargor or chargee, the charged property is wholly or partially destroyed or the security is rendered insufficient and the chargee has given the



chargor a reasonable opportunity of providing further security which will render the whole security sufficient, and the chargor has failed to provide such security;

- (c) where the chargee is deprived of the whole or part of his security by, or in consequence of, the wrongful act or default of the chargor; Provided that –
 - (i) in the case specified in paragraph (a) -
 - (a) a transferee from the chargor shall not be liable to be sued for the money unless he has agreed with the chargee to pay the same; and
 - (b) no action shall be commenced until a notice served in accordance with subsection (1) has expired;
 - (ii) the court may, at its discretion, stay a suit brought under paragraph (a) or paragraph (b), notwithstanding any agreement to the contrary, until the chargee has exhausted all his other remedies against the charged property, unless the chargee agrees to discharge the charge.”

75. It is clear from the Applicant/Plaintiff's Affidavit that the deceased died on November 29 2003 and the bank served the deceased widow with a Statutory with a 45 Statutory Notice to sell the property. I have perused the file and do confirm that neither of the Plaintiff nor the Respondents has produced the Statutory Notice issued by the bank and I am unable to ascertain whether it is indeed true that the bank issued a Notice as required by law.

76. This court is of the view that even if the widow to the deceased was issued with the Statutory Notices by the bank as alleged by the Applicant/Plaintiff, the widow lacked capacity to sign the transfer documents although it is evident that an agent who is Mr. Don Nyagweth was appointed to effect the transaction. The said public auction was not an open process as the Applicant/Plaintiff had pre-arranged everything so as to have Mr. Nyagweth place a bid in order to purchase the suit property on behalf of the 1st Respondent.

Whether the Applicant/Plaintiff and the Respondents acted contrary to section 45 of the Law of Succession Act.

77. Section 45 of the Law of Succession Act, Cap 160 Laws of Kenya (hereinafter "the Act") provides: -

“ 45. (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased.

- (2) Any person who contravenes the provisions of this section shall-
 - a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and



- b) be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration."

78. Section 82 of the Act provides: -

"82. Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers -

- a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate;
- b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:

Provided that -

- i. purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and
- ii. no immovable property shall be sold before confirmation of the grant;"

Muriuki Hassan.v. Rose Kanyua and 4 others [2014] eKLR, when faced with a situation of sale of property belonging to an estate before succession was undertaken, Makau J held: -

"The interested parties are not direct creditors of the deceased before his death but purchasers from one of the deceased's beneficiaries and the sale of land to them is challenged in this application. In such circumstances, the interested parties' interest cannot be considered in this matter and the remedy for them is if they would be aggrieved by final court's decision and distribution, is to file suit against the said Muriuki Musa Hassan."

Morris Mwiti Mburugu .v. Denis Kimathi M'Mburugu [2016] eKLR, the Court held: -

"... where any person interferes with the free property of the deceased or deals with an estate of a deceased person contrary to the provisions of sections 45 and 82 of the Act, that is intermeddling, is unlawful and cannot be protected by the court. The transaction is subject to be nullified and set aside at the instance of the innocent beneficiaries who may have been affected by the act but were not involved in the same."



Who are the beneficiaries to the estate of the deceased?

79. The Applicant in his Affidavit has stated that the deceased left behind a widow that is Consolata Omany, a daughter-in-law that is Bertha Omany who are the 2nd Respondents and four daughters namely Dorothy, Sarah, Ruth and Janet. Sr. Dominic Savio in her Witness Statement stated that she knows Mrs. Bertha Omany as one of the estranged wives of the deceased who never lived within the homestead but began living in the homestead after the deceased's demise, having learnt of the Congregation's intention to purchase the suit property.
80. The Interested Parties on the other hand confirmed that they are the only surviving children to the deceased and that their mother was the only wife to the deceased who died before the death of their father. They confirmed that Consolata Omany is not a wife to the deceased and Bertha Omany had divorced their late brother.
81. It is not the responsibility of this court to determine who or not is a beneficiary to the deceased estate and therefore this court is of the view that if the 2nd Respondents were beneficiaries of the estate of the deceased, they ought to have taken out Grant of Letter of Administration Intestate before agreeing to sell the suit property.

Whether the 1st Respondent purchased whole or part of the suit property.

82. The Applicant/Plaintiff in paragraph 14 of the Supporting Affidavit stated that the 1st and 2nd Respondents had agreed to obtain a Surveyor to draw out the portions to be taken by respective parties upon transfer by Chargee and subdivision and it was further agreed that the Sisters would provide for and on behalf of the family sum between Kshs.1,500,000/= to Kshs. 2,000,000/= and acquire the health facility that is 5 acres and an extra 10 acres to allow them room for expansion. That the family would retain 30 acres where the homestead stands and the cultivated farms and Woodlands SDA Church would remain on about 2 acres with the remaining 1 acre to be taken up by the roads to give access after subdivision.
83. The 2nd Respondents at paragraph 10 of the Replying Affidavit reiterated the contents of paragraph 14 of the Applicant/Plaintiff's Affidavit while the 1st Respondent at paragraph 37 of its Replying Affidavit stated that the Congregation paid the full purchase price of the suit property measuring approximately 48 acres. The 1st Respondent in their Witness Statement gave contradictory information as they have admitted that they were to leave out the homestead and graves.
84. This court has looked at the advertisement of the auction in the daily newspaper published on November 29, 2004 where Legacy Auctioneering Services advertised the sale of the whole suit property. The Certificate of Sale issued by Legacy Auctioneering Services on December 7, 2004 also indicates that the 1st Respondent bought the entire suit property measuring 19.5 Ha. The Transfer document signed between the bank and the 1st Respondent clearly indicates that the bank was transferring the entire suit property to the 1st Respondents.
85. This court is of the considered view that the parties herein have given contradictory information with regards to the issue of whether the suit property was to be transferred to the 1st Respondent as a whole or in part.

Whether there was a valid consent from the Land Control Board.

86. Section 6,7, 8 and 22 of the [Land Control Act](#) states as follows:



6. 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 into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 (L.N. 516/1961) for the time being apply;

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 the 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.

7. Recovery of consideration

If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to section 22.

8. Application for consent

- (1) An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto: Provided that the High Court may, notwithstanding that the period of six months may have expired, extend that period where it considers that there is sufficient reason so to do, upon such conditions, if any, as it may think fit.
- (2) The land control board shall either give or refuse its consent to the controlled transaction and, subject to any right of appeal conferred by this Act, its decision shall be final and conclusive and shall not be questioned in any court.
- (3) For the purposes of subsection (1), an application shall be deemed to be made when it is delivered to the authority prescribed in the manner prescribed.



- (4) An application under subsection (1) shall be valid notwithstanding that the agreement for the controlled transaction is reduced to writing, or drawn up in the form of a legal document, only after the application has been made.

22. Acts in furtherance of void transaction

Where a controlled transaction, or an agreement to be a party to a controlled transaction, is avoided by section 6 of this Act, and any person—

- (a) pays or receives any money; or
- (b) enters into or remains in possession of any land, in such circumstances as to give rise to a reasonable presumption that the person pays or receives the money or enters into or remains in possession in furtherance of the avoided transaction or agreement or of the intentions of the parties to the avoided transaction or agreement, that person shall be guilty of an offence and liable to a fine not exceeding three thousand shillings or to imprisonment for a term not exceeding three months, or to both such fine and imprisonment.

Justice Nyarangi in the case of *Onyang'o & Another v Luwayi* [1986] KLR 513 at P. 516 held as follows:

"The appellants admitted that no consent for the proposed transaction concerning agricultural land had been given by the divisional Land Control Board. The transaction was therefore void for all purposes under section 6(1) of the *Land Control Act*, cap 302, because the transaction was not excluded by section 6(3). An application for consent in respect of the proposed sale of the material parcel of land had to be made to the appropriate Land Control Board within six months of the making of agreement between Samson Luwayi and Javan Bulemi. No such application was made. That agreement therefore is of no effect and no question of specific performance can lawfully arise."

87. In the case of *Willy Kimutai Kitilit v Michael Kibet* [2018] eKLR the court held as follows:

"A contract for the sale of land to which the *Land Control Act* applies is not void from inception nor is it an illegal contract. It becomes void when no application for consent of the Land Control Board is made or if made, it is refused and the appeal from the refusal, if any, has been dismissed (see Section 9 (2)). The *Land Control Act* prescribes the time within which the application for consent should be made to the Land Control Board but does not prescribe the time within which the Land Control Board should reach a decision or the time within which any appeal should be determined. The process from the time of the making the application to the time of the determination of the appeal, if any, may obviously take time. However, the requirement that an application for the consent should be made within six months of the making of the agreement and the provisions of Section 7 of the *Land Control Act* for recovery of the consideration is an indication that Parliament intended that controlled land transactions should be concluded within a reasonable time."

88. The 1st Respondent and the Bank failed to obtain Consent to transfer from the Land Control Board. Based on the above sections of the law and case law, it is clear that there was no valid transaction and even if the consents were obtained, the same could have been invalid as the Respondents herein



lacked capacity to transfer the deceased's property as they had not obtained Grant of Letters of Administration. Based on Section 8 of the *Land Control Act*, it is clear that the six months period required to obtain a Consent had lapsed and neither of the parties filed an Application to the High Court to have the time extended. The transfer of the suit property could not be effected to the 1st Respondent as there was no valid consent and therefore this court is of the view that the property still belongs to the deceased and therefore his beneficiaries should benefit from his estate.

Whether the Applicant/Plaintiff is entitled to costs/fees incurred in the transaction.

89. This court is of the view that the Applicant/Plaintiff is not entitled to the costs as he did not act in good faith. As regards his fees, the Applicant /Plaintiff should be in a position to ascertain who between the Respondents should pay his fees as both of them engaged his services in different occasions. In the upshot, this court finds that this suit lacks merit and is hereby dismissed with costs.

DATED AT KISUMU THIS 6TH DAY OF MAY, 2022

ANTONY OMBWAYO

JUDGE

This judgment has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2019.

ANTONY OMBWAYO

JUDGE

