



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ELCC (PETITION) No. 360 OF 2017

COVE INVESTMENTS LIMITED PETITIONER

VERSUS

JOHANA KIPROTICH RONO &

JOSEPH RONO LANGAT

AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF

MATHIAS KIMNYOLE LANGAT 1ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT

JUDGMENT

1. The petitioner herein describes itself in amended petition dated 17th September 2019 as a limited liability incorporated under the provisions of the Companies Act. It brings the petition against the first respondents who are legal representatives of the estate of Mathias Kimnyole Langat and the second respondent who is the Attorney General of Kenya. The petitioner avers that the second respondent is enjoined herein "by reason of being the defender of the public interest" under Article 156 of the Constitution of Kenya.
2. It is averred in the amended petition that sometime in early 1998 Mathias Langat (deceased) visited one Sarah Jerotich Kipsaita who is the mother of the petitioner's company secretary who owned a farm in Ngata which immediately neighboured the deceased's farm. It is averred further that the deceased on numerous occasions had sought to persuade her to convince petitioner's company secretary to buy or introduce a buyer to him who would be interested in purchasing the suit property herein, which was situated in Menengai/Ol'Ongai side of Rongai as he wanted to relocate his home to Kericho. That the petitioner's company secretary was eventually persuaded by the deceased's pressure and insistence purchased the suit property for a total sale price of KShs 16,758,425.
3. It is further averred that an agreement for sale was executed by the both parties and the deceased together with his sons collected the first instalment payment and thereafter a total sum of 15,976,000 was collected. That further, the parties agreed in the agreement for sale that the deceased was to procure the necessary land control board consent and in this regard the petitioner executed the relevant forms. That thereafter, the deceased filed Nakuru HCCC No. 158 of 2005 seeking vacant possession on the basis that the land control board consent had not been procured within the time specified under the Land Control Act. That as a result, the petitioner filed Nairobi High Court Civil Suit No. 588 of 2006 (O.S) seeking leave to apply for land control board consent out of time. The court rendered a ruling in Nairobi High Court Civil Suit No. 588 of 2006 (O.S) to the effect that the issue of consent be dealt with in Nakuru HCCC No. 158 of 2005. That ultimately, Nakuru HCCC No. 158 of 2005 was dismissed on 24th May 2013 for want of prosecution.
4. The petitioner further averred that it has been in occupation of the suit property and farming it since 1999 and that it has undertaken massive improvements on it. That the 1st respondents have lost any claim of title over the suit property and that they now hold the same in trust for the petitioner as constructive trustees.
5. The petitioner further averred that the respondents' conduct and the provisions of Sections 6 and 8 of the Land Control Act requiring that an application for consent be made within six months of the making of an agreement are unjustifiable and a violation of its rights under Articles 19, 23, 24 and 40 of the Constitution. That the 1st respondents unlawfully invaded the suit property thereby causing it loss and damage for which it claims compensation from the 1st respondents in the sum of a total of KShs 11,335,000.
6. The petitioner therefore prays for judgment as follows:

a) Leave be granted for the petitioner to apply for land control board consent under section 8 of the Land Control Act relying on the good and valid reasons disclosed in the Petition herein and by the further reasons that the parties herein had, at the execution of the

Agreement for Sale herein, agreed under which the Vendor would obtain the Land Control Board Consent.

b) The Deputy Registrar of this Honourable Court be mandated to execute any necessary forms, transfer Instruments necessary for obtaining the said Land Control Board Consent.

c) A declaration that the 1st respondents hold LR. NO. NAKURU/OL'ONGAI PHASE 11/34 in trust for the Petitioner and the respondent be directed to formally transfer the suit property and execute the transfer document within 14 days failing which the Deputy Registrar of this court be authorised to execute such transfer documents in favour of the Petitioner and the land registrar Nakuru to forthwith cancel the title to the suit property issued in the name of the 1st respondent and to re-issue a new title in the name of the petitioner.

d) Compensation for the loss and damage as set out at paragraph 4.5.4.

IN THE ALTERNATIVE

e) A Declaration that S6 of the Land Control Act in as far as it invalidates controlled land transactions where land control board consent has not been obtained not more than six months after agreement for sale has been executed is unconstitutional null and void and that such consent may be obtained at any time before the transfer is registered on the grounds that S8(1) of the Land Control Act in declaring that dealing in a controlled transaction is null and void unless consent is obtained within six months of the making of the agreement for the controlled transaction action:

(i) does not comport with any rationale legitimate purpose of the Land Control Act;

(ii) is unconscionable, harsh and unreasonable;

(iii) amounts to an unjust enrichment in favour of one party against the other;

(iv) unnecessarily interferes with the constitutional rights of citizens to own and deal in property as envisaged in Article 40 of the Constitution;

(v) is against the public policy of Kenya.

f) Any other or further order that this Honourable court may deem fit to grant.

g) Costs.

7. The petition was heard partly through oral testimony and partly through affidavit evidence.

8. The petitioner's company secretary, Kenneth Kiplagat testified as the sole witness in support of the petitioner's case. He adopted and relied on his supporting affidavits sworn on 17th September 2019 and 22nd September 2017, his supplementary affidavit sworn on 12th February 2018 and his further affidavit sworn on 8th May 2018 as well as the documents annexed to the said affidavits.

9. He stated in the affidavits that the deceased owned several properties in the Nakuru/Rongai area and that one of his properties immediately neighbored a farm owned by Sarah Jerotich Kipsaita, who is his mother. That early in 1998, the deceased visited his mother numerous times seeking to get her mother to convince him to buy the suit property herein which is situated in the Menengai/Ol'Ongai side of Rongai. The deceased wanted to relocate to his home district of Kericho. That ultimately, he was persuaded by his mother to introduce the petitioner herein to purchase the land and an agreement for sale was executed by the petitioner. He annexed a copy of the agreement and a copy of the title to the suit property.

10. He added that the deceased went to Nairobi with his sons for the execution of the Agreement for Sale and also collected the first instalment payment from the petitioner. He further stated that the petitioner had to procure financing through a bank loan and annexed a copy of a letter of offer from Transnational Bank Limited. That he arranged for the signing of the relevant application for Land Control Board Consent by the petitioner and handed the forms to the deceased who confirmed to him that he would present the application for approval at the next Land Control Board hearing. That the deceased was very familiar with the land control board process having presented previous applications to the board.

11. Mr Kiplagat stated further that the deceased and his sons abandoned the suit property without informing him as a result of which many of the structures in it were vandalised and went into disrepair. That upon inquiring from the deceased, the deceased informed him that he had assumed that the petitioner had taken possession as soon as the first deposit was made. He added that the deceased subsequently made various trips to Nairobi with his sons and collected various payments from the petitioner totalling Kshs.15,976,000 which according to him is more than 95% of the purchase price. That whereas the Agreement for Sale contemplated that the deceased was to present to the petitioner the completion documents upon 50% of the purchase price being paid, Cove Investments Limited continued paying Mathias Langat and his sons the purchase price to the tune of Kshs.15,976,000/= out of the total sale price of Kshs.16,758,425 being more than 95% of the sale price. That the deceased justified his request for extra payment by indicating to the petitioner and to him that he was relocating and he needed the money to complete the purchase of land and to put up a new home in Kericho and that the petitioner graciously accommodated the deceased and his sons by meeting their cash requirements outside the strict terms of the Agreement for Sale. He annexed are copies of acknowledgment of the further payments.

12. He stated that upon the petitioner requiring that the transaction be completed, the deceased and his sons suggested that they had not presented an application before the Nakuru Land Control Board for consent and that since Land Control Board Consent had not been procured within the time specified under the Land Control Act, they were entitled to assume vacant possession of the suit property. That they proceeded to institute a suit, Nakuru HCCC No. 158 of 2005 Mathias Kimnyole Langat vs Cove Investments Limited, in that regard. He annexed a copy of the plaint in the said matter.

13. He further stated that the petitioner then lodged a suit, being Nairobi High Court Civil Suit No. 558 of 2006 (O.S.) seeking leave to apply for Land Control Board Consent out of time and that the court rendered a considered ruling and held that since the issue of the Land Control Board Consent was part of the subject matter in the pending proceedings in Nakuru HCCC No. 158 of 2005, it was best that the issue of the extension of time for the application for Land Control Board Consent be ventilated in the said pending suit. That ultimately, the deceased failed to prosecute HCCC No. 158 of 2005 and it was dismissed for want of prosecution on the 24th May, 2013.

14. Mr Kiplagat further stated that the petitioner has been in occupation of the suit property since 1999, has undertaken massive improvements on it and has been paying land rent, water bills and electricity bills and farming on it. He annexed copies of property rates payment records and added that the 1st respondents have now revived their harassment of the petitioner by demanding vacant possession. That the issue of land control board consent has been, and continues to be a devise and a gimmick used by fraudulent vendors to vex innocent purchasers and that courts have variously stated that the application of the Land Control Act in this regard engenders harsh and unfair results. That the manner in which the issue of the Land Control Board Consent has been applied has generated consequences, which are not in consonance with clear provisions of the Constitution in particular, and the spirit of the Constitution in general. That there is no reasonable rationale consistent with overriding constitutional imperatives in our 2010 Constitution to require consent to be obtained within six months of the signing of an Agreement for Sale. That the objects of the Land Control Act are not impaired whatsoever by requiring the consent under the Act to be obtained prior to the actual transfer of land falling under the Act as is normal with other completion documents such as clearance certificates for both rates and land rent, as well as assessment of stamp duty.

15. Mr Kiplagat also stated that on 2nd June 2018 he got information from Mr. Kibwott the petitioner's Farm Manager that the 1st respondent had with aid of rowdy youths armed with bows and arrows invaded the suit premises, disrupted operations destroyed property, and dispossessed the petitioner. As a result, the petitioner sought the intervention of this court and this court restored the petitioner into possession through a ruling delivered on 27th July 2018. That as a prelude to the invasion the 1st respondents had demanded that the petitioner's Farm Manager vacates the suit premises through a letter dated 20th April 2018. That following the restoration of possession the petitioner undertook an audit of the loss and damage occasioned by the 1st respondents and their agents' invasion and wrongful dispossession of the petitioner. He listed particulars of damage as below:

- (i) Missing or converted trailer tarpaulin valued at.....KShs 30,000
- (ii) 5 broken padlocks @KShs.8,000 KShs 40,000
- (iii) 100 fencing posts; missing/stolen or converted by the 1st respondents @Kshs.300 per post..... KShs 30,000
- (iv) Fencing wire mesh; missing/stolen or converted by the 1st respondents per roll..... KShs 28,000
- (v) Labour for repair and fixing damaged/broken locks... KShs 10,000
- (vi) Ploughing, harrowing, chiselling 94 acres..... KShs 752,000
- (vii) Roundup spraying 94 acres..... KShs 105,000
- (viii) Tripple K weed Tilling..... KShs 94,000
- (ix) Spraying expenses/Labour..... KShs 94,000
- (x) Loss of wheat harvest @20 bags per acre x 94 x 2 years.....KShs 1,0152,000
- TotalKShs 11,335,000

16. Under cross-examination and re-examination, Mr Kiplagat stated that although the petitioner paid KShs 15,976,000 out of the purchase price of Kshs.16,758,425, the balance remains unpaid since the transaction has not been completed.

17. The petitioner's case was then closed.

18. The 1st respondents called one witness, Mr Johana Kiprotich Rono. He stated that he is an administrator of the deceased's estate. He adopted his replying affidavit which was filed on 25th October 2019.

19. He stated in the said affidavit that the petitioner is trying to mutate a contractual claim to a constitutional petition. That the petitioner readily admits in the petition that the Land Control Board's consent for the controlled transaction was never obtained and that therefore, the petition is aimed at circumventing Section 6 (1) and 8 (1) of the Land Control Act which provides that parties to a transaction dealing with agricultural land must seek consent from the Land Control Board within 6 months of making of the agreement. That although the petitioner desires to have time extended within which it can apply for the consent, the procedure provided under Section 8 (1) of the Land

Control Act does not contemplate the filing of a constitutional petition as is the case herein.

20. He added that although the petitioner is faulting the deceased for not procuring the consent, since the Land Control Act provides in Section 8 (1) that the consent can be procured by any of the parties to the transaction, the petitioner had a duty to procure the consent for the purpose of completion of the transaction. That the petitioner knew about the requirement of the consent but did not take any step to procure it. That since the petitioner has admitted that it sought an extension of time pursuant to Section 8 (1) of the Land Control Act in Nakuru HCCC No. 158 of 2005 which suit was dismissed for want of prosecution, the issue of extension is *res judicata*.

21. Mr Rono further stated that by virtue of Section 6 (1) of the Land Control Act, the moment that the consent was not obtained, the controlled transaction became void for all intents and purposes and that the petitioner's claim that it has been on the suit property since 1999 amounts to an admission that it knew that it was committing an offence under Section 22 of the Land Control Act since remaining in possession was in furtherance of a void transaction. That this being a court of justice, it cannot legalize illegalities and a nullity. That the provisions of the Land Control Act are clear enough to leave no room for application of principles of equity. That the petitioner cannot claim that it has been deprived of any interest since it had no interest in the first place.

22. Under cross-examination, Mr Rono stated that when his father was selling the suit property, his sons including Mr Rono himself were involved and that they used to sign acknowledgments of receipt of the purchase price.

23. The 1st respondent's case was closed at that point. The 2nd respondent case was also closed at that point since although a state counsel had appeared earlier in the day during the call over, there was no appearance for the 2nd respondent come the time allocated for hearing.

24. The petition was canvassed through written submissions. Although state counsels attended court on behalf of the 2nd respondent and were even granted several opportunities to file a response to the petition, the 2nd respondent neither filed a response nor submissions.

25. The 1st respondents filed their submissions first. They identified as the first issue for determination, the question of whether the transaction was null and void. They submitted that the petitioner's company secretary who testified as PW1 acted for both parties in the sale agreement by drawing, executing it on behalf of the petitioner and "commissioning" it. That by doing this he acted contrary to **Section 4 of the Oaths and Statutory Declarations Act**, thereby rendering the agreement null and void. They cited the case of **Kenya Federation of Labour & Another v Attorney General & 2 Others [2014] eKLR**. Relying **Sections 6 (1) and 8 (1) of the Land Control Act** as well as the case of **Willy Kimutai Kitilit v Michael Kibet [2018] eKLR**, they submitted further that any party to the agreement could apply for consent and that since no consent was sought or granted, the transaction is null and void.

26. The second issue for determination that the 1st respondents identified is whether this court can and ought to extend time for seeking and obtaining land control board consent. They argued that although the purchase price was to be fully paid by 31st December 1999, the petitioner paid only KShs 6.5 million thereby leaving an outstanding balance of KShs 10,258,425. They submitted further that any party to the transaction could have sought the consent and that the petitioner should not therefore fault them for not obtaining consent. That since consent had not been obtained the petitioner has not acquired any proprietary rights worthy of protection under **Article 40 (2) of the Constitution of Kenya, 2010** which only protects property acquired legally. They added that the petitioner bears the onus to demonstrate that **Sections 6 (1) and 8 (1) of the Land Control Act** are unreasonable and unconstitutional, which burden they argue the petitioner has failed to discharge. Relying on the case of **Samson Muriungi Mwirebua v Silas Kimathi Mutonga & Another [2019] eKLR**, they argued that there is a presumption of constitutionality of statutes.

27. The 1st respondents further argued that the present suit is barred by *res judicata* as the matters raised in it were determined by a court of competent jurisdiction in Nakuru HCCC No. 158 of 2005 which was dismissed for want of prosecution.

28. Regarding the issue of whether the reliefs sought should issue, the 1st respondents drew the court's attention the case of **David Sironga Ole Tukai vs Francis Arap Muge & 2 Others [2014] eKLR** and argued that equitable doctrines like constructive trust and proprietary estoppel are inapplicable since there are express statutory provisions in **Sections 6 and 22 of the Land Control Act**. They submitted further that the petitioner had not acquired proprietary interest over the suit property having not paid the full purchase price and having failed to obtain the land control board consent despite taking possession of the suit property and effecting developments on it. They draw the court's attention to the case of **Mary Akai Lutere v Johnstone Kamau Mwangi [2020] eKLR** where the court cited the case of **Macharia Mwangi Maina & 87 others vs Davison Mwangi Kagiri [2014] eKLR** and the case of **Koyumkei Multipurpose Co-operative Society Ltd & 17 others vs Real Chepngetich Koech [2019] eKLR**.

29. They submitted further that the petitioner did not lodge in court any company resolution authorizing the institution of this suit, contrary to Order 4 rule 1 of the Civil Procedure Rules, thereby rendering the suit incompetent and liable to striking out. They relied inter alia on the cases of **Leo Investments Limited vs Trident Company Limited, HCCC No. 893 of 2010, Curly Klurly Ltd v Mtoi Mwero Mtoi & 3 others [2019]** and **Steel Formers Limited v SGS (Kenya) Limited & another [2020] eKLR**. They urged the court to strike out the petition or in the alternative dismiss it with costs.

30. On its part, the petitioner argued that the 1st respondents did not offer any testimony to controvert its case as to the agreement for sale and even payment of KShs 15,976,000 towards the purchase. That having received more than 95% of the purchase price and having acknowledged such receipt in Nakuru HCCC No. 158 of 2005, the 1st respondents are precluded by the doctrine of judicial estoppel from claiming that the petitioner did not pay the amount.

31. It further argued that the justice of the matter is in its favour since it has been in possession for more than 21 years and undertaken substantial investments on it. Regarding the issue of whether lack of consent of the land control board could in the circumstances of this case invalidate the agreement, it argued that **Article 10 of the Constitution of Kenya 2010** has now imported equity as a national value and that the harsh provisions of **Section 6 of the Land Control Act** cannot survive that constitutional imperative. It referred to the decision of the

Court of Appeal in the case of **Willy Kimutai Kitilit v Michael Kibet [2018] eKLR**. It added that in view of the said case, its possession for more than 21 years, payment of more than 95% of the purchase price and default on the part of the 1st respondents makes it deserving of the reliefs sought. It added that it is entitled to specific performance since it has complied with the terms of the agreement. It relied *inter alia* on the cases of **Triton Gas Station Limited & another v Kenya Commercial Bank Limited & 2 others [2015] eKLR**, **GSD v RSK [2019] eKLR**, **County Government of Kilifi v Mombasa Cement Limited [2017] eKLR**, **Jeremiah Kariuki Gitau v Joseph Kangethe Mbugua [2016] eKLR**, and **Joseph Mbogo Mwaniki v Lucy Njoki Njuki [2013] eKLR**. The petitioner concluded by urging the court to find and hold that the 1st respondents and the deceased acted inequitably and to allow the petition with costs.

32. I have considered the petition, the evidence on record and the submissions by parties. The issues that arise for determination are whether this court has jurisdiction; whether the petition is *res judicata*; whether the petition is defective for want of company resolution authorizing its institution; whether **Section 6** of the **Land Control Act** is unconstitutional and lastly whether the reliefs which are sought should issue.

33. From the material placed before the court by the parties, there is no dispute that the petitioner and the deceased entered into a sale agreement dated 1st December 1999 pursuant to which the deceased sold to the petitioner all that piece of land known as L.R. No. Nakuru/OI'Ongai Phase 11/34 together with all the buildings and improvements thereon. The agreed purchase price was KShs 16,758,425 50% of which was to be paid on execution and the balance on completion. The completion date was agreed as 31st December 1999. Pursuant to Special Condition No. 6, the deceased was to give possession of the property to the petitioner within 15 days of payment of the deposit. Further, Special Condition No. 11 provided that the deceased was to provide the petitioner with all the consents necessary for completion of the transfer 15 days before the completion date. Mr Johana Kiprotich Rono who is joined herein as one of the 1st respondents confirmed in his testimony that he is an administrator of the deceased's estate.

34. The 1st respondents took issue with the agreement on the basis that it was drawn, executed on behalf of the petitioner and "commissioned" by the petitioner's company secretary, Kenneth Kiplagat. They claimed by doing so Mr Kiplagat acted contrary to **Section 4** of the **Oaths and Statutory Declarations Act**, thereby rendering the agreement null and void. Suffice it to state that the preamble to the Act makes it clear that the said statute was enacted to "to provide for the appointment of commissioners for oaths, and to make provision in regard to the administering of oaths and the taking of statutory declarations". A sale agreement is not a document on oath and the advocate drawing it or attesting its execution does so simply as an advocate and not a commissioner for oaths. Clearly, the objection is bereft of legal foundation.

35. There is further no dispute that completion has so far not taken place, that the suit property is agricultural land and that consent of the Land Control Board has neither been sought nor obtained in respect of the transaction comprised in the agreement.

36. It is also not disputed that arising from the transaction, the deceased filed **Nakuru HCCC No. 158 of 2005** against the petitioner seeking vacant possession on the basis that the land control board consent had not been procured within the time specified under the Land Control Act while the petitioner filed **Nairobi High Court Civil Suit No. 588 of 2006 (O.S)** against the deceased seeking leave to apply for land control board consent out of time. **Nakuru HCCC No. 158 of 2005** was dismissed on 24th May 2013 for want of prosecution.

37. The petitioner stated, without exhibiting the ruling, that the court rendered a ruling in **Nairobi High Court Civil Suit No. 588 of 2006 (O.S)** to the effect that the issue of consent be dealt with in **Nakuru HCCC No. 158 of 2005**. Nevertheless, it is still possible to verify the petitioner's claims as regards the ruling.

38. A statutory body known as National Council for Law Reporting has been established pursuant to **Section 2** of the **National Council for Law Reporting Act, 1994** and mandated under **Section 3** of the said Act to prepare and publish reports known as the Kenya Law Reports which contain judgments, rulings and opinions of superior courts of record. Under **Section 19** of the **National Council for Law Reporting Act, 1994** every judge of a superior court of record is required to, as soon as practicable after delivering a judgment, ruling or an opinion cause a copy of it to be furnished to the editor of the Kenya Law Reports for publishing.

39. A perusal of the Kenya Law Reports reveals a ruling delivered by Hon. Justice J. L. A. Osiemo on 26th June 2006 in **High Court Civil Suit No. 588 of 2006 (O.S)**. The ruling conclusively determined the originating summons. It is reported as **Cove Investments Limited v Mathias Kimnyole Langat [2006] eKLR**. The learned judge stated in part as follows:

In the verifying affidavit to this application the applicant avers that there is in existence a suit between the parties herein being NAKURU/HCCC NO. 158 OF 2005. ...

Since the issue of consent of the Land Control Board is raised in the pleadings by both the plaintiff and the defendant, the orders sought if granted ex parte will substantially and drastically change the mode of the pleadings. This application ought to have been filed in the already existing Civil Suit so that the plaintiff would be accorded an opportunity to challenge the same as indicated in paragraph 12 of Defence to the Counterclaim.

In the result this application fails and the same is dismissed with no order as to costs.

40. It is thus manifest that the court in **Nairobi High Court Civil Suit No. 588 of 2006 (O.S)** determined the said case by ordering that the issue of consent be dealt with in **Nakuru HCCC No. 158 of 2005**.

41. Does this court have jurisdiction to entertain this matter? In their replying affidavit, the 1st respondents took the position that the petitioner is trying to mutate a contractual claim to a constitutional petition. Although they did not develop or address that point further in submissions, I have deemed it necessary to investigate it since it is an issue that may go to the jurisdiction of the court. Their position seems to be that the claim herein should have been brought as an ordinary civil claim.

42. I do not for a moment entertain any doubt that the petitioner has a right under **Article 22** of the **Constitution** to institute proceedings in court claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or is threatened.

43. Procedural law in regard to constitutional matters is that where there exist ample statutory avenues for resolution of a dispute, the constitutional court will defer to the statutory options and decline to entertain the dispute. Nevertheless, when a litigant is challenging the constitutional validity of a legislation, it is acceptable to bundle his other claims connected to the cause of action in the constitutional petition. Thus, in **Sumayya Athmani Hassan v Paul Masinde Simidi & another** [2019] eKLR the Court of Appeal stated:

... where a legislation has been enacted to give effect to a constitutional right, it is not permissible for a litigant to found a cause of action directly on the Constitution without challenging the legislation in question. ... [Emphasis supplied]

44. Whereas it is not in dispute that the dispute between the parties traces its roots to the sale agreement dated 1st December 1999 pursuant to which the deceased sold the suit property to the petitioner, a perusal of the prayers sought in the amended petition reveals that at prayer (e) the petitioner seeks a declaration that **Section 6** of the **Land Control Act** is unconstitutional, null and void for among other reasons not comporting with any legitimate purpose of the Act and for unnecessarily interfering with the constitutional rights of citizens to own and deal in property as envisaged in **Article 40** of the **Constitution**. Such a prayer cannot be sought in an ordinary civil suit since pursuant to **Articles 22 (1) and 22(3)** as read with the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 - Legal Notice No. 117 of 2013**, the Bill of Rights is enforced by filing a petition in the High Court. Pursuant to **Article 23(3)**, the court may grant appropriate relief including a declaration of invalidity of any law that violates the Bill of Rights. See **Sumayya Athmani Hassan v Paul Masinde Simidi & another** (supra).

45. The petitioner's action of bundling its other claims connected to the issue of consent of the Land Control Board in the constitutional petition is in the circumstances excusable when viewed against the constitutional edict under **Article 159 (2)** that justice shall not be delayed and that justice shall be administered without undue regard to procedural technicalities. To require the petitioner to now start all over by filing a separate suit over those very issues would be contrary to **Article 159 (2)**. I hold that this court has jurisdiction to entertain this constitutional petition including the bundled prayers.

46. Now on to the second issue for determination. *Res judicata* is a doctrine of general application which, although founded in ordinary civil jurisdiction, also applies in litigation concerning constitutional rights. It has found statutory expression in **Section 7** of the **Civil Procedure Act** as follows:

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

47. For an objection based on *res judicata* to be upheld there must have been a previous suit in which the matter was in issue; the parties in both matters must be the same or litigating under the same title; the previous matter must have been heard and determined by a competent court and the issue is raised once again in the new suit. See **John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others** [2015] eKLR.

48. The Supreme Court had occasion to address the doctrine generally and its applicability to constitutional petitions in **Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another** [2016] eKLR. The court stated:

[52] Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights. It would appear that the doctrine of res judicata is to apply in respect of matters of all categories, including issues of constitutional rights ...

[54] The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to Court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the Courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.

49. Whereas it is true that a previous suit being **Nairobi High Court Civil Suit No. 588 of 2006 (O.S)** existed in which the petitioner sued the deceased seeking leave to apply for land control board consent out of time, the suit was never determined on the merits. Even the deceased's **Nakuru HCCC No. 158 of 2005** was never heard and determined on the merits. It follows therefore that the petition herein is not *res judicata*.

50. The 1st respondents contend that the petition herein is defective for want of company resolution authorizing its institution, contrary to **Order 4 rule 1** of the **Civil Procedure Rules**, thereby rendering the petition incompetent and liable to striking out. I have perused the original petition filed herein on 27th September 2017. I note that it was accompanied with a verifying affidavit sworn by Kenneth Kiplagat, the petitioner's company secretary. He deposed that he was authorised by the board of the petitioner to swear the affidavit and he annexed a resolution authorizing the filing of these proceedings. The resolution has the petitioner's seal affixed on it and appears at page 27 of the petitioner's original bundle. Although there is no similar resolution in respect of the amended petition that was filed on 25th September 2019, I am satisfied that the petition herein was properly filed and is not defective for want of company resolution.

51. The next issue for determination is whether **Section 6** of the **Land Control Act** is unconstitutional in so far as it invalidates controlled land transactions where land control board consent has not been obtained not more than six months after agreement for sale has been executed. The section provides:

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;

(c) the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative 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 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.

52. There is a general presumption that all statutes duly enacted are constitutional. Needless to state, that presumption can be rebutted. The burden of proving unconstitutionality is always on he who alleges it. E C Mwitia J stated in Kenya Human Rights Commission v Attorney General & another [2018] eKLR as follows:

47. *There is a general but rebuttable presumption that a statute or statutory provision is constitutional and the burden is on the person alleging unconstitutionality to prove that the statute or its provision is constitutionally invalid. This is because it is assumed that the legislature as peoples' representative understands the problems people they represent face and, therefore enact legislations intended to solve those problems. In Ndynabo v Attorney General of Tanzania [2001] EA 495 it was held that an Act of Parliament is constitutional, and that the burden is on the person who contends otherwise to prove the country.*

48. *Another key principle of determining constitutional validity of a statute is by examining its purpose or effect. The purpose of enacting a legislation or the effect of implementing the legislation so enacted may lead to nullification of the statute or its provision if found to be inconsistent with the constitution...*

50. *And in the case of Centre for Rights Education and Awareness & another v John Harun Mwau & 6 others [2012] eKLR the court observed that in determining whether a statute is constitutional or not, the court must determine the object and purpose of the impugned Act and this can be discerned from the intention expressed in the Act itself.*

53. In its preamble, the **Land Control Act** states that its purpose is to provide for controlling transactions in agricultural land. The Court of Appeal discussed the purpose of the statute in David Sironga Ole Tukai v Francis Arap Muge & 2 others [2014] eKLR. Owing to its centrality to the issue of unconstitutionality raised herein, I reproduce the court's discussion at length:

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. Those authorities cover a span of 47 years from the date of enactment of the Act in 1967 to this day. ...

Granted the centrality of the provisions of the Land Control Act in this appeal, it is important at this point to set out verbatim, some of the important provisions of that legislation. For present purposes, these are sections 6, 7, 8 and 22 ...

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. ...

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 sub-division 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 obliged 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!”

54. As can be discerned from prayer (e) of the amended petition, the petitioner has specifically targeted **Section 6** of the Act which it seeks to be declared unconstitutional. The petitioner’s main concern is the requirement that an application for consent in respect of a controlled transaction be made within six months of the making of the agreement. The six-month limitation is provided for under **section 8 (1)** of the Act and not **section 6**. **Section 6** only declares void transactions where the consent has not been obtained.

55. The six-month limitation provided for under **section 8 (1)** is not a dead end. The proviso to the section gives parties to a transaction the right to approach this court, seeking extension of the period notwithstanding that the period may have expired. If sufficient reason is disclosed, the court is at liberty to enlarge time upon such conditions as it may think fit. Similarly, there is a right of appeal against refusal by the board to grant consent. Indeed, the petitioner herein sought extension through **Nairobi High Court Civil Suit No. 588 of 2006 (O.S)** wherein the court ordered that the issue of consent be dealt with in **Nakuru HCCC No. 158 of 2005**. As it turns out, the latter matter was dismissed for want of prosecution.

56. As noted earlier, when considering whether or not to grant consent, the land control board is required under the Act to consider 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. Most, if not all, of those factors are usually dynamic, hence perhaps the need to cap the period within which an application ought to be made to six months.

57. As the Court of Appeal stated in **David Sironga Ole Tukai v Francis Arap Muge & 2 others** (supra), the enactment of the Act was informed by noble and deliberate public policy considerations. The six-month limitation may be inconvenient but inconvenience alone is not a basis for declaration of unconstitutionality. I am not persuaded that the six-month limitation or **Section 6** of the Act are contrary to the purpose of the Act or that they interfere with the constitutional rights of citizens to own and deal in property under **Article 40** of the **Constitution** in a manner that offends **Article 24** of the **Constitution**.

58. The upshot of the foregoing is that the petitioner has not persuaded me that **Section 6** of the **Land Control Act** is unconstitutional.

59. The last issue for determination is whether the reliefs sought should issue. Among the reliefs sought is prayer (a) to the effect that leave be granted for the petitioner to apply for the consent. Notwithstanding the wording of the prayer, parties are in agreement that what is being addressed is whether an order extension of time to apply for the consent should issue. As previously discussed, there is no dispute that the agreement was entered into and that it provided that the deceased would obtain and present the relevant consents. That includes the consent required under **Section 6** of the **Land Control Act**. Thus, it is misleading for the 1st respondents to suggest that the petitioner ought to have pursued the consent.

60. From the material on record, it is apparent that the petitioner has been in possession since 1999, for a period of 21 years now, pursuant to the sale agreement dated 1st December 1999. The 1st respondents suggested that they regained possession in 2018. Suffice it to state that the 1st respondents’ attempt to get possession in the year 2018 was found by this court in the ruling dated 27th July 2018 to have been in violation of an order of the court. The court granted a mandatory injunction reinstating the petitioner in possession. The 1st respondents cannot use that short-lived unlawful interruption to claim that they have been in possession.

61. Additionally, I note that the petitioner stated in the affidavits it relied on that it paid to the deceased and 1st respondents a total of KShs 15,976,000 out of the total purchase price of KShs 16,758,425. The 1st respondents did not anywhere in their replying affidavit expressly deny receiving the said sum. Mr Johana Kiprotich Rono who is joined herein as one of the 1st respondents confirmed in his testimony that he, his brothers and the deceased severally received money towards the purchase price from the petitioner.

62. Further, I note that among the documents exhibited by the petitioner is a copy of the plaint in **Nakuru HCCC No. 158 of 2005** and the verifying affidavit thereof. The 1st respondents concede that the deceased filed the case against the petitioner and that it was about the transaction. The plaint is dated 10th June 2005. At paragraph 9 of the plaint, the deceased stated explicitly that as at the date of the plaint, the petitioner had paid KShs 15,976,000 towards the purchase price. The deceased declared at paragraph 3 of the verifying affidavit that the averments in the plaint were correct. I am thus satisfied that as at 10th June 2005 the petitioner had paid KShs 15,976,000 which as the petitioner rightly contends, constitutes over 95% of the purchase price. It will be recalled that the petitioner was required under the sale agreement to pay only 50% so as to get possession. There remains a balance of KShs 782,425 which the petitioner should pay the 1st respondents in exchange for transfer.

63. The petitioner has not stated what it wishes to do about the balance of KShs 782,425. The 1st respondents have not lodged any cross claim for the amount. If the transaction has to be completed, the petitioner must pay the entire purchase price. I will make an order in that regard.

64. The petitioner pleaded at paragraph 3.1.16 (a) of the amended petition that the 1st respondents hold the suit property in trust for it as

constructive trustees. In William Kipsoi Sigei v Kipkoech Arusei & another [2019] eKLR the Court of Appeal stated:

20. Taking into account the Macharia Mwangi Maina decision and the Willy Kimutai Kitilit decision alongside the circumstances of this case, we are of the view that the fact that the appellant herein, received the full purchase price for the property, allowed the 1st respondent to take possession, and for a period of at least fourteen years, let him remain on the property undisturbed, a constructive trust had been created....

21. We come to the conclusion that in the circumstances of this case the equitable doctrines of constructive trust and proprietary estoppel were applicable and enforceable in regard to land subject to the Land Control Act. We therefore agree with the learned judge of the Environment and Land Court that despite the lack of consent of the Land Control Board, the doctrine of constructive trust applied to the agreement between the appellant and the 1st respondent.

65. The circumstances in William Kipsoi Sigei v Kipkoech Arusei & another (supra) are on all fours with the situation herein. Although the petitioner has slightly under 5% of the purchase price to pay, the terms of the agreement for sale are clear as to when the balance of the purchase price was payable: the deceased had to obtain and provide the petitioner with all the consents necessary for completion of the transfer 15 days before the completion date. I am satisfied that equitable doctrines of constructive trust and proprietary estoppel are applicable herein and that the petitioner is entitled to a declaration that the 1st respondents hold the suit property in trust for it and that an order extension of time to apply for the consent should issue. Having sold the suit property to the petitioner, having received almost the entire purchase price and having put the petitioner in possession for about 21 years now, the 1st respondents have a duty in equity to complete the transaction.

66. The petitioner also seeks compensation for loss and damage in the sum of KShs 11,335,000 whose details are set out at paragraph 15 above. As I understand it, the claim for compensation is in the nature of special damages. The law is that special damages must be specifically pleaded and strictly proved with a degree of certainty and particularity. See Richard Okuku Oloo vs South Nyanza Sugar Co. Ltd [2013] eKLR. Beyond claiming that it undertook an audit of loss and damage occasioned by the 1st respondents and their agents' invasion and dispossession, the petitioner has not provided any material to justify the figures. Consequently, that limb of the claim fails for want of proof.

67. In view of the foregoing discourse, I make the following orders:

a) The petitioner to deposit in court the sum of KShs 782,425 (Seven Hundred Eighty-Two Thousand, Four Hundred Twenty-Five) being balance of the purchase price due to the 1st respondents. The deposit to be made within 21 (twenty-one) days from the date of delivery of this judgment.

b) Time within which to apply for consent of the Land Control Board in respect of the transaction over the parcel of land known as LR. No. Nakuru/Ol'ongai Phase 11/34 comprised in the Agreement for Sale dated 1st December 1999, between Mathias Kimnyole Langat and the petitioner herein, is hereby extended for a period of 6 (six) months from the date of delivery of this judgment.

c) The 1st respondents to execute all necessary forms and transfer instruments necessary for obtaining the said consent of the Land Control Board within 30 (thirty) days from the date of delivery of this judgment. In default, the Deputy Registrar of this court to execute all such necessary forms and transfer instruments on behalf of the 1st respondents.

d) A declaration is hereby issued that the 1st respondents hold the parcel of land known as LR. No. Nakuru/Ol'ongai Phase 11/34 in trust for the petitioner.

e) The 1st respondents are hereby directed to formally transfer the parcel of land known as LR. No. Nakuru/Ol'ongai Phase 11/34 to the petitioner and to execute the transfer document within 30 (thirty) days from the date of delivery of this judgment. In default, the Deputy Registrar of this court to execute the transfer document on behalf of the 1st respondents.

f) Upon transfer being registered in favour of the petitioner and issuance of title in the name of the petitioner, the sum of KShs 782,425 (Seven Hundred Eighty-Two Thousand, Four Hundred Twenty-Five) referred to under order number a) above be released to the 1st respondents.

g) Costs of the petition are awarded to the petitioner and shall be borne by the 1st respondents.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 18TH DAY OF MAY 2021.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Kairaria for the petitioner

Mr Okiro holding brief for Mr Kipkoech for the 1st respondents

Ms Cheruiyot for the 2nd respondent

Court Assistants: B. Jelimo & J. Lotkomoi