



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 82 OF 2015

DAMARIS WANJIRU NGANGA.....PLAINTIFF

VERSUS

LOISE NAISIAE LEIYAN.....1ST DEFENDANT

KENYA COMMERCIAL BANK LIMITED2ND DEFENDANT

VICTOR MAHONGA AYUMBA.....THIRTY PARTY

J U D G M E N T

1. The plaintiff commenced the instant suit by way of a plaint dated 19th March 2015. The plaint was amended on 10th November 2015 and further amended on 31st March 2017. The suit was founded on an agreement for sale dated 5th February, 2014 entered into between the plaintiff and the 1st defendant for the purchase by the plaintiff from the 1st defendant of land parcel **Miti Mingi Mbaruk Block 8/2367 (Kianjoya "D")** (hereinafter referred to as " the suit property"). The plaintiff averred that she fulfilled all the terms of the sale agreement but that the 1st defendant failed to avail the completion documents to enable the transaction to be completed while the 2nd Defendant(interested party) held a charge over the suit property which required to be discharged for the sale transaction to be finalized.

2. The plaintiff prays for judgment against the 1st defendant for:-

- (a) A permanent injunction restraining the defendant from selling the property to other third parties and/or in any way interfering with the suit property.*
- (b) An order for specific performance.*
- (c) A refund of any sum or excess incurred or likely to be incurred by the plaintiff in the completion of the agreement upon orders of the Court.*
- (d) In the alternative refund of the equivalent of the current market value of the property at Kshs. 9 Million.*
- (e) Interest on (a), (b), (c), and (d) at Court rates.*
- (f) Cost of the suit.*
- (g) Any other relief the Honourable Court may deem fit to grant.*

Additionally, the plaintiff has prayed for judgment against the Interested Party for :-

- (h) An order of disclosure of the status of the Loan account to the plaintiff to facilitate the plaintiff's clearance of the loan balance.*
- (i) An order restraining the withdrawal of the sums in the loan account by the first defendant (sic) by herself, her servants and or agents.*
- (j) An order for the transfer of the suit premises to the plaintiff upon the plaintiff's or first defendant's (sic) settlement of the loan account.*

(k) Any other relief that this Honourable Court may deem fit to grant.

3. The 1st defendant filed a statement of defence dated 8th September 2016. The 1st defendant's contention was that the suit property was agricultural land and consequently subject to the provisions of the Land Control Act, Cap 302 of the Laws of Kenya. She stated the Agreement of sale entered into on 5th February 2014 became a nullity and unenforceable as no consent of the Land Control Board was applied for and/or obtained under the provisions of the Land Control Act. The 1st defendant averred in the circumstances the plaintiff's claims were unsustainable and that the plaintiff would only be entitled to claim a refund of any money she had paid pursuant to the void contract.

4. The 2nd defendant, KCB Ltd filed a defence dated 21st April 2016. The 2nd defendant averred that it was a stranger to the plaintiff's averments respecting her sale agreement with the 1st defendant but admitted having charged the suit property to secure a loan facility advanced to the 1st defendant by the Bank. The 2nd defendant stated it would discharge the security upon the outstanding loan being cleared.

5. The suit was heard before me on 26th September 2019 and 28th November 2019. The plaintiff testified as the sole witness in support of the plaintiff's case. The 1st defendant opted not to offer any oral evidence in defence while one Ms Christine Keter, Branch Manager of the 2nd defendant's Nakuru Branch testified on behalf of the 2nd defendant.

6. It was the plaintiff's evidence that she was introduced to the 1st defendant by a friend who knew she (the plaintiff) was looking for a plot to buy and was aware the 1st defendant was selling her residential plot **Miti Mingi Mbaruk block 8/2367**. The plaintiff stated the 1st defendant showed her the plot which had a uncompleted residential building. She furnished her with copies of the title documents which showed the plot was in the 1st defendant's name. The plaintiff carried out a search at the Lands Office which revealed the plot was indeed in the 1st defendant's name and was charged in favour of the 2nd defendant to secure a loan facility of Kshs4.5 million. The plaintiff stated she agreed to purchase the plot from the 1st defendant and that they entered into the sale agreement dated 5th February 2004.

7. The plaintiff's bundle of documents dated 19th March 2015 and filed on 23rd March 2015 were admitted in evidence as **PEX 1-16** while the certificate of official search was admitted as **PEX 17 (a) & (b)** respectively.

8. The purchase price under the Agreement of sale was Kshs.5,800,000/= which was to be paid as provided under clause 3.1 of the sale agreement. The completion period was 180 days from the date of execution of the agreement. The plaintiff in her evidence stated she paid the full purchase price as provided within the period of the completion of the transaction. She stated that the 1st defendant was supposed to apply part of the purchase price to repay the bank loan and obtain a discharge of the charge. By the completion date the 1st defendant was to avail the completion documents itemized under clause 5.2 as follows:-

(i) Original title deed

(ii) Discharge of charge from KCB Ltd

(iii) Executed transfer in favour of the purchaser

(iv) Consent to transfer from the relevant Land Control Board.

(v) Valid rates clearance certificate

(vi) Vendor's passport size photographs

(vii) Copies of vendor's ID card and PIN certificate

9. The plaintiff stated although she paid the full amount to the 1st defendant, the 1st defendant did not pay the amount outstanding on the loan to enable the Bank to release the discharge of charge. The plaintiff explained that after she had paid the full purchase price she took possession of the suit property in July 2014 and placed a caretaker on the property and later completed the house and was now living in the house with her family. The plaintiff further testified that after she completed paying the purchase price the 1st defendant became uncooperative which prompted her (the plaintiff) to have her advocates write to the 1st defendant the several letters exhibited in the plaintiff's bundle of documents requesting for the completion documents. Notably the letters dated 3rd July 2014 and 7th July 2014 from Sheth & Waithigo Advocates. Vide the letter dated 3rd July 2014 the plaintiff confirmed she was ready to complete the transaction and by the letter dated 7th July 2014 the plaintiff confirmed having deposited with the advocates the sum of Kshs.528,334/= which she stated was the outstanding balance on the purchase price.

10. The plaintiff further testified that following attempts at mediation/ settlement of the matter, the 1st defendant wrote a letter dated 26th August 2014 (**PEX9**) committing to avail the completion documents. The contents of this letter addressed to the plaintiff were as follows:-

Damaris Wanjiru Nganga

P O Box 2870-20100

26th August 2014

NAKURU

Dear Damaris,

RE: SALE OF LAND PARCEL NO.MITI MINGI/MBARUK BLOCK 8/2367 (KIANJOYA "D") LOISE NAISIAE LEIYAN TO DAMARIS WANJIRU NG'ANG'A

Following the agreement between you and I witnessed by the MP, Nakuru West and County Director (Humanity Without Borders Inc), I am ready and willing to complete the transaction and have the Title documents and Discharge of Charge released to you. However, I am not able to secure the discharge of the Title from the Bank since the loan has not been fully paid. My request to you is release and pay the sum of Ksh.529,334/= and deposit to my loan account No. 1100262504, Kenya Commercial Bank Ltd-Nakuru Branch.

I promise to deliver the title document of Miti Mingi/Mbaruk block 8/2367 within sixty days (60) from the date you make the payment to the bank of the money held by you.

Kindly confirm once you have deposited the money so that I can pay the difference and start the process of applying for the release of the title.

Yours faithfully

LOISE NAISIAE LEIYAN

Cc : Sheth & Wathigo Advocates

Cc: Oburu Mbeche Advocates

11. The plaintiff stated the 1st defendant did not, however honour the pledge she made to avail the completion documents despite her lawyers(plaintiff's) making repeated demands that she honours her promise. The plaintiff explained that as the 1st defendant was not servicing the loan account she lodged a caution against the title on 11th July 2014 as evidenced by the certificate of official search dated 19th November 2014 (**PEX12**) to protect her interest as a purchaser. The 1st defendant on 2nd December 2014 once again wrote to the plaintiff committing to avail the completion documents (**PEX13**) but she failed to do so.
12. The plaintiff stated that the 1st defendant had the obligation to avail all the completion documents including the consent of the Land Control Board and the Discharge of charge. The plaintiff explained that as she had paid the full purchase price she took possession of the suit property, completed renovation/construction of the incomplete building and continued to service the bank loan against the 1st defendants account to forestall foreclosure by the bank which would have resulted in the property being sold by public auction by the bank in exercise of its power of sale under the charge. The plaintiff stated that after the house was completed she moved in and she was now residing in the house with her family. The value of the property including the house as per the valuation carried out in 10th March 2015 was Kshs.9,000,000/=. The plaintiff stated she continued to pay the loan to preserve the property. She stated that although she had a right to apply for the Land Control Board as a party to the sale agreement, she could not do so as there was a subsisting charge over the property which had not been discharged.
13. Under cross examination by Mr. Oduor advocate for the 1st defendant, the plaintiff affirmed that the sale agreement dated 5th February 2014 was executed by both herself and the 1st defendant and that as at 5th August 2014 there had been no application made to the appropriate Land Control Board. She explained though as a party she could have made the application to the Land Board she could not do so since the land was charged and a discharge of charge would have been required. The plaintiff said she took possession of the suit property in July 2014 and that she continued to pay the loan to the Bank to pre-empt the Bank from auctioning the property.
14. The evidence of Christine Keter (DW1) was simply that the 1st defendant was advanced a loan of Kshs.4.5 million as a member of staff of the 2nd defendant on the security of land parcel **Miti Mingi/Mbaruk Block 8/2357** (Kianjoya 'D'). The letter of offer dated 17th January 2013 and the charge dated 7th February 2013 and the copy of title deed were admitted in evidence as **DEX 1, 2 & 3** respectively. The witness stated as at 23rd September 2019 the 1st defendant's loan account had an outstanding balance of Kshs.2,623,674/16. She stated initially the 1st defendant was servicing the loan directly but presently it was a different person who was making deposits. DW1 stated that the Bank had not authorized the sale of the property but indicated if the loan was paid in full the Bank would release the title and issue a discharge to the 1st defendant and/or as ordered by the Court.
15. The witness cross-examined by Mr. Oduor advocate for the 1st defendant, affirmed that the approval of the bank was not sought before the plaintiff and the 1st defendant entered into the sale agreement. She further pointed out deposits into the loan account were made by the plaintiff and other persons who she could not tell whether they were making the deposits on behalf of the plaintiff or the 1st defendant. The witness however stated she had not come across any deposit made by the 1st defendant. She stated when the 1st defendant left the employment of the Bank, the bank made a demand for the payment of the loan which was now at commercial rate of interest since the 1st defendant ceased being a staff of the bank. The witness further stated the loan account was not in arrears since the loan was being serviced.
16. The parties after the close of the trial filed written submissions as directed by the Court. The Court has reviewed the pleadings, the evidence tendered by the parties and has considered the submissions made on behalf of the parties. The following issues arise for determination by the Court:-

(i) Whether the sale transaction between the plaintiff and the 1st defendant was null and void and therefore unenforceable by

reason of lack of consent from the Land Control Board?

(ii) Whether the remedy of specific performance of the contract is available to the plaintiff?

(iii) Whether the sale agreement between the plaintiff and the 1st defendant entered into without the consent of the 2nd defendant as chargee was a nullity?

(iv) Whether the 2nd defendants' rights under the charge were affected in any way by the contract between the plaintiff and the 1st defendant?

(v) What orders/ reliefs should the Court grant?

Submissions analysis and determinations

18. The plaintiff has submitted that she performed the terms of the sale agreement dated 5th February 2014 and that although the property was charged to the 2nd defendant, the 1st defendant as part of her obligations under the agreement was to obtain a discharge of the charge from the 2nd defendant. The plaintiff submitted that the 1st defendant could lawfully sell the charged property provided she sought the consent of the chargee, and which consent could not be unreasonably denied/or withheld. The plaintiff submitted that she trusted the 1st defendant would as an employee of the 2nd defendant would have had no difficulty in obtaining the requisite consent from the chargee to sell the property. The plaintiff stated that she entered into the agreement in good faith and that she trusted the 1st defendant would perform her part of the bargain.

19. The plaintiff further submitted she completed payment of the purchase price and took possession of the suit property as provided under the agreement. She stated that the 1st defendant was obligated under the agreement to furnish a letter of consent from the Land Control Board and that having failed to procure the consent of the Land Control Board was using her own failing to avoid the contract. The plaintiff has argued that notwithstanding that the Land Control Board had not given its consent to the sale transaction as required under section 6(1) of the Land Control Act, Cap 302 Laws of Kenya, in the circumstances an implied or constructive trust was created in favour of the plaintiff. The plaintiff contended that the 1st defendant had indeed executed a transfer in her favour, had executed an application for consent of the Land Control Board and had undertaken to ensure the consent was obtained. In the circumstances the plaintiff submitted she had acquired a proprietary interest over the suit property having fully paid the purchase price, taken possession and having effected developments on the land. She submitted the 1st defendant was under the doctrine of proprietary estoppel, estopped from reneging on the sale agreement. The plaintiff placed reliance on the Court of Appeal cases of *Macharia Mwangi Maina & 87 Others -vs- Davidson Mwangi Kagiri (2014) eKLR* and *Will Kimutai Kitilit -vs- Michael Kibet (2018) eKLR* to support her submission that a Constructive trust and a proprietary interest over the suit property interest over the suit property had accrued in her favour. In the case of *Macharia Mwangi Maina & 87 others -vs- Davison Mwangi Kagiri (supra)* the Court held that as the appellants had paid the full purchase price and they had been put in possession by the respondent, a constructive trust was created in their favour and that the consent of the Land Control Board was not a prerequisite in order for constructive trust to be enforced. The Court in the case stated at paragraphs 25 of the judgment as follows:-

25. The transaction between the parties is to the effect that the respondent created a constructive trust in favour of all persons who paid the purchase price. We are of the considered view that a constructive trust relating to land subject to Land Control Act is enforceable. Our view on this aspect is guided by the overriding objectives of this Court and the need to dispense substantive and not technical justice..."

20. The 1st defendant in her submissions drew the Court's attention to the Court of Appeal decision in the case of *David Sironga Ole Tukai -vs- Francis Arap Muge & 2 Others (2014) eKLR* which conflicted with the decisions in the *Francis Mwangi Maina* case (*supra*) and *Willy Kimutai Kitilit* case (*supra*) in that in the case of *David Sironga Ole Tukai (supra)* the Court of Appeal held that equitable doctrines like constructive trust or proprietary estoppel were inapplicable where there was express statutory provisions. She thus submitted section 6(1) & (2) of the Land Control Act were express and therefore a constructive trust could not arise where the consent of the Land control Board had not been sought and obtained. The agreement was simply null and void and unenforceable. In the case of *David Ole Tukai -vs- Francis Arap Muge & 2 others (2014)* the Court of Appeal albeit differently constituted, differed with the position taken by the same Court in the *Macharia Mwangi Maina* case (*supra*) substantially on the application of equitable principles to the Land Control Act. In the *David Ole Tukai* case (*supra*) the Court inter alia held:-

"—first and foremost, we have already stated that in our opinion granted the express and unequivocal and comprehensive provisions of the Land Control Act, there is no room for the Courts to import doctrine of equity in the Act. This is one simple message of Section 3 of the Judicature Act.

Consequently, invocation, of equitable doctrine 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 has 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".

21. The Court of Appeal in the *Willy Kimutai Kitilit -vs- Michael Kibet* case (*supra*) which was decided nearly 4 years after the decisions in the *Macharia Mwangi Maina* case and the *David Ole Tukai* case considered the decision in the 2 cases and proceeded to hold that the doctrines of equity were part of our laws and that in appropriate circumstances would be applicable. The Court in explaining their differing opinion to that expressed by the same Court in the *David Sironga Ole Tukai* decision stated under paragraph (20) of the judgment thus:-

20. One of the reasons the Court gave in David Sironga Ole Tukai decision for differing with the decision in Macharia Mwangi Maina (supra) was that the Court in the latter case ignored the provisions of section 6 (2) of the Land Control Act. However in our view, the

phrase “declaration of a trust of agricultural land” refers to an express creation of a trust by parties over agricultural land by deed or instrument as envisaged by section 36 of the Land Registration Act or Section 126 of the repealed Registered Land, Act and not a constructive trust or trust created by operation of the Law.

In public Trust -vs- Wanduru Ndegwa (1984) eKLR, Madan JA, as he then was said;

“The provisions of Land Control Act have no application to where the claim to title of agricultural land is by operation of law such as by adverse possession. It is not an agreement, a transaction or dealing in agricultural land.”

Similarly, equity is law and section 6 (2) does not prohibit a Court in exercise of its equitable jurisdiction in the process of adjudicating a land dispute from declaring that a party holds land in a fiduciary capacity.

A court’s decision being final and binding subject to appeal, it would be illogical to hold that such a decision of a Court requires the consent of the Land Control Board before it becomes final and valid”.

22. The Court further in the *Will Kimutai Kitilit -vs- Michael Kibet* case explained why they held the doctrine of equity and proprietary estoppel to be applicable to transactions that were otherwise subject to the provisions of the Land Control Act in paragraphs 23, 24 and 25 of the judgment as follows:-

[23] *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 or 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 contracts which are void and enforceable, in our view, and 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 Act have unreasonably delayed in performing the contract. However, whether the court will apply the doctrines of constructive and proprietary estoppel to a contract rendered void by lack of the consent of Land Control Board will largely depend on the circumstances of each particular case.*

[24] *There is another stronger reason for applying the doctrines of constructive trust and proprietary estoppel to the Land Control Act. By Article 10(2) (b) of the Constitution of Kenya, equity is one of the national values (emphasis supplied) which binds the courts in interpreting any law (Article 10(1) (b)). Further, by Article 159(2) (e), the courts in exercising judicial authority are required to protect and promote the purpose and principles of the Constitution. Moreover, as stated before, by virtue of clause 7 of the Transitional and Consequential Provisions in the Sixth Schedule to the Constitution, the Land Control Act should be construed with the alterations, adaptations, and exceptions necessary to bring it into conformity with the Constitution.*

[25] *The word equity broadly means a branch of law denoting fundamental principles of justice. It has various meanings according to the context but three definitions from Black’s Law Dictionary, Ninth Edition will suffice for our purpose:*

“1.

---2. *The body of principles constituting what is fair and right.*

3. *The recourse to principles of justice to correct or supplement the law as applied to particular circumstances ---*

4. *The system of law or body of principles originating in the English Court of Chancery and superseding the common and statute law (together called “Law” in the narrower sense) when the two conflict”*

Thus, since the current Constitution has by virtue of Article 10(2) (b) elevated equity as a principle of justice to a constitutional principle and requires the courts in exercising judicial authority to protect and promote that principle, amongst others, it follows that the equitable doctrines of constructive trust and proprietary estoppel are applicable to and supersede the Land Control Act where a transaction relating to an interest in land is void and enforceable for lack of consent of the Land Control Board.”

23. The 1st defendant in her submissions has strongly urged this Court not to follow the decision of the Court of Appeal in the case of *Macharia Mwangi Maina & 87 others vs Davidson Mwangi Kagiri (2014) eKLR* which the Court of Appeal followed in the case of *Willy Kimutai Kitilit -vs- Michael Kibet (2018) eKLR* and instead to follow the decision in *David Sironga Ole Tukai -vs- Francis Arap Muge & 2 others (2014) eKLR*. She has argued the jurisprudence as per the case of *David Sironga Ole Tukai (supra)* was properly anchored in law as the judges held it was a fundamental flaw on the part of the judge to invoke the doctrines of equity while ignoring the express provisions of the Land Control Act. Further the 1st defendant contended the Judges in the *David Sironga Ole Tukai* case were right in holding that even in the case of a declaration of trust in terms of section 6(2) of the Land control Act, the consent of the Land Control Board was also required as long as land was agricultural land as it constituted a dealing in land under section 6 (1) of the Land Control Act. The 1st defendant further submitted that possession/occupation of land pursuant to an agreement that had been voided for lack of consent of the Land Control Board was illegal under Section 22 of the Land Control Act and could therefore not become an overriding interest on the land.

24. The 1st defendant referred the Court to a recent decision of this Court in the case of *Koyumkei Multipurpose Co-operative Society Ltd & 17 others -vs- Rael Chepngetich Koech (2019) eKLR* where my brother Hon. Justice Munyao faced with having to make the choice which of the Court of Appeal decisions he should follow opted to go by the decision of *David Sironga Ole Tukai*. He stated as follows:-

“—on my part, I opt to follow the decision of David Ole Tukai. I think there is a purpose to the Land Control Act. If one looks at section 9 of the Act for example, the LCB can allow or decline to give consent, based on factors such as the economic development of the Land concerned or on the maintenance or improvement of standards of good husbandry---. If I am to allow the transaction herein to proceed, I will be usurping the powers of the LCB, and override a specific provision of statute. I will be giving a go ahead when there is a possibility that consent would have been denied by the LCB. The parties needed to present their transaction before the LCB so that the LCB can either allow or deny them consent. I therefore hold that the agreement in issue is void for want of consent of the Land Control Board and unable to be enforced”.

25. Under the doctrine of stare decisis and/or precedent this Court is bound by the decisions of the Court of Appeal. Where there are conflicting decisions of the Court of Appeal on the same point, as in the present matter where the Court has to determine whether or not the equitable doctrines of constructive trust and/or proprietary estoppel could be invoked to override the otherwise clear provisions of section 6 (1) of the Land Control Act requiring all transactions relating to agricultural land be sanctioned by the Land Control Board, the Court has to determine which decision would be most appropriate having regard to the facts of the particular case under consideration.

26. The Court of Appeal in the *Willy Kimutai Kitilit -vs- Michael Kibet* case (*supra*) considered the previous two decisions of the same Court and my understanding is that the Court was of the view that Section 6 (2) of the Land Control Act related to a declaration of trust effected by way of a deed and/or instrument that perhaps required to be registered. The Court was categorical that section 6 (2) of the Land Control Act did not relate to a constructive trust or trust created by operation of the law. These did not constitute dealing with the land within the meaning of section 6(1) of the Land Control Act and therefore did not require the consent of the Land Control Board. The Court was equally clear that both under the repealed Registered Land Act, Cap 300 Laws of Kenya and now under Section 25(2) of the Land Registration Act, 2012 that the registration of a person as proprietor of a parcel of land did not relieve such person from any obligation to which he was subject to as a trustee. Indeed under section 28 of the Land Registration Act, 2012 trusts are acknowledged as overriding interest requiring no registration and which all registered land is subject to. Trusts can either be express where the same are created by way of deed or instrument and/or can be implied having regard to the circumstances. The Court additionally considered the import and ramifications of various provisions of the Kenya Constitution 2010 notably Articles 60 and 67 which heralded the land reforms that saw the enactment of the National Commission Act, the Land Registration Act, 2012 and the Land Act, 2012 which resulted in the repeal of several of the previous land laws like the Registered Land Act, Registration of Titles Act, the Indian Transfer of property Act, 1882, the Government Land Act and the Land Titles Act. The Court noted that under Article 10 (2) of the Constitution, equity was elevated to a national value and thus the Courts were obliged while exercising judicial authority to protect and promote equitable principle in dispensing justice. Having regard to the foregoing I would be inclined to follow the decision in *Willy Kimutai Kitilit -vs- Michael Kibet (2018)* and hold that where a constructive trust is found to have arisen in a controlled land transaction, the provisions of section 6 (1) of the Land Control Act would be inapplicable.

27. The 1st defendant in her submissions has argued that the sale agreement dated 5th February 2014 did not comply with the provisions of section 3 (3) of the Law of Contract Act Cap 21 Laws of Kenya as the parties signatures to the agreement were not appropriately attested as required. This was an issue that was only raised in the submissions and was not raised in the pleadings. The 1st defendant vide her defence dated 8th September 2016 filed on 13th September 2016 admitted the agreement of sale and her only issue was that the consent by the Land Control Board was not given and hence the agreement was void and unenforceable. Under paragraph 3 (c) (d) (e) and (f) of the defence the 1st defendant pleaded as follows:-

(c) Whereas an agreement signed 5th February 2014 was executed as averred in the Further Amended Plaintiff, there was no application or approval for the sale or transfer by the Land Control Board under section 6 of the Land Control Act (Chapter of the Laws of Kenya).

(d) Accordingly the agreement dated 5th February 2014 is void and wholly unenforceable;

(e) In so far as the entire Further amended plaintiff is predicated on the agreement dated 5th February 2014 being enforceable, and now that it is wholly void, the Further amended plaintiff is unsustainable.

(f) The 1st Defendant avers that the Plaintiff is only entitled to refund of demonstrable purchase price monies but not the land, as is prayed for.

28. The Court has perused the sale agreement dated 5th February 2014 (“PEX2”) and notes the same was signed on every page by the plaintiff and the 1st defendant and was duly executed and the signatures of the vendor (1st defendant) and the purchaser (plaintiff) were attested by Pascoline Wanjiru Wachira advocate who also completed the certificate of attestation. The sale Agreement was not denied by the 1st defendant as pointed out in her defence.

29. On the evidence on record I am satisfied that indeed the plaintiff and the 1st defendant entered into a valid sale agreement dated 5th February 2014 and that the agreement was in compliance with the provisions of section 3 (3) of the Law of Contract Act.

30. There is no dispute that no consent of the Land Control Board was accorded to the sale transaction envisaged under the agreement of sale entered into between the plaintiff and the 1st defendant on 5th February 2014. The Agreement consequently became null and void after the expiry of six months under the provisions of section 6 (I) read together with section 8(1) of the Land Control Act which stipulates that the consent of the Land Control Board must be obtained within six months although the High Court has power to extend such period where there is sufficient reason on such terms as it may consider fit. The 1st defendant has argued that since the Agreement for sale became null and void for want of consent of the Land Control Board the plaintiff would not be entitled to an order of specific performance maintaining that the plaintiff would be entitled only to a refund of any money she may have paid pursuant to the void agreement for sale.

31. The plaintiff for her part counters that she met her obligations under the agreement of sale took possession of the property and that

notwithstanding no consent of the Land Control Board was accorded to the transaction, a constructive trust had been created in her favour and that the 1st defendant ought to be ordered to effect transfer of the property to her. The plaintiff acknowledges the 2nd defendant held a charge over the property securing a loan advanced to the plaintiff and she seeks an order for the discharge of the property. The plaintiff argues the 1st defendant had an obligation to redeem the loan and obtain a discharge of the property to effectuate the transfer of the property to her but failed to do so forcing her (the plaintiff) to take up the responsibility of servicing the loan to forestall the bank from foreclosing on the property and selling the same to recover its money.

32. The 2nd defendant, the bank for its part has submitted that it was not a party to the sale agreement between the plaintiff and the 1st defendant and that its consent was not sought prior to the agreement being entered into as required under the charge. It is trite law that a contract can only bind the parties to it. The 2nd defendant was not a party to the sale agreement dated 5th February 2014 and therefore cannot be affected by it. The only interest that 2nd defendant had in the property was that of a security for the loan it had advanced to the 2nd defendant. If the loan was fully settled the bank would cease to have any interest in the property and would be obligated to issue a discharge of the charge; The transfer to the plaintiff cannot lawfully be effected until and unless the loan owing to the 2nd defendant is paid and a discharge issued.

33. On the evidence on record I am satisfied that the plaintiff and the 1st defendant entered into the sale agreement dated 5th February 2014 and I am further satisfied that the plaintiff paid the full purchase price as per the agreement pursuant to which she entered into possession of the suit property whereof she effected development and renovations to the residential house that the 1st defendant had commenced construction thereon but was incomplete as at the time of sale. The plaintiff exhibited receipts supporting payment of the purchase. As per the plaintiff's Advocates letter of 7th July 2014 ("**PEX6**") to the 1st defendant only a balance of Kshs.528,334/= remained outstanding and which the plaintiff had deposited with her lawyers. The 1st defendant vide her letter dated 26th August 2014 ("**PEX9**") to the plaintiff affirmed she was ready to complete the transaction and undertook to obtain the completion documents including the discharge of charge. The said letter in part read as follows:-

"--- I am ready and willing to complete the transaction and have the title documents and discharge of charge released to you. However I am not able to secure the discharge of charge of the title from the bank since the loan has not been fully paid. My request to you is release and pay the sum of Kshs.520,334/= and deposit to my loan account No.110262504 Kenya Commercial Bank Ltd – Nakuru Branch. I promise to deliver the title of Miti Mingi /Mbaruk Block 8/2367 within sixty days (60) from the date you make the payment to the bank of the money held by you.

Kindly confirm once you have deposited the money so that I can pay the difference and start the process of applying for the release of the title.

Yours faithfully

Loise Naisial Leiyani

Signed

CC: Sheth & Wathigo Advocates

CC: Oburu Mbeche Advocates

34. On the 28th August 2014, the plaintiff caused to be deposited into the 1st defendant's KCB Bank Account the balance of the purchase price of Kshs. 528,334/00 as per the bank deposit slip exhibited amongst the bundle of receipts as "**PEX3**". The 1st defendant in spite of the plaintiff honouring the request made vide her letter of 26th August 2014 did not avail the completion documents within the 60 days as she had undertaken to do. The plaintiff in my view as at 7th July 2014 when she deposited the final balance of Kshs.528,334/= with her lawyers and requested the 1st defendant to avail the completion documents in completion of the transaction had done all she was required to do under the agreement of sale. When the 1st defendant requested for the release of the balance to her and the plaintiff complied, the 1st defendant's interest in the suit property ceased and henceforth the 1st defendant held title to the land in trust for the plaintiff. I have no doubt that by the agreement of sale, the 1st defendant intended to sell the suit property and transfer the same to the plaintiff. Her actions were consistent with that intention. She permitted the plaintiff to assume possession of the suit property after she had been paid the full purchase price under the agreement and the plaintiff trusting the 1st defendant would honour her part of the bargain continued to effect developments on the property.

35. The 1st defendant wants to take advantage of her own failing to obtain the consent of the Land Control Board and the fact that the property remains charged to the 2nd defendant to wriggle out of what was otherwise a valid contract of sale. The defendant was under an obligation to obtain the consent of the Land Control Board and to obtain a discharge of the charge which she did not. The plaintiff was too trusting particularly when she paid the entire purchase price to the 1st defendant without insisting that the 1st defendant secures a discharge of the charge. The plaintiff also while aware the 2nd defendant had charged the suit property nonetheless decided to enter into the sale agreement trusting the 1st defendant would obtain the consent of the 2nd defendant to the sale and/or would pay the outstanding loan balance in redemption of the loan and obtain the discharge of charge.

36. As I observed earlier the 2nd defendant not having been privy to the agreement between the plaintiff and the 1st defendant, would only be obliged to discharge its charge if its loan was paid in full. It is not in doubt that the plaintiff continues to service the loan albeit in the name of the 1st defendant to prevent the bank from realizing its security. However the fact that no consent of the chargee was obtained before the sale

agreement was entered into did not render the agreement illegal. All it meant was that for the agreement to be completed, the 2nd defendant's loan had to be paid in full so that it could issue a discharge.

37. On the evidence and guided by the Court of Appeal decision in *Willy Kimutai Kitilit -vs- Michael Kibet (2018) eKLR* discussed herein above I am persuaded in the circumstances of this matter that once the plaintiff paid the full purchase price and took possession of the suit property and commenced residing on the property as the owner thereof she acquired a proprietary interest in the property and the 1st defendant continued holding the title as a trustee in her favour. A constructive trust was in essence created in favour of the plaintiff. It could not be just or equitable for the 1st defendant to hoodwink the plaintiff to enter into the agreement, receive the full payment either directly or through deposits into her loan account, permit the plaintiff to enter into occupation and possession and expend substantial sums of money in improving the property and walk out of the transaction by merely pointing out that there was no consent of the Land Control Board to the transaction. Like the Court of Appeal stated in *Willy Kimutai Kitilit* case (*supra*) while agreeing with the decision in the *Macharia Mwangi Maina* decision the Court would be abrogating from its duty of protecting and promoting the National values enshrined under Article 10 (2) of the Constitution where equity is specifically cited as one of the values. Section 28 (b) of the Land Registration Act 2012 acknowledges "trusts including customary trust" as overriding interests that subsist and affect registered land and not require to be registered. Having found that a constructive trust was created in favour of the plaintiff as against the plaintiff it follows that section 6 (1) of the Land Control Act was not applicable. The constructive trust was by operation of the law and was not subject to the provisions of the Land Control Act. It did not constitute an agreement and/or a dealing in agricultural land in the manner envisaged under the provisions of the Land Control Act.

38. As I have come to the conclusion that a constructive trust was created in favour of the plaintiff in regard to the suit property I have now to consider and determine what reliefs to grant in view of the interest the 2nd defendant has as a chargee over the property. The 2nd defendant's interest takes precedence and priority over any subsequent interests acquired in the suit property. Any such interests can only crystalline if the chargee's interest is discharged. Thus even though I have found and held the 1st defendant holds title to the suit property as a trustee for the plaintiff such trust will only take effect upon full settlement of the loan due to the 2nd defendant as chargee upon settlement whereof the 2nd defendant will issue a discharge of charge. Given that the 1st defendant has demonstrated unwillingness to settle the loan and it is infact the plaintiff who has been paying the loan to preserve the property, the plaintiff may determine to pay off the loan owing to the 2nd defendant to enable the trust in her favour to crystallise with no encumbrances. Should the plaintiff settle the outstanding loan to the 2nd defendant, the plaintiff would be entitled through a separate action to claim from the 1st defendant any sums she may have paid over and above the purchase towards the redemption of the property.

39. The net result after having considered all the evidence on record is that I find and hold that the plaintiff has proved that she fully satisfied her obligation under the Agreement of sale dated 5th February 2014 pursuant to which she took possession and effected improvements on the property. I hold that even though no consent of the Land Control Board was given to the sale transaction, a constructive trust was created in favour of the plaintiff and that she is entitled to have an order for specific performance of the contract subject to the 2nd defendant's outstanding loan on the account of the 1st defendant being fully cleared.

40. I accordingly enter judgment in favour of the plaintiff on the following terms:-

- (1) That the 1st defendant is hereby ordered to transfer Land Parcel Miti Mingi/Mbaruk Block 8/2367 (Kianjoya 'D') to the plaintiff Damaris Wanjiru Nganga upon full settlement of the outstanding loan to the 2nd defendant and issue of discharge of charge.**
- (2) The plaintiff will be at liberty after 30 days from the date of this judgment in case the 1st defendant shall not have settled the outstanding loan in full to the 2nd defendant, to pay the outstanding loan balance and to have the discharge of charge and the title documents released to her.**
- (3) In the event the plaintiff pays the outstanding balance against the 1st defendant's loan account, the plaintiff shall be entitled to bring a fresh suit against the 1st defendant to recover all the money she may have paid towards the redemption of the title over and above the purchase price.**
- (4) In the event the 1st defendant defaults in executing any necessary documents to give effect to this judgment, the Deputy Registrar of this Court is hereby authorized to execute any such documents to effectuate the judgment in place of the 1st defendant.**
- (5) The 1st defendant is ordered to pay the plaintiff's and the 2nd defendant's costs of the suit.**

Judgment dated signed and delivered virtually at Nakuru this 30th day of September 2020.

J M MUTUNGI

JUDGE