



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

IN THE MATTER OF THE ESTATE OF RICHARD MOINKETT OLE MEELI (DECEASED)

P & A 44 OF 2017

RULING

1. The genesis of the Application that has led to this ruling was an Affidavit of protest against the confirmation of the Grant dated 9th March 2015 and filed by the Protestor Simon Moinket Meeli on the same day.

PROTESTOR'S CASE

2. The gist of the protestor's case is that in his lifetime, the deceased subdivided his estate and gave each of his sons and himself 128 acres. Out of this subdivision, Peter Dama Meeli was issued parcel number **Kajiado/Kaputei North/7876** (disputed land). The protestor asserts that through an agreement entered into sometimes in August 2007, he purchased from Peter Dama Meeli the disputed land and paid him the whole of the purchase price. The Protestor alleges that since the disputed land was registered in the deceased's name, it was to be transferred directly to him. He alleges that the deceased signed the Transfer Forms and made an application to the Land Control Board for consent which application was subsequently approved. The protestor therefore contends that he is entitled to the disputed land, having purchased it from Peter Dama Meeli.

3. The protestor further averred that Peter had insisted that he be allocated the disputed land during the various meetings that the beneficiaries held to discuss the distribution schedule of the deceased's estate. According to the protestor, he objected to this as he had already paid the whole of the purchase price of the property to Peter. The dispute culminated in Kajiado **PMCC No. 31 of 2014** which was eventually dismissed.

4. The protestor averred that it was evident from the Petition of Letters of Administration that all the Petitioners, including Peter acknowledge that he is the beneficial owner of the disputed land. He urged the court to find that he is the beneficial owner of the property.

RESPONDENT'S CASE

5. Peter Dama Meeli responded via an affidavit dated 12th May and filed on 14th May 2015. He agreed with the protestor's assertion that the deceased had allocated 128 acres each to his sons. However, he denied ever selling any land to the Protestor, citing that the said land had not been transferred to his name by the deceased.

6. The Respondent averred that in the year 2000, he faced financial difficulties and needed money to pay his children's school fees and to repay a loan borrowed from the Agricultural Finance Corporation of Kenya. He requested the Protestor for a loan and the Protestor agreed to lend him a refundable sum of Kshs 5,000,000. The Respondent averred that soon thereafter, the Protestor left for the United States of America before giving him any money as had been agreed.

7. According to the Respondent, in the year 2007, their brother David K. Moinket approached him and informed him that the Protestor had given him some money amounting to Kshs. 1,300,000. This money was to be given to the Respondent in accordance with an agreement he had with the Protestor. He accepted and received the money and signed for the same in a black notebook, which David kept.

8. The Respondent averred that the copy of the agreement filed by the Protestor purported to have been made between him and David K. Moinket on behalf of the Respondent was a lie. He denied having meet David and signing the agreement. He averred that all the signatures on the Agreement were forgeries and went on to say that David did not have power of Attorney to act on behalf of the Protestor.

9. As per the Respondent, he could not have entered into a written or oral Agreement in respect of the disputed land as the same was not registered in his name, meaning he was not the legal owner.

10. The Respondent averred that all family members had agreed that the ownership to the disputed land be determined by this Honorable Court.

11. He averred that from the application for consent of land control board filed by the Protestor, the signature of the purchaser and that of the owner were forged and further that the signature of the Protestor on the application for the consent to transfer differed from his signature on the transfer form. In addition, the respondent claimed that the signatures of the deceased on the application for consent to transfer and on the transfer form were forgeries as well.

12. The Respondent averred that the transfer purported to have been signed by the deceased was neither dated nor executed by an advocate as it was a forgery done after the death of the deceased and in the absence of the Protestor who at the time was in the USA.

13. According to the Respondent, the protestor had not attached a duly signed consent to transfer issued by the Land Board in his favor as proof that the deceased had transferred the disputed land to him.

14. The Respondent sought to have the court dismiss the affidavit by the Protestor opposing the confirmation of grant.

15. Both parties filed written submissions in support of their respective positions.

PROTESTOR'S

SUBMISSIONS

16. Njoroge, advocate for the Protestor in the submissions outlined a brief background of the dispute and then framed the issue for determination as being whether the payments made to the respondent by the protestor were a loan or a purchase price for the disputed land.

17. It was submitted that during the hearing of the Protest, evidence was adduced by both the protestor and his witness who is their sister to the fact that there was an oral Agreement for Sale between the protestor and the Respondent to purchase his share of the deceased's estate. Mr. Njoroge further submitted that according to the protestor and his sister, who corroborated his evidence, the sale of land by the Respondent and the fact that the Respondent had financial problems was public knowledge within the family and was known also by the deceased.

18. Mr. Njoroge submitted that the oral Agreement for Sale informed the decision of the deceased to directly transfer the Respondent's share of the estate to the Protestor herein. Further the deceased made an Application for consent to the Land Control Board which was approved.

19. Counsel went on to submit that in his testimony, the Respondent did not dispute the fact that he received approximately Kenya Shillings Five Million from the Protestor. It was alleged that the Respondent was loaned the said amount by the protestor to help him repay a loan that he alleged that he owed the Agricultural Finance Corporation of Kenya and stated that he was ready to repay the amount to the protestor. Njoroge submitted that the change of tune by the Respondent was an afterthought having known that land prices have since appreciated and it would be easy to repay the protestor after selling a small portion of the suit land at the current market rate.

20. According to Njoroge, the amount paid could not have been a loan because the protestor struggled to finance the payment and was even forced to sell his huge herd of livestock. If it were a loan, the protestor herein could not have gone to such extent as loans are given when someone has surplus funds. He put forth that the Agricultural Finance Corporation of Kenya loan referred to was less than Kenya Shillings Five Million and if the payment was meant to be a loan to solely help in settling the Agricultural Finance Corporation of Kenya loan, the protestor would not have given more money than the actual Agricultural Finance Corporation of Kenya loan amount and the Respondent would not have agreed to receive more than the amount needed to settle the Agricultural Finance Corporation of Kenya loan.

21. Counsel submitted that the agreed purchase price for the Respondent's parcel of land was Kenya Shillings Forty Thousand (Ksh. 40,000) per acre. The total acreage was 128 acres. When you multiply the purchase price with the acreage, it amounts to Kenya Shillings Five Million, One Hundred and Twenty Thousand (Ksh. 5,120,000) which is approximately the amount given to and received by the Respondent.

22. Counsel submitted that when the protestor had travelled to the United States of America (USA) he told his late brother David Moinket to handle the sale transaction on his behalf to which he did. He went on to highlight that the Respondent admitted in his Affidavit to receiving part of the payment being Ksh. 1,300,000 from the late David Moinket yet during cross-examination, the Respondent denied ever signing any document acknowledging receipt of any money. It was submitted that the document that the Respondent admitted to have signed was annexed to the Protestor's Affidavit and marked as SSM-1. It is the Land Sale Agreement dated August, 2007, acknowledging that the final balance of the purchase price had paid being Ksh. 1,327,000. According to the Protestor's advocate, it is clear that the said Agreement is hand written on a piece of paper which originated from the black notebook alluded to by the Respondent.

23. Njoroge submitted that though the Respondent accepts that he is ready to repay the loan it is an afterthought because he was given the money in the year 2000, it is Seventeen (17) years down the line and he has never repaid a cent. The protestor has never demanded for the repayment of his money for the simple reason that it wasn't a loan but a purchase price and so he was only waiting for the transfer of the land to his name.

24. Counsel then submitted that despite the Respondent disowning the hand-written Agreement with his signature and calling it a forgery, he did not call the family members who signed as witnesses in the said Agreement to corroborate his allegations of forgery nor did he call handwriting expert to prove that the document was a forgery. He has also not reported the alleged forgery to any police station as it amounts to a criminal offence.

25. As per Njoroge, the deceased was instrumental in ensuring the protestor assisted the Respondent in paying the Agricultural Finance Corporation of Kenya loan and was aware of the oral Agreement for Sale. This informed his decision to transfer the Respondent's land directly to the Protestor.

26. Counsel submitted that the Respondent was shifting the goal posts because of greed and after learning that the parcel of land has since

appreciated in value. Further, he submitted that the Respondent did not have any witness from the family to corroborate his evidence. According to Counsel, the Respondent should have brought the witnesses in the Land Sale Agreement executed in August 2007 to indicate to court whether their signatures were forged.

27. Counsel submitted that the protestor was supported by their sister, Agnes Sian Moinkett, who testified to the effect that the sale of land to the protestor by the Respondent was public knowledge within their family and that they were shocked when he disowned the oral Agreement for Sale.

28. Regarding the issue of the legality of oral Agreements for Sale, Counsel relied the Court of Appeal authority of **Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri [2014] eKLR** to support his position.

29. On the basis of the above, counsel for the Protestor submitted that the protestor purchased the Respondent's parcel of land on a willing seller willing buyer basis. The Respondent received the entire purchase price. Therefore, he should not be allowed to turn around and assert that the oral Agreement for Sale is unenforceable and/or renege on the oral Agreement for Sale to the detriment of the protestor.

30. It was further submitted that the Respondent's entire evidence amounted to mere and unjustified denials without any corroborating evidence. He did not prove that it was his late father's will to transfer to him any land. He neither attached, as part of this evidence, any transfer documents executed by the deceased in his favour nor exhaustively explained to the Honorable Court why he was the only family member without the any transfer documents executed in his favour. It was therefore crystal clear that it was not the deceased's will to transfer to Peter Dama any parcel of land as the Deceased was aware of the existing Sale Agreement between the Protestor and the Respondent.

31. Counsel urged this Honourable Court to find that the Protestor is the beneficial owner of the disputed land.

RESPONDENT'S SUBMISSIONS

32. The Respondent relied entirely on his affidavit dated 12th May and filed on 14 May 2015.

33. For the Respondent, the issue in contention was whether the amount given out by the Protestor was a loan advanced to him or was the purchase price for the disputed land.

34. Onchiri for the Respondent submitted that the only witness called by the protestor was his Sister who did not indicate whether she was present when the oral agreement was made as alleged. None of the brothers or sisters who were present during the making of the oral agreement was called by the protestor apart from Agnes Sian Moinket who admitted in her affidavit sworn on 13 July 2015 and filed on 23 July 2015 that she was aware of all the transactions as she frequently communicated with Simon when he was in the United States via email who could update her on the same. According to Onchiri, this was proof that she was not present when the oral agreement was made.

35. Mr.Onchiri submitted that there was no written sale agreement between the protestor and the respondent and nobody witnessed the same if it ever existed. The acknowledgment referred to by the protestor which is headed "Land sale Agreement" was drawn by one person, even the handwriting on it shows.

36. Counsel submitted that it was surprising that the protestor avoided calling any of the people alleged to have witnessed the signing of the said sale agreement because he knew it as not a genuine document as all the signatures on it were forged.

37. Mr.Onchiri further submitted that no consent from the Land Control Board was issued and all the signatures on the transfer forms purporting it to that of the deceased were forgeries. Additionally, the said transfer forms were never executed before a Commissioner of Oaths and were not dated to show that there were done before the owner of the said Land died.

38. Onchiri submitted that the Honorable Court dismiss the application with orders to cost to the Respondent.

ISSUES FOR DETERMINATION

39. Having carefully considered the affidavits, evidence on oath of both parties written and oral submissions of both parties, it is my opinion that in order to make a conclusive determination on whether the payments made to the respondent by the protestor amounted to a loan or were purchase price for the disputed land. I will need to answer three pertinent questions to wit:

a. Whether there was a valid written agreement for the sale of the disputed land?

b. Whether there was a valid oral Agreement for Sale and if so, what was the implication of its existence?

c. Whether the disputed land had been subject to a valid transfer?

40. I will begin by first examining the existence of a written agreement for sale. From the evidence on record, the purported agreement for sale is a document produced by the Protestor that is claimed to be first the written agreement for sale and later an acknowledgment of payment of the balance of the purchase price. It is trite law that an agreement for the sale of land must be in writing, it must be signed by the parties thereto as well as be attested by witnesses for each party.

41. The **Law of Contract Act** clearly stipulates the requirements for a valid instrument to convey an interest in land. **Section 3 (3)** of the **Law of Contract Act** (Cap 23 of the Laws of Kenya) stipulates that no suit shall be brought upon a contract for the disposition of an interest in

land unless some memorandum or note there of is in writing and signed by the party to be charged. The leading authorities on this are Morgan v Stubenitisky 1977 KLR 188 and Wagichiengo v Gerald (1988) KLR406.

42. The Agreement in question at first glance would seemingly satisfy the above mentioned requirements. A closer examination of the document however reveals a few peculiarities. First of all, the land in question is not explicitly mentioned in the agreement. In addition, the document has a vague date of August 2007. To my mind, nothing would have been easier than to include these details.

43. Another peculiarity is that the transaction in the document and the signatures of the parties are that of the Respondent and David Moinkett. This raises the issues of under whose authority was David entering into an agreement for the sale of the land. This is because from the evidence on the record, by August 2007 when this document was purportedly drawn, the disputed land was still under the name of the deceased. How then could David enter into an agreement, even if it was on behalf of the Protestor?

44. Section 114 of the Registered Lands Act (*Repealed*) makes provisions for powers of attorney. Pursuant to this section, an instrument dealing with an interest in land shall not be accepted for registration where it is signed by an agent other than the registered proprietor without a power of attorney. This was clearly not the case in this transaction.

45. It therefore follows that the purported written agreement for the sale of land could not be able to pass any interest in the land for the reasons enumerated above and I find and hold as much.

46. It's a legal requirement in our jurisdiction that contracts for the sale of land be in writing to be enforceable. The common practice is for an exchange of contracts to take place indicative alienation of land from one party or legal entity to another on specified terms. This involves two sets of agreements of sale being signed by each party of which a copy is retained by each.

47. From the evidence on record the purported contract of sale of land being a share set aside for the benefit of the respondent during distribution of the estate to the dependants of the deceased lacks the following fundamentals. A contract in writing identifying the parties, the land to be sold and description, the purchase price, the signatures of the purchaser and seller with their respective witnesses if any as a sign of meeting of minds, conditions of sale, transfer, timeline for closing the contract and vacant possession by the purchaser.

48. This was an inheritance kind of sale where title to the suit property remained in the name of the deceased father to both the protestor and the respondent. The respondent had no clean title to convey to his brother the protestor in this succession cause. The deceased was the sole proprietor of the suit land and therefore capable to create an interest during his lifetime over the share due to the respondent for the benefit of the protestor.

49. In the instant case a transaction of this nature is clearly stated by the express terms of an Act of Parliament. What is more the necessary consents of a party to the transactions must be obtained within six months from the state of execution of the contract. I would only add that in my view this is a case in which the deceased and his two sons might well have been intended this disputed share of land be transferred unto the protestor subject to the land control Board consent. Nothing is said about coming into effect of the agreement between the protestor and respondent by the family members save for P.W.2 after the demise of the deceased before enforcing the terms in the statute. I find it difficult to believe the version put forth by the protestor and his witness in respect of contemplated sale agreement.

50. From the standpoint of the parties themselves and as I have pointed out there was no such mutual conception of the sale though probable initially but does not necessarily spell compliance with the provisions of the law of succession or the Land Control Act.

51. The Protestor advanced the position that there was a valid oral Agreement for sale between Simon and Peter. In supporting this position, Mr. Njoroge cited the case of Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri [2014] ekLR as below:

“In Yaxley – vs- Gotts & Another, (2000) Ch 162, it was held that an oral agreement for sale of property created an interest in the property even though void and unenforceable as a contract; but the oral agreement was still enforceable on the basis of a constructive trust or proprietary estoppel. In the instant case, it was the respondent who put the appellants in possession of the suit property not as licensees but with the intention that he was to transfer individual plots purchased by them. The respondent went ahead and received the purchase price. We are of the considered view that the doctrines of proprietary estoppel and constructive trust are applicable and the respondent cannot renege. As Lord Bridge observed in Llyods Bank Plc – vs- Rosset, (1991) 1 AC 107,132, a constructive trust is based on “common intention” which is an agreement, arrangement or understanding actually reached between the parties and relied on and acted on by the claimant. In the instant case, there was a common intention between the appellants and the respondent in relation to the suit property. Nothing in the Land Control Act prevents the claimants from relying upon the doctrine of constructive trust created by the facts of the case. The respondent all along acted on the basis and represented that the appellants were to obtain proprietary interest in the suit property. Constructive trust is an equitable concept which acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner by defeating the common intention. As was stated by Lord Reid in Steadman – vs-Steadman (1976) AC 536, 540,”

“If one party to an agreement stands by and lets the other party incur expense or prejudice his position on the faith of the agreement being valid he will not then be allowed to turn around and assert that the agreement is unenforceable”.

52. I find the set of circumstances in this current case to be in contrast with the situation in the **Mwangi Kagiri** case. In that case, the honourable judges found that a constructive trust had been created by the circumstances of the case. In the instant case however, I do not see how a constructive trust can be created. Even if there was an oral agreement, at the time it was being made, the Respondent did not have title over the disputed land. He could not as a result purport to pass a good title or interest in the land as he did not possess such title.

53. The final issue I have to contend with is whether the disputed land had been subject to a valid transfer. I have already found that the written Agreement for Sale did not constitute a proper document for the transfer of land and neither was the Oral Agreement valid or

enforceable. All that remains is that I examine the transfer documents in their totality.

54. From the evidence on record, it is clear that the transfer form is defective. It is not dated, it lacks proper execution and attestation and on the face of it appears to not have been registered. Such a document cannot pass the threshold of being referred to as a valid transfer document.

55. Similarly, the application for consent to the Land Control Board, which the Protestor submits was duly approved, is not dated. In addition, as per the Land Control Board Regulations, there is a prescribed form that is used to prove consent was indeed obtained. No evidence was tendered to show how consent was obtained. I am not inclined to believe that by merely inscribing the words 'Approved' on the Application for consent; the Land Control Board actually issued its approval.

56. On this position I am guided by the dictum of Honourable **Munyao Sila** in **Wesley Rutto v James Talam [2016] eKLR**. It is a lengthy dictum in which he illustrates his position on the issue of consents and goes further to cite other case law. However, for the purpose of driving the point home, I am obliged to reproduce it verbatim:

I have looked at the Land Control Board documents produced by the plaintiff. What he has produced is the application for consent. The nature of the transaction indicated in the said application is a subdivision and an eventual sale of 2.02 hectares for the plaintiff in consideration of Kshs. 30,000/=. The plaintiff stated that consent was given, an issue again denied by the defendant. I have looked at the application for consent produced and there is a writing above in the following words, "approved 2-3-78". I am however not persuaded that the plaintiff has proved on a balance of probabilities that their application for consent, if any, was approved for the reasons that follow.

The Land Control Act does contain the Land Control Regulations which provide for the manner in which the application for consent is to be lodged and given. For our purposes Regulations 2 (2) (a) which deals with subdivisions and Regulation 3 which deals with the way in which consent is given are material and I will set them out. They are drawn as follows :-

2. (2) Every application for approval to a subdivision of land shall be accompanied by -

a. a suitable plan on durable material showing the manner of subdivision, the means of access to each subdivision and, very approximately, any existing permanent development;

3. The consent of a land control board shall be given to the applicant, in duplicate, in Form 2 in the Schedule; the original consent shall be marked "Registration Copy" and shall accompany the document evidencing the controlled transaction when it is presented for registration.

The plaintiff in this case did not provide any plan showing the manner of subdivision of the defendant's land. I am therefore at a loss as to what subdivision was presented to the Land Control Board. But most importantly, the plaintiff did not produce the consent, to demonstrate that the Land Control Board actually gave consent to the transaction. It will be seen that there is a special form, which is Form 2 of the Schedule, which is the form evidencing that consent was given. If the plaintiff did not have the form, then at the very least, he should have tabled the minutes of the Land Control Board, showing that the Board did actually sit and approve the transaction for the subdivision of the defendant's land and sale of one of the subdivided portions to the plaintiff. The plaintiff produced neither consent nor the minutes of the Land Control Board to demonstrate that consent was actually given approving any transaction that the plaintiff may have had with the defendant. I cannot accept the mere writing "approved" on top of the application for consent, as evidence enough that consent was given, especially given the denial by the defendant. Any person could simply write "approved" on top of an application for consent. That by itself, without additional evidence on how the writing "approved" came to be on the document, will be too risky to take as evidence enough that consent was given. This is especially so, where there is denial by the other party that consent was never issued. It is for these reasons that I find that the plaintiff has not proved that consent of the Land Control Board was issued.

*I have already held that the plaintiff has not proved an agreement for sale with the defendant. I have also held that I have not been persuaded that consent of the Land Control Board was given. It was however argued by Mr. Mutai for the plaintiff, that equity should come to the aid of the plaintiff, even if it is found that consent of the Land Control Board was not given. I was referred to the Court of Appeal decision in the case of **Macharia Mwangi Maina & 87 Others vs Davidson Mwangi Kagiri**, Court of Appeal at Nyeri, Civil Appeal No. 6 of 2011 consolidated with Civil Appeal No. 26 and 27 of 2011. The brief facts of the case were that the respondent sold one acre plots of his expansive land (measuring 256 acres) to the appellants between the years 1983 and 1990. However, no consent of the Land Control Board was ever obtained. In the meantime the appellants moved into the portions sold to them and developed them. In the suit, they sought an order to compel the respondent to transfer the said portions to them. The High Court gave judgment for the respondent, inter alia finding that the transactions with the appellants, was subject to the Land Control Act and failure to have consent made the agreements void and unenforceable against the respondent. On appeal, the Court of Appeal (Koome, Mwilu & Odek JJAs) was of the view that since it is the respondent who put the appellants in possession, an overriding interest in favour of the appellants was created. The court further held that the respondent created an implied or constructive trust in favour of the persons who had paid the purchase price in respect of the plots sold. The court held that it is enjoined to dispense substantive justice to the parties and that the conscience of humanity would not allow an individual to receive a purchase price yet later plead that the agreement is void. The appeal was allowed.*

*Mr. Mutai also referred me to the decision of my sister, Honourable Justice A. Omollo, in the case of **John Simiyu Ndalila vs Francis Soita**, Bungoma Environment and Land Case No. 26 of 2013. In the said case, the plaintiff had entered into three agreements between the years 1998 and 2001, to purchase some land from the defendant. An issue arose as to whether the transaction was void for want of consent of the Land Control Board. The Court followed the Court of Appeal decision in **Macharia & 87 Others vs Davidson Mwangi Kagiri** and found that the defendant was relying on the provisions of the Land*

Control Act to perpetuate a fraud. The learned judge entered judgment for the plaintiff.

I have done my own research on the aftermath of the decision in Macharia & 87 Others. That decision was a clear departure from a chain of authorities which firmly held that lack of consent of the Land Control Act rendered the transaction void. One of the most oft quoted cases in this subject and which exemplified this position is the case of Wamukota vs Donati (1986) KLR 328. The facts were that in the year 1976, the respondent/defendant purchased certain land but consent of the Land Control Board was not given. In 1982, the same seller sold the same land to the plaintiff/appellant at about three times the price of the earlier sale. Consent was given for this latter transaction and the land transferred to the appellant. The appellant then sued the respondent for eviction. The High Court held that the sale to the appellant was a fraud on the respondent. On appeal, the Court of Appeal held that the first sale could not be upheld for want of consent of the Land Control Board. The issue of the Land Control Act, being used to perpetuate fraud was exhaustively discussed in the case. Gachuhi JA, dealing with the matter stated as follows :-

"The main question in this appeal is whether equity would apply in contrast to the express provisions of the law. The law as it stands, is that there is no way by which equity can be applied to assist a litigant who failed to obtain Land Control Board consent to a transaction dealing with agricultural land.

There is no apparent evidence of fraud on the part of the appellant. If the appellant and the owner colluded to deprive the respondent of what, at one time, appeared to be a dealing in land which he wished to buy and the appellant and the owner acted within the law in their dealing, there is nothing the court can do for the respondent. If the Act was applied by the appellant and the owner as a means of fraud as the learned trial judge put it, so long as the procedure that was followed is what is laid down in the law, however sympathetic the respondent's case is, there is no way, as the matter stands, the court can interfere. It is only the parliament that can amend any part of the Act that is applicable in this case which is causing injustice or which is causing inconvenience or hardship to the parties relating to a controlled transaction. Ignorance of the procedure is no defence."

The Court of Appeal was of alive to the injustice that may be caused to parties who may have purchased land but not obtained the consent of the Land Control Board where required. But it was of the view that the law must be applied unless amended by Parliament."

57 in disagreeing with the position taken in the Mwangi Kagiri(supra) case, Munyao J went on to cite David Sironga Ole Tukaivs Francis arap Muge & 2Others, Nairobi Civil Appeal No.76 of 2014 (2014) eKLR where he held that:

"the cut and dry provisions of section 6 of the Land Control Act, would wreak inequality, injustice" and concluded that the solution to the problem was to apply "the principles of equity, of natural justice, to temper the harshness of the law such (as) section 6 of the Land Control Act." Judgment was entered for the defendants for transfer of the land in issue. On appeal, the respondent relied on the case of Macharia & 87 others to support the decision of the High Court. The Court of Appeal (bench of Kariuki, M'Inoti & Mohamed JJAs) considered whether the departure in decision in Macharia & 87 others was based on a sound legal foundation. The Court was of the view that the decision of Macharia & 87 others was wrong, and I think it is important and I hope that I will be forgiven, that I quote parts of the said decision in extensu. The learned judges stated as follows:-

"For several reasons, we are, with respect, unable to agree with the above reasoning (that of Macharia & 87 others). First and foremost, we have already stated that in our opinion, granted the express, unequivocal and comprehensive provisions of the Land Control Act, there is no room for the courts to import doctrines of equity into the Act. This is the simple message of section 3 of the Judicature Act. Consequently, invocation of equitable doctrines of constructive trust and estoppel to override the provisions of the Land Control Act has, in our view, no legal foundation. We have also noted that this Court had previously held in a line of consistent decisions and in very clear terms, that there was no room for application of the doctrines of equity in the Land Control Act..."

Secondly, in holding that there was an implied or constructive trust which did not require the consent of the Land Control Board, the Court not only ignored previous decisions of itself on the point, but also completely ignored the express terms of section 6(2) of the Land Control Act which provides as follows:

For the avoidance of doubt it is declared that the declaration of a trust of agricultural land situated within a land control area is dealing in that land for the purposes of subsection (1).

As this Court explained in Daniel Ng'ang'a Kiratu V Samuel Mburu (supra) section 6(2) of the Land Control Act was introduced on 24th December 1980 by Act No 13 of 1980 to undo the judgment of the High Court in Gatimu Kinguru V Muya Gathangi (supra) where Madan, J., as he then was, held that creation of a trust over agricultural land in a land control area did not constitute "other disposal of or dealing" for the purposes of section (1) of the Land Control Act and therefore did not require the consent of the Land Control Board. In Daniel Ng'ang'a Kiratu V Samuel Mburu (supra) this Court, relying on section 6(2) of the Land Control Act reiterated that declaration of trust over agricultural land requires consent of the Land Control Board. By relying on Gatimu Kinguru V Muya Gathangi (supra) whose effect had been undone by the amendment, which brought in section 6(2), the decision of this Court in Macharia Mwangi Maina & 87 Others V Davidson Mwangi Kagiri (supra), was clearly per incurium. On the same vein even the judgment of the High Court in Mwangi & Another V Mwangi [1986] KLR 328 which was cited in Macharia Mwangi Maina & 87 Others was also per incurium because it was based on Gatimu Kinguru without realizing that the latter decision had been overridden by Act No 13 of 1980.

The decision of the High Court in Mutsonga V Nyati (supra), which held that equitable doctrines of implied, constructive and resulting trusts are applicable to registered land, did not involve the Land Control Act and is therefore not relevant. In addition, that judgment cannot apply in cases involving the Land Control Act because of section 6(2) of the Land Control Act, which expressly requires consent of the land

control board even in cases of declaration of trusts.

Thirdly, for actual possession of land to amount to an overriding interest within the meaning of **section 30(g)** of the **repealed Registered Land Act**, that occupation must be occupation, which in law, is not declared to be illegal. We have already noted that under **section 22** of the **Land Control Act**, occupation of agricultural land pursuant to a transaction, which has not obtained the consent of the relevant control board, is a criminal offence. To that extent, such occupation cannot, with respect, constitute an overriding interest...

To hold that occupation that is declared by statute to be illegal can constitute an overriding interest would, with respect, amount to the courts recognizing and enforcing conduct that is by law declared to be illegal. No court of law will enforce an illegal contract or one, which is contrary to public policy. Decisions of this Court abound on the point...

Fourthly, we are not convinced that there can be an estoppel against the provisions of a statute. The **Land Control Act** requires consent to be obtained from the relevant land control board if the transaction involves agricultural land and failure to do so renders the transaction void for all purposes and in addition any occupation of the land pursuant to such a void transaction is declared to be a criminal offence. We are firmly of the opinion that no estoppel can arise under the **Land Control Act** to render valid and lawful conduct, which is otherwise declared by the Act to be void for all purposes and also a criminal offence.

Lastly, we do not share the view that the express provisions of the **Land Control Act** can be equated to procedural technicalities that can be overlooked by virtue of **Article 159 (2) (d)** of the **Constitution** and the overriding objective under the **Appellate Jurisdiction Act**. We have already adverted to the history and the policy considerations behind the **Land Control Act**, which firmly convinces us that the requirement for application for consent of the land control board before a transaction involving agricultural land can be legally recognized is far much more than a procedural requirement. We must never lose sight of the fact that the overriding objective is first and foremost a case management tool; it was never intended to sound the death knell for substantive requirements of the law...

In our humble view and with utmost respect, the law on the interpretation and application of the **Land Control Act** antedating ***Macharia Mwangi Maina & 87 Others V Davidson Mwangi Kagiri***(*supra*) remains good law."

58. I fully align myself with the decisions as cited above. As such I find that the protestor did not fulfill the requirements for consent from the Land Control Board.

59. Further, if indeed the deceased had intended to transfer the land directly to the Protestor, nothing would have been easier than for him to effect the transfer during his lifetime. No evidence has been tendered to support this allegation.

60. From the preceding analysis, the only logical conclusion that can be drawn is that the disputed land has not properly divested to the Protestor.

61. There was no sale agreement exhibited confirming that a share of 128 acres was to be conveyed to the protestor by virtue of an earlier payment of ksh 5,000,000 by his brother the respondent.

62. Its unrealistic that the protestors proposed purchase of a share of the portion of land meant for the benefit of the respondent was never acknowledged nor corroborated by other beneficiaries to the estate of the deceased. The witness who gave evidence on behalf of the protestor had scanty information on the details of the alleged agreement. In my view most of it was hearsay evidence which had no probative value

63. Section 107 1 of Evidence Act provides as follows: Whoever desires any court to give judgment as to any legal right or liability on the existence of facts which he asserts must prove those facts exist. Evidence is the basis of justice. Our legal system critically depends on the parties ability to produce information and material that substantiates their claims.

64. The evidence by the protestor in this objection proceedings gave rise to a clustered probabilities of either high ,low or in between, which qualifies as good evidence but never went far enough to establish existence of facts for the court to decide in his favor.

65. The protestor urged this court to place reliance on incomplete transfer forms purportedly meant prepared to transfer suit land but no evidence of delivery of title was completed by way of consent and registration. The transfer forms remained a mere intent.

66. The most fundamental guiding principle of the Kenyan inheritance law is testamentary freedom, where the person who owns property during life the power to direct its disposition at death.

67. We are told by the protestor that the deceased distributed his estate to all his beneficiaries in his lifetime ,that is how this contested share was to be passed on to his benefit under the purchase scheme of arrangement with the respondent .That may as well be true but so long as the deceased never executed a Will the court is unable to exclude any of the beneficiaries. If there was a Will in the mode of distribution it would have spoken where the deceased is no longer able to speak.

68. I find and hold that whatever monies the Protestor paid to the Respondent could amount to either an intention for the purchase price for the disputed land or soft loan to be secured by some form of security. If anything, from the evidence on the record, I can only conclude that the monies were a soft loan between brothers. The resolution of such a dispute therefore, is not in the realm of this succession court during confirmation hearings pursuant to the provisions in section 71 of cap 160 of the laws of Kenya. I think it is common ground that this court has such jurisdiction as is expressly conferred on it by statute and the constitution. As whether the protestor availed **Prima facie** evidence for the determination of this dispute in his favour the answer is in the negative.

69. The decision as to what happens to the amount of Kenya shillings five million paid to the respondent in lieu of sale of his share of land to

his brother the protestor in this proceedings should be pursued in another legal forum or through mediation .The deceased had distributed his land among the heirs during his lifetime. He however died intestate and the court was being asked to decide the allocation of this portion of land earmarked for the respondent but which was to be transferred to the protestor.

70. If that were the case and end of the matter I hold the view that the distribution should have been done among the heirs and their entitlements subject to any disposed of by their father in his lifetime or by Will so that no heir may be disinherited completely. The power to dispose of the size or whole of the share in dispute should have been vested with the respondent.

71. In the upshot I make the following orders:

- a. The Affidavit of protest filed on the 9th of March 2015 is hereby dismissed.
- b. The disputed land, that is parcel number Kajiado/Kaputei North/7876 revert back to the Estate of the deceased for distribution according to the schedule to be agreed upon by the beneficiaries in compliance with the law of succession Act cap 160 of the laws of Kenya.
- c. Costs of this litigation be borne by the parties.

Dated, delivered and signed in open court on 6th April, 2018 at Kajiado.

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R. NYAKUNDI

JUDGE

In the presence of:

Mr. Kariuki for the petitioners

Mr. Onchiri for the respondent

Mr. Oduor holding brief for Talit for the protestor