



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

HCCC NO. 6898 OF 1991

KAMUTHI FARMERS CO-OPERATIVE SOCIETY LTD.....PLAINTIFF

VERSUS

NAIROBI CITY CONTY.....DEFENDANT

ARCHDIOCES OF NAIROBI (KAHAWA

WEST CATHOLIC CHURCH).....1ST INTERESTED PARTY

SARAH WAITHERA NJUGUNA.....2ND INTERESTED PARTY

JOSEPH KAMAU THUO.....3RD INTERESTED PARTY

REGINA WITHUTI KIMARU.....4TH INTERESTED PARTY

PETER KAMAU NJOROGE.....5TH INTERESTED PARTY

MARY WANJIRU NJOROGE.....6TH INTERESTED PARTY

GORDON MWANGI MACHARIA.....7TH INTERESED PARTY

SAMUEL KINGORI KARIUKI.....8TH INTERESTED PARTY

JOESPH PETER GATUNG'O.....9TH INTERESTED PARTY

DANIEL GITAU KIMANI.....10TH INTERESTED PARTY

LAWRENCE KIOI NGARUIYA.....11TH INTERESTED PARTY

RALPH AUGUSTINE MWANGI KIMOTHO.....12TH INTERESTED PARTY

ESTHER TABU MWADIME.....13TH INTERESTED PARTY

RAHAB WANJIKU GIKUNGU.....14TH INTERESTED PARTY

HANNAH MUTHONI MWANGI.....15TH INTERESTED PARTY

GABRIEL NJOROGE KAMAU.....16TH INTERESTED PARTY

JAMLICK NGUGIRA KAMANDE.....17TH INTERESTED PARTY

WILFRED NDURE KAMARU.....18TH INTERESTED PARTY

ANNE GATHONI KABAYA.....19TH INTERESTED PARTY

JUDGMENT

1. By a plaint dated 24th December 1991 the plaintiff seeks judgment against the defendant for:-

- (a) Eviction of the defendant from LR No. 71/7, a property situated at the City of Nairobi measuring 415 acres or thereabouts.*
- (b) Mesne profits for the year 1989.*
- (c) Costs of the suit.*
- (d) Interest in (b) and (c) above at courts rates.*
- (e) Any other or such further relief as to which this honourable court deems fit and just to grant.*

2. Upon being served with copies of plaint and summons to enter appearance, the defendant filed its defence and counterclaim on 6th August 1992. The same was amended on 9th April 2009. In the further amended denfence, and counterclaim the defendant seeks:-

- (i) A declaration that the defendant is pursuant to the sale agreements between itself and Kahawa Farmers Co-operative Society Limited entitled to be registered as proprietor of a portion of 154.5 acres and 21.238 acres out of LR No. 71/7.*
- (ii) A declaration that the sale transaction of 21.238 acres between the defendant and Kahawa Farmers Co-operative Society Limited between 1979 and 1981 is valid and that the defendant is entitled to be registered as the proprietor of the said portion out of LR No. 71/7.*
- (iii) A declaration that Kahawa Farmers Co-operative Society Limited held the portion of 154.3 acres and 21.238 acres respectively in trust for the defendant and the conveyance of Land Reference No.71/7 to the plaintiff absolutely was void.*
- (iv) An order requiring the plaintiff to excise and transfer the portions of 154.5 acres and 21.238 acres of Land Reference NO. 71/7 in occupation by the defendant to the defendant failing which the registrar of the High Court be directed to execute the necessary documents to vest to the portions of 154.5 acres and 21.238 acres in the Defendant.*
- (v) In the alternative the defendant prays that it be declared the rightful owner of the said portions of 154.5 acres and 21.238 acres of Land Reference No. 71/7 by virtue of and under the doctrine of adverse possession.*
- (vi) Costs of this suit together with interest.*
- (vii) Such other or further relief as the honourable court may deem fit to grant.*

3. Pw1, James Mungai Wainaina, adopted his witness statement as part of his evidence in chief. He told the court that he is a member of Kamuthi Farmers Cooperative Society, the owner of LR No. 71/7 measuring about 415 acres in total. That the, then Mayor of Nairobi City, Andrew Kimani Ngumba said, the City Council needed part of the land but the members refused. He further told the court that there was no resolution giving the defendant the portion of the land. That the defendant constructed residential houses on the said portion, the members got nothing as value for the said 154.5 acres which was taken by the defendant. He prays that the defendant be compelled to pay compensation for the 154.5 acres and a refund of the rates.

4. PW2, Eliud Perminus Njoroge, the secretary of the plaintiff told the court that he has been in office since the year 2004. He stated that he was handed over documents. One of the documents was a commission of inquiry report by the Ministry of Cooperatives touching on the transaction between Kahawa Farmers Cooperative Society and Nairobi City Council. The report is dated July 2003. It appears there was a complaint by members of Kahawa Farmers Cooperative Society Limited regarding the running of affairs of the society. He and other officials were mandated by the members to implement the said report specifically to recover lost assets, excision, sale and disposal of LR 71/7. The City Council was interested in two portion LR No. 71/7 measuring approximately 154.5 acres and LR No. 71/7/10 measuring approximately 21.97 acres. There was an agreement of sale allegedly between Kahawa Farmers Cooperative Society Limited and Nairobi City Council in 1973. The purchase price was kshs.135,000/-.

5. Pw2 further stated that he could not tell who were the officials of the Society then. He stated that he interacted with the founder members of the society who claim they did not consent to the disposal of the 154.5 acres in an Annual General Meeting or Special General Meeting. He said he got information that the members rejected the decision to dispose of the property. There is no resolution confirming the sale of the property to the Nairobi City Council. Further that there was no such record in the Ministry of Cooperatives. That on 9th October 1974 the then President of Kenya, Jomo Kenyatta vide a gazette notice exempted said sale from the requirements of the Land Control Board. That the said gazette notice came after the alleged transaction. That there was no such transfer to the defendant with respect to LR 71/7. That on 20th December 1989 Kahawa Farmers Cooperative Society Limited conveyed the entire 415 acres to Kamuthi Farmers Cooperative Society Limited. The conveyance was registered in the Land Registry on 21st December 1989. By this time LR 71/7 was still the property of the plaintiff.

6. That by this time 1989, the defendant had erected an estate on the 154.5 acres. It is what is now Kahawa West Estate. The defendant occupies another portion LR 71/7/10 which there is a sewerage plant. The occupation was contested by the members who did not approve of the sale. No sale with respect to this portion was registered with the Ministry of Cooperatives. The portion measuring 21.97 acres has a sewerage plant. The occupation was contested by the members who did not approve of the sale. No sale with respect to this portion was registered with the Ministry of Cooperatives. The portion measuring 21.97 acres has a sewer though abandoned. It has a title in the plaintiffs

name issued on 6th July 2016. He also stated that the plaintiff has been paying the charges due in respect of the entire parcel of land. He prays that the defendant be removed from the portion the occupy as the transaction was illegal. The sale agreement of 1974 was not approved by all members and was signed by questionable officials, valuation was not done. He prays that the defendant's counterclaim be dismissed with costs. In support of its case the plaintiff relied on the documents in the list of documents dated 30th October 2010.

7. PW3, David Nyika, a licensed land surveyor, told the court in 2004, he was engaged by the plaintiff and the then Chief Land Surveyor from the City Council of Nairobi to carry out investigation in connection with the suit property. He was to determine what portion of the land the defendant was occupying. He completed the exercise, prepared a report which he addressed to the plaintiff and the Director of City Planning & Architecture. It is dated 11th April 2005. The findings were;

(i) The defendant was occupying LR No. 71/7/1 measuring 154.5 acres (what is known as Kahawa West Estate/Congo Village contained in survey plan FR No. 133/14.

(ii) The defendant was also occupying LR NO. 71/7/10 measuring 21.97 acres contained in survey Plan No. 184/66. This portion contained the sewerage works. They were part of subdivision of LR 71/7.

He produced the report as exhibit in this case by consent of both parties.

8. Dw1 Stephen Gathuta Mwangi is the Nairobi County Chief Officer Lands. He is also a licensed surveyor. He told the court that he has worked with the defendant from 1st February 1985. That he has had an opportunity to look at the documents relating to the suit properties. He told the court that in 1973, Nairobi City Council then bought 154.5 acres from Kahawa Famers Cooperative Society Limited for Kshs.135,000/-. The amount was paid. On instructions from the seller kshs.70,000 was paid to Agricultural Finance Cooperation to offset a debt owed by Kahawa Farmers Cooperative Society Limited, Kshs.65,000 was paid directly to the said Society. There was to be a subdivision so that 154.5 acres could go to the defendant and 260 acres to Kahawa Farmers Cooperative Society Limited. The subdivision was effected and a deed plan No. 198427 was issued on 21st September 1995. He produced the correspondences between the City Council of Nairobi and Agricultural Finance Cooperation as exhibits D1 and D2. The sale agreement was produced as exhibit D3 and the Deed plan as exhibit D4. The gazette notice dated 19th October 1974 issued by the First President of Kenya Jomo Kenyatta exempting the transaction from being subject to the Land Control Board conditions was produced as exhibit D5. He further told the court that a transfer was not effected as at some point the original title deed was misplaced.

9. That in 1979, the City Council of Nairobi acquired 21.238 acres for the construction of the sewer treatment plant which was to serve the estate and the adjacent areas. The purchase price was Kshs.435,000/-. He produced the correspondences between City Council of Nairobi and Kahawa Farmers Cooperative Society Limited on the sewer treatment works. The price was agreed at Kshs.20,000 per acre. There is a letter dated 17th April 1980. It is signed by three officials of Kahawa Farmers Cooperative Society Limited. The purchase of the 21.238 acres for purposes of sewer treatment works was approved by a general purpose committee meeting of the Nairobi City Council held on 14th May 1990. On 20th May 1981 there was instructions by Kahawa Farmers Cooperative Society Limited for payments of Kshs.180,000 to one Samuel Njatha of P. O. Box 75195 Nairobi. The balance of Kshs.245,000/- was to be paid to Kahawa Farmers Cooperative Society Limited. The same was paid vide a voucher dated 15th June 1981 to Kahawa Farmers Cooperative Limited vide a cheque No. D49669 of 18th July 1981. The Kshs.180,000 was paid vide a remittance advice giving cheque No. 174174 to Kahawa Farmers Cooperative Society Limited. The said cheque was collected by C. Kuria of Kahawa Farmers Cooperative Society Limited on 15th August 1981. The Kshs. 435,000 was paid in full. He produced the correspondence as exhibit D6. By the time the sewer was being constructed, there were developments and farms belonging to members of Kahawa Farmers Cooperative Limited. The City Council compensated those members one of them is Wangare Makindu who was paid Kshs.9,900/-. On 25th July 1979 vide cheque No. 145026. There is a left hand thumb print affixed. Another one is Michael Njuguna who was paid Kshs.41,000 vide cheque No. 145096. He has signed. A total of fifteen members were compensated. He produced the two cheques as exhibit D7.

10. In the 154.5 acres the City Council of Nairobi constructed Kahawa site and service estate. There are permanent houses with tarmac roads among other amenities. This was between 1978 – 1982. There are approximately 600 houses which were sold to individual allottees on tenant purchase terms. All the houses were sold. He produced the original list of allottees as exhibit D8. There is also a school and a market on the said land. In phase 2 of the said project the City Council allocated land to various allottees and private developers. There are new houses and schools. The land is fully occupied. The City Council has been in occupation since 1973 to date. The 600 tenants finished paying for the houses but they are yet to be issued with ownership documents owing to the lack of title for the 154.5 acres. The officials of Kahawa Farmers Cooperative Society Limited declined to sign the necessary transfer documents citing lack of payment for the 21.238 acres. The City council paid for the said portion. He produced correspondences between the City Council and the said Society herein as exhibits in this case. The City Council paid fully for the two portions namely 154.5 acres and 21.238 acres respectively. He urged the court to declare that the two parcels belong to the defendant. He further told the court that a title was issued in 2016 for the 21.238 acres in favour of the plaintiff. The defendant wrote to the National Land Commission requesting cancellation of the said title as it was sewer land. The National Land Commission wrote to the County Secretary of the defendant vide a letter dated 26th January 2018. The letter is produced as exhibit D8. A restriction was then placed on the title pending the hearing and determination of this suit. He prays that the plaintiff's suit be dismissed with costs and that the defendant be declared the owner of the two parcels.

11. DW2, Michael Njuguna Makindu told the court he was a member of Kahawa Farmers Cooperative Society Limited. He was member no. 129. He stated that his mother was also a member. He told the court that he is aware of the sewer that was constructed in the 1980s. The members were informed of the sale of 21 acres at Kshs.20,000 per acre. The City Council was the buyer. He told the court that the members did not object. He told the court that he had constructed a permanent house. The issue of compensation was discussed and he was paid Kshs.41,000/-. He also stated that his mother had a semi permanent house and she was paid Kshs.9,900/-. That S. N Wambaru was a surveyor who was undertaking survey on behalf of Kahawa Farmers Cooperative Society Limited. He further stated that he joined Kahawa Farmers Cooperative Society Limited in 1978 when Kahawa West Estate was already existing. He stated that the plaintiff came into being on 12th August 1986. The certificate of registration shows there were 152 members and not 182. He said he was an official of the plaintiff between 1999 to 2004. He took over from Duncan Mwaniki who was the Chairman then. He said as an official of the plaintiff he never got

any complaint from members regarding Kahawa West Estate and the sewer. He said he did not order any inquiry into the sale while he was in office. He said he does not know who wrote to the Ministry of Cooperatives.

12. DW3 Isaac Njuguna said he was relying on the valuation report dated 17th May 2016. It was produced by consent. He works with the Nairobi County as a valuer. He said he was conversant with Kahawa West Estate and the sewer land. That the 154.5 acres holds Kahawa West Estate whose phase 1 has 600 houses. There are 2 and 1 bedroom houses which have been disposed as a tenant purchase scheme. There is also a public market with 250 stalls. Mahiga Primary School, a public play ground, public administration offices, service roads, sewerage system and other infrastructure phase 2 has 2000 plots serviced by the County Council of Nairobi allocated to individuals. The said phase is now built up with permanent houses. It has private schools, churches, petrol station, commercial buildings etc. Approximate 3000 people live there. The sewer line is still in use and the value is approximately Kshs. 10 billion. That the defendant owns public utilities. The titles have not been issued because of the matters pending in court. The defendant intends to confer ownership rights on the owners. He produced the valuation report as exhibit D10.

13. At the end of the testimonies the parties tendered written submissions.

The Plaintiff's submissions

14. The submissions are dated 3rd February 2019 and filed in court on 5th February 2019 Kamuthi Housing Cooperative Society Limited is a successor in title of Kahawa Farmers Cooperative Society Limited which was wound up due to realignment of the plaintiff's objectives with the authorization of the commissioner of cooperatives. It is the plaintiff's case that the defendant forcefully without proper alienation documents entered the suit property and constructed a housing estate on a portion measure 154.5 acres together with a sewerage treatment plant. Regarding the issue of ownership of the suit property, it is the plaintiff's submissions that the original LR No. 71/7 was subdivided into LR 71/7/1 which the defendant illegally and forcefully occupied by constructing Kahawa West estate. The same measures approximately 154.5 acres. LR NO. 71/7 10 in which the defendant forcefully constructed a sewerage plant, measures approximately 21.97 acres. The documents produced by both parties support the fact that LR NO. 71/7 belonged to Kahawa Farmers Cooperative Society Limited. On the alleged sale agreement between the Kahawa Farmers and the defendant, over 154.5 acres, PW2 (Eliud Perminus Njoroge) confirmed that LR No. 71/7/1 was excised from LR No. 71/7. Pw2 gave evidence confirming that sometime in 1970s the defendant approached the plaintiff's predecessor and expressed its desire to acquire 154.5 acres for the construction of a housing estate. PW2 said that upon convening a members general meeting by the officials of the society the proposal to alienate or sell a portion of the land was declined for the reason that members believed the society had need for the land.

15. That following this refusal the defendant began a calculated exercise to forcefully acquire the land by signing a purported sale agreement dated 2nd January 1973. under clause (b) of the alleged sale agreement, there was an express provision that after subdivision had been done in favour of the defendant, the remaining portions of 260.5 acres would be reconveyed back to the plaintiff clause (3) stated that the consideration to the plaintiff would be a deposit of Khss.135,000/- pending subdivisions and upon successful subdivision and registration of the 154.5 acres a total of 11 homes constructed by the defendant to be transferred to 11 individuals outlined in the agreement. PW1 testified in court that he is member no182 of the plaintiff having joined in 1972. He testified that the then officials of Kahawa Farmers Society approached the members about the defendant acquiring 154.5 acres but the members opposed the alienation hence there was no resolution passed by members.

16. The alleged sale agreement dated 2nd January 1973 has been challenged on the grounds that it was not supported by any resolutions from a duly convened general meeting, there was no land control board consent for subdivision, sale and transfer and that the alleged consideration was substantially paid to individual persons for their sole and exclusive benefit in contravention of the Cooperative Societies Act. That section 42 of the Cooperative Society Act provides that "the property and funds of a cooperative society shall only be applied for the benefit of the society and its members in accordance with that section 27 provides that the central management committee shall enter into contracts upon getting appropriate resolutions from the members through a general meeting duly executed. That additionally, according to the plaintiff's by laws annexed in the list of documents. The alienation of any immovable property upon obtaining a members resolution, authorized officials shall prepare proper documents to be executed by the chairperson, vice chair person, honorary Secretary, Treasurer and thereafter ratified by a cooperative officer within its jurisdiction.

17. The alleged sale agreement did not indicate in its descriptive portion a date in which a resolution by members was passed. LR No. 71/7 was agricultural land which required consent before subdivision. The legal notice no. 260 of 19th October 1974 issued by the President Jomo Kenyatta purporting to exempt such transaction from the provisions of the land control board was done after the alleged sale agreement dated 2nd January 1973 had been illegally executed. On the issue of consideration, it was submitted that both PW1 and PW2 testified in court that the consideration alleged to have been made was not received by the members of the plaintiff and did not benefit the members of the plaintiff in any way.

18. The purported payment structure in disposing property belonging to a cooperative Society and then having individual persons being allocated houses by the defendant in their personal names contravened the provisions of section 42 of the Cooperative Societies Act. The defendant did not pay any consideration to the plaintiff as envisaged in section 42 of the Act and the defendant's allegation of acquiring the 154.5 acres portions are devoid of any legal process and therefore the portions still the property of the plaintiff. PW3, a licenced surveyor James Nyika informed the court that the defendant in addition to occupying LR 71/7/1 also occupied a further 21.97 acres on LR No. 71/7/10 of which the defendant had constructed a sewerage treatment plant. The defendant witnesses produced no documents showing the alleged sale process of the land nor contracts and that they only produced internal documents.

19. The purported payment for the 21.97 acres by the defendant to any individual persons cannot be deemed as legal consideration to the plaintiff. The sale of immovable property must be in writing and executed by both parties as emphasized by section 3 of the law of contract Act. 21.97 acres belong to the plaintiff who has obtained a title to the same which was issued by Ministry of Lands.

20. The defendant's claim for adverse possession is purely an afterthought and or alternative way of seeking ownership since the discoveries of the additional 21.97 acres occupied by the defendant was made in 2005, by the joint survey Report of 11th April 2005. Any cause of

action regarding the portion measuring 21.97 acres, the limitation of action computation can only be deemed to start running from 11th October 2005 when it became clear that 21.97 acres was outside the 154.5 acres that was subject of the alleged sale agreement.

21. The defendant's entry into the plaintiff's 154.5 acres was by virtue of the alleged sale agreement and not just an open occupation. The claim for adverse possession is a nonstarter. It prays that the defence and counterclaim be dismissed with costs to the plaintiff.

The Defendant's Submissions

22. They are dated 22nd January 2019. By the year 2004 the tenants who had purchased the houses constructed by the defendant under the tenant purchase scheme had completed paying and the defendant appointed an advocate to process the leases. It was at this point that the defendant realized that the two portions of land had not been transferred to it. It prepared a transfer of the 154.5 acres and sent it to the plaintiff for execution which they declined and the original title for the entire LR No. 71/7 was reported missing.

23. DW1 testified that the defendant purchased the 154.5 acres. He produced an agreement of sale between the City Council of Nairobi and Kahawa Farmers. On the payment of the purchase price. The same was properly sealed. PW2 was not able to produce the by laws of Kahawa Farmers Cooperative Society Limited which would have shown that the persons who executed the agreement were not authorized signatories as alleged or whether or not a resolution of the members was required. The plaintiff's witness sought to rely on the inquiry report in respect of Kamuthi Farmers Cooperative Society Limited by the Ministry of Cooperatives Development in 2003 but the said report does not contain by laws of Kahawa Farmers Cooperative Society Limited which was dissolved in 1988. It relies on section 107 and 109 of the Evidence Act. The plaintiff failed to call sufficient evidence to prove its case to the required standard of probability.

24. The consent of the Land Control Board is required when effecting registration of the transfer of land and can therefore be obtained at any point prior to the registration and transfer documents. The defendant urged the court to make judicial notice of the fact that it is common practice for a vendor to make an application for the consent of Land Control Board upon execution of the agreement for sale. The transaction herein was not invalidated by the fact that the exemption from the requirement of consent was issued after execution.

25. The plaintiff disputes the transaction of 21.238 acres due to lack of a written agreement. Section 3(3) of the Law of Contract Act Cap 23 as amended vide Act No. 2 of 2002 came into effect in June 2003. Section 3(7) of the Land Act excludes the application of sub-section 3(3) of the Act to contracts made before the commencement of the section. DW1 produced documents duly executed by the City Council of Nairobi and Kahawa Farmers showing the meeting that had been held to discuss and set down the terms of transaction and documents executed by the officials of Kahawa Farmers Cooperative Society Limited acknowledging receipt of the purchase price.

26. DW2 testified that he was a member of Kahawa Farmers Cooperative Society Limited prior to its dissolution. He later became an official of the Kamuthi Farmers cooperative Society Limited from the year 1999 to 2004. He confirmed there was a transaction between Kahawa Farmers and the City Council of Nairobi in 1979. He confirmed that the land relating to the transaction was not vacant as some members had built houses and planted crops. It was agreed that the Nairobi City Council would compensate the members who had developed their parcels. DW1 was one of those compensated. It put forward the case of **Samuel Mugo Michuki vs Peter Mberi Michuki [2012] eKLR** and the same case in Appeal as **Peter Mberi Michuki vs Samuel Mugo Michuki [2014] eKLR**.

27. The defendant having purchased the two parcels was put in possession of the said parcels by Kahawa Farmers Cooperative Society Limited which created an overriding interest in favour of the defendant.

28. The act of granting the defendant in possession of the parcels created an implied, constructive or trust in its favour. It quoted **Hulsbury's Laws of England 4th Edition, Volume 48 at paragraph 690** to explain constructive trust, it also put forward the case of **Macharia Mwangi Maina & 87 others vs Davidson Mwangi Kagiri [2014] eKLR; Munyuka Kura Company Limited vs Barnado Vicezo De Masi (The Administrator of the Estate of Domenico De Masi (Deceased) [2018] eKLR**. DW3 testified that the defendant has developed one portion with a permanent residential estate, schools, churches, a market and commercial developments and on the other portion the defendant has constructed a sewer to serve the estate. DW3 produced a valuation report which estimated the value at Kshs. Ten (10) billion. Kahawa Farmers Cooperative Society Limited transferred the entire LR 71/7 measuring approximately 415 acres to the plaintiff in 1989 without informing the defendant, or excising the two portions and further in 2016 the plaintiff irregularly transferred 21.238 acres to a 3rd party known as Kamuthi Housing Cooperative Society Limited. Kahawa Farmers held the two portions of land in trust and therefore the conveyance of LR No. 71/7 measuring 415 acres to Kamuthi Farmers in 1989 was void.

29. It is undisputed that the defendant took possession of the two portions in 1973 and 1979 and developed them. In light of Section 7, 9, 13, 37, 38 of the Limitation of Actions Act, time started running in 1973 for the 154.5 acres and in 1979 for the 21.238 acres when the defendant took possession. By the time the plaintiff filed this suit in 1991 the defendant had been in possession for 18 and 12 years respectively and as such possession had been continuous, exclusive, and uninterrupted.

30. The plaintiff did not adduce any evidence to show that the defendant was dispossessed of the property when it allegedly acquired the suit property. It has put forward the cases of **James Mama Kinya vs Gerald Kwendaka [2018] eKLR; Sammy Likuyi Adiema vs Charles Shamwati Shisikani [2014] eKLR; Munyuka Kuria Company Limited vs Bernado Vilezo Demasi. (The administrator of the Estate of Domesico De Mase (Deceased) [2013] eKLR**. The defendant's possession is not wrongful as the same was delivered upon payment of the full purchase price and other conditions of the contract mesne profits are special damages available to the owner on whose property has been trespassed upon and such damages must be pleaded and proven. It relied on the case of **Karanja Mbugua & Another vs Marybin Holding Co. Limited [2014] eKLR**.

31. The sale and purchase of the two portions having been valid and that the defendant is in occupation, it follows that the two portions be registered in the defendant's name. The 1995 sub-divisions of 21.238 acres caused by the plaintiff where the Deed Plan NO. 145029 was issued and the certificate of title issued in 2016 when this suit was pending ought to be cancelled as it was obtained irregularly and that both parcels should be transferred to the defendant to enable it issue leases to purchasers who are currently in occupation of the suit premises. It has put forward the case of **Alice Chemutai Too vs Nickson Kipkirui Korir & 2 Others [2015] eKLR**. It has also relied on Section 26 of

the Land Registration Act, 2012.

32. DW2 who was a member of the plaintiff and its Chairman between 1991 – 2004 testified that the plaintiff has since ceased to exist hence the parcels cannot be registered in its name. The fact that the plaintiff transferred 21.238 acres to a different Society (Kamuthi Housing Cooperative Society Limited) in 2016 instead of itself shows that the plaintiff's society lacks *locus standi* in this suit as it has ceased to exist. The sale of both portions to the defendant was valid and that Kahawa Farmers held the two portions in trust for the defendant. It prays that the plaintiff's suit be dismissed with costs and that the defendant's counterclaim be allowed with costs.

33. I have considered the pleadings, the evidence on record. I have considered the written submissions made on behalf of the parties and the authorities cited. The issues for determination are:-

(i) Who between the plaintiff and the defendant is the legal and bonafide owner of the portion approximately 154.5 acres within LR NO. 71/7 to locate within Kahawa West estate in Nairobi County?

(ii) Who between the plaintiff and the defendant is the bonafide owner of 21.97 acres within LR No. 71/7 where the defendant has constructed a sewerage treatment plant?

(iii) Whether Kahawa Farmers Cooperative Society Limited held the portion of 154.5 acres and 21.238 acres out of LR No. 71/7 in trust for the defendant.

(iv) Is the plaintiff entitled to mesne profit for the two portions measuring 154.5 acres and 21.97 acres within LR No. 71/7 currently occupied by the defendant and what is the quantum thereof?

(v) Is the defendant entitled to the reliefs sought in the counterclaim herein.

(vi) Who should bear costs?

34. It is not in doubt that the defendant is in occupation of the 154.5 acres in LR No. 71/7 and 21.97 acres on the said parcel. DW1 testified that in the 154.5 acres there is a permanent residential estate, schools, churches, a market and other amenities. In the said estate there are about 600 houses, sold to individual allottees on tenant purchase terms. All the houses were sold. He produced the list of original allottees as exhibit D8. In phase two of the said portions, the land was allocated to various allottees and private developers. The same is developed with houses, schools and other amenities. He told the court that the defendant has been in occupation of this portion since 1973. The defendant has put up a sewerage treatment plant on the portion measuring 21.97 acres. All this is confirmed by the plaintiff.

35. It is the plaintiff's case that the sale of 154.5 acres was invalid as the agreement was not signed by authorized officials and was not sealed. That the exemption from the Land Control Board was issued after execution of the agreement and that there was no resolution by members to sell. Further that the sale of the 21.238 acres was invalid as there was no written agreement for sale, and there was no resolution of the members to sell. DW1 told the court that the defendant purchased 154.5 acres out of LR No. 71/7 from Kahawa Farmers Cooperative Society Limited in the year 1973 at an agreed purchase price of Kshs.135,000/-. On instruction from the said society, the defendant paid Kshs.70,000 to Agricultural Finance Cooperation who held the title to the property as security and the balance of Kshs.65,000 was paid directly to Kahawa Farmers cooperative society limited. The sale of agreement dated 21st January 1973 was produced as exhibit in this case, the same is duly signed and sealed with a common seal of the Kahawa Farmers Cooperative Society. PW2, when is shown the sale agreement confirmed that it had the seal of the society on it. He also confirmed that there were no minutes to show that the members rejected the sale. DW1 also produced as evidence correspondences between the City Council of Nairobi and Kahawa Farmers Cooperative Society Limited on the payment of purchase price.

36. In the year 1974, the first President of Republic of Kenya Jomo Kenyatta vide legal notice NO. 260 in the Kenya Gazette supplement No.75 exempted the sale of the property LR No. 71/7 to Nairobi City Council from the requirement for the consent of the Land Control Board. This has not been challenged by the plaintiff herein. DW1 further testified that the defendant was interested in purchasing a further 2.1238 acres from Kahawa Farmers Cooperative Society Limited for the construction of a Sewerage treatment plant. The agreed purchase price was Kshs.20,000 per acre making a total of Kshs.435,000/-. Evidence of correspondences relating to this transaction and how the purchase price was paid was produced as exhibits in this case. The said evidence has not been challenged by the plaintiff. I am convinced that the sale agreement dated 2nd January 1973 was duly signed by authorized signatories. PW2 when cross examined was not able to provide a list of the authorized signatories and the requirement of a resolution of the members before a sale. The plaintiff also failed to produce the by-laws of Kahawa Farmers Cooperative Society Limited to confirm that a resolution of the members was necessary before a sale. I therefore find that the sale agreement in respect of the 154.5 acres is valid and is enforceable. There is evidence that on the said portion lies Kahawa West Estate, schools, a market, churches and other amenities. In the case of **Samuel Mugo Michuki vs Peter Mbiri Michuki [2012] eKLR** cited by the defendant's counsel, it was held thus:

".....in the affidavit evidence on record and the oral evidence tendered before me, I find as a fact that there was an agreement of sale between the plaintiff and the defendant in respect of the suit property and that on the strength of that agreement the plaintiff took possession and later on the plaintiff brother one Joseph Mugo Michuki took over until the property was demolished by the defendant. if there was no agreement for the sale as stated the defendant could not have written to the plaintiff on the same along the lines of the letter from Karuga Wandai advocates....."

37. Sitting on appeal in the same case of **Peter Mbiri Michuki vs Samuel Mugo Michuki [2014] eKLR**. The Court of Appeal upheld the High Court's finding that there existed an agreement for sale stating thus:

".....on the issue whether there was a sale agreement between the parties, the learned judge made a finding that there was a

valid sale agreement. The judge observed that the applicant in his supporting affidavit stated that he had paid a purchase price of Kshs.200/- and a further Kshs100/-. We are of the view that the learned judge did not err in finding that a valid sale agreement existed. We are fortified in this view because the letter dated 18th August 1978 from Karuga Wandai & Co. Advocates on behalf of the appellant stated that the appellant had deposited Kshs.300/- for transmission to the plaintiff because he had changed his mind to sell the land; we find that this letter is corroborative evidence illustrating that a sale agreement had been entered into between the parties and purchase price had been paid. On the strength of this corroborative evidence, we are convinced that that the learned judge did not err in finding that there was a sale agreement.....”

38. In relation to the second portion measures 21.238 acres out of LR No. 71/7 the same was purchased in 1979 for the construction of a sewerage treatment plant. The plaintiff disputed the validity of the sale as there was no written agreement citing the provisions of Section 3(3) of the Laws of Contract Act Cap 23 Laws of Kenya.

Section 3(3) of the Laws of Contract Act provides that:-

No suit shall be brought upon a contract for the disposition of an interest in land unless:-

(a) the contract upon which the suit is founded:-

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Section 3 (7) of the Act provides that:-

“The provisions of subsection (3) shall not apply to any agreement or contract made or entered into before the commencement of that subsection.”

39. Dw1 produced documents duly executed by the City Council of Nairobi and Kahawa Farmers Cooperative Society Limited showing that a meeting had been held to discuss the sale and setting out the terms of the transaction including the purchase price. DW2 who was an official of the plaintiff confirmed that there was such a transaction. He confirmed that he was among the members who were compensated for the developments in the said portion. The plaintiff did not challenge this evidence. The defendant produced documents executed by the official of the Kahawa Farmers Cooperative Society Limited acknowledging receipt of the purchase price. The defendant’s evidence that it had paid the full purchase price for the 21.97 acres has not been challenged by the plaintiff.

40. I find that the defendants has demonstrated that it entered into agreement with Kahawa Farmers Cooperative Society Limited for the sale and purchase of the two portions, prior to liquidation of the society. I therefore find that the defendant is the legal and bonafide owner of the portions approximately measuring 154.5 acres and 21.97 acres respectively within LR NO. 71/7 in which the Kahawa West Estate sits and the sewerage treatment plant.

41. In the case of **Kiplagat Kotul vs Rose Jebor Kipngok [2019] eKLR** the Court of Appeal held thus, in part:-

“We have deliberated on the reasoning by the trial court on the validity of the consent of the land control board, certain pertinent facts are evident and proven from the record. It is indisputable that the sale agreement was entered into between the appellant and the respondent; pursuant to the agreement, the respondent received the purchase price of Kshs.700,000/- from the appellant. The trial Judge correctly held that the respondent is estopped from reneging on the sale agreement. We agree with the judge and add that the doctrine of proprietary estoppel and constructive trust are applicable in the instant case and the respondent cannot renege from her contractual obligations as well as fiduciary duty imposed by law and equity. As Lord Bridge observed in Lloyds Bank PLC vs Rosset [1991] IAC 107, 132, a constructive trust, is based on a ‘common intention’ which is an agreement, arrangement or understanding actually reached between the parties and relied on and acted on by a claimant.....”

I am guided by the above authority.

42. The defendant having purchased the two portions was put into possession by Kahawa Farmers Cooperative Society Limited in the years 1973 and 1979 respectively. By doing this Kahawa Farmers Cooperative Society Limited created an implied or constructive trust in favour of the defendant. **Halsbury Laws of England 4th Edition, Volume 48 at paragraph 690** explains constructive trust as follows:-

“A constructive trust will arise in connection with the legal title to property whenever one party has so conducted himself that it would be inequitable to allow him to deny to the other party a beneficial interest in the property acquired.....The relevant intention of each party is the intention reasonable understood by the other party to be manifested by the party’s words or conduct notwithstanding that he did not consciously formulate that intention or even acted with some different intention which he did not communicate.

The first question is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the property, there has at any time prior to acquisition, or exceptionally at some later date, been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially, such an agreement will be conclusive.

Where the evidence is that the matter was not discussed at all, the court may infer a common intention that the property was to be shared beneficially from the conduct of the parties. In this situation direct contributions to the purchase price by the party who is not the legal owner, whether initially, or by way of mortgage installment, will readily justify the inference necessary to the creation of a constructive trust.

Exceptionally the agreement, arrangement or understanding may be arrived at after the date of the original acquisition. Once common intention has been established, whether by direct evidence of common agreement or by inference from conduct, the claimant must show that he acted to his detriment in reliance on the agreement....”

43. It is not in dispute that upon receiving the purchase price the Kahawa Farmers Cooperative Society Limited gave vacant possession to the defendant in respect of the two parcels. It is in evidence that in 1989, Kahawa Farmers Cooperative Society Limited transferred the entire LR No. 71/7 measuring 415 acres to the plaintiff without excising off the two portions to the defendant. The defendant is neither a trespasser nor a licensee on the suit property as it was put in possession by Kahawa Farmers Cooperative Society Limited. In the case of **Macharia Mwangi Maina & 87 Others vs Davidson Mwangi Kagiri[2014]** the Court of appeal stated thus:

“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”.

Also in the case of **Peter Ndungu Njenga vs Sophia Watiri Ndungu [2000] eKLR**, The Court of Appeal expressed itself as follows:-

“The concept of trust is not new. In case of absolute necessity but only in case of absolute necessity, the court may presume a trust. But such presumption is not to be arrived at easily. The court will not imply a trust save in order to give effect to the intention of the parties”.

I am of the view that Kahawa Farmers Cooperative Society Limited given all circumstances intended to transfer the two portions to the defendants.

44. Similarly in the case of **Willy Kimutai Kitilit vs Michael Kibet [2018] Eklr** the Court of Appeal stated thus:

“The Land Control Act does not, unlike section 3(3) of the Law of Contract Act and section 38(2) of the Land Act, save the operation of the doctrines of constructive trust and proprietary estoppel nor expressly provide that they are not applicable to controlled land transactions. Although the purpose of the two statutes are apparently different they both limit the freedom of contract by making the contract void and enforceable. Since the doctrines of constructive trust and proprietary estoppel apply to oral contract which are void and enforceable, in our view, are by analogy, they equally apply to contracts which are void and enforceable for lack of consent of the Land Control Board especially where the parties in breach of the Land Control Board, have unreasonably delayed in performing its contract. However, whether the court will apply the doctrines of constructive trust to a contract rendered void by lack of consent of Land Control Board will largely depend on the circumstances of each particular case”.

I am guided by the above authority.

45. I find that the Kahawa Farmers Cooperative Society Limited held the two portions of 154.5 acres and 21.238 acres out of LR 71/7 in trust for the defendant and therefore the conveyance of LR No. 71/7 measuring approximately 415 acres to Kamuthi Farmers Cooperative Society Limited in 1989 was void. The issuance of title to LR No. 71/7/10 to Kamuthi Housing Cooperative Society for 21.23 acres is also void.

46. Having found that the two parcels belong to the defendant, I will not go into a finding of whether the plaintiff is entitled to mesne profits. It goes without saying that the plaintiff is not entitled to mesne profit as the defendant’s occupation of the two properties was not wrongful.

47. In conclusion I find that the plaintiff has failed to prove its case against the defendant and the suit is dismissed with costs to the defendant.

48. Accordingly, judgment is entered in favour of the defendant in its counterclaim as follows:-

(a) That a declaration is hereby issued that the defendant is pursuant to the sale agreements between itself and Kahawa Farmers Co-operative Society Limited entitled to be registered as proprietor of two portion measuring approximately 154.5 acres and 21.238 acres out of LR No. 71/7.

(b) That a declaration is hereby issued that the sale transaction of 21.238 acres between the defendant and Kahawa Farmers Co-operative Society Limited between 1979 and 1981 is valid and that the defendant is entitled to be registered as the proprietor of the said portion out of LR No. 71/7.

(c) That a declaration is hereby issued that Kahawa Farmers Co-operative Society Limited held the portions of 154.5 and 21.238 acres respectively in trust for the defendant and the conveyance of Land Reference No.71/7 to the plaintiff absolutely was void.

(d) That an order is hereby issued compelling the plaintiff to excise and transfer the portions of 154.5 acres and 21.238 acres out

of Land Reference NO. 71/7 in occupation by the defendant to the defendant. In default the Deputy Registrar of the High Court is hereby directed to execute the necessary documents to vest to the portions of 154.5 acres and 21.238 acres in the Defendant.

(e) That the defendant do have the costs of the suit and interest

Dated, signed and delivered in Nairobi on this 4TH day of JUNE 2020.

.....

L. KOMINGOI

JUDGE

In the presence of:-

No appearance for the plaintiff

Ms Muthoni for Mrs. Maina for the Defendant

Kajuju – Court Assistant