



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC APPEAL NO. 16 OF 2019**

**JENNIFFER NG'ENDO WAWERU..... APPELLANT**

**VERSUS**

**MARGARET BEATRICE MURIGI .....RESPONDENT**

*(Being an Appeal from the Judgment and Decree of Honourable C. Kutwa, Principal Magistrate, sitting at Githunguri Law Courts dated 24<sup>th</sup> January 2019 in Civil Suit No. 6 of 2015)*

**JUDGMENT**

By a Complaint dated 26<sup>th</sup> January 2015, the Respondent herein **Margaret Beatrice Murigi**, who was a Plaintiff thereon brought a suit being **Githunguri PMCC No. 6 of 2015**, against the Appellant herein, **Jennifer Ngendo Waweru** (Defendant then) and sought for the following reliefs:-

- (a) An order for vacant possession and for eviction orders to compel the Defendant whether by herself, her servants and/or agents to remove all unlawful structures erected on the Plaintiff's land parcel known as LR. No. Githunguri/Kimathi/659.*
- (b) A permanent injunction prohibiting the Defendant whether by herself, her servants and/or agents or otherwise howsoever from remaining on or continuing in occupation of the Plaintiff's plot LR. No. Githunguri/Kimathi/659.*
- (c) Damages for illegal trespass.*
- (d) Costs of the suit.*
- (e) Any other relief that this honourable Court may deem fit to grant.*

The Respondent (Plaintiff) claim was premised on the fact that she is the registered owner of the suit property **Githunguri/Kimathi/659**, and is entitled to the possession of the same. However, the Defendant (Appellant) has wrongfully trespassed upon the said suit property and has erected structures thereon and despite repeated demands by the Plaintiff (Respondent) to vacate the said property and deliver vacant possession, the Defendant (Appellant) has failed and refused to do so. Therefore, the Respondent (Plaintiff) has been denied and deprived use and enjoyment of the said land and has suffered loss and damage. The Plaintiff (Respondent) urged the court to issue eviction orders to compel the Defendant (Appellant) to remove all the structures illegally erected on the Respondent (Plaintiff) suit property and also issue permanent injunction to prohibit the Defendant (Appellant) whether by herself, servants or agents from remaining on or continuing to occupy the said premises.

The Appellant (Defendant) contested the suit and filed a Defence on **10<sup>th</sup> March 2015** and urged the Court to dismiss the Plaintiff's suit. The Appellant later filed an amended Defence on **18<sup>th</sup> May 2015**, and averred that her late husband **Stephen Waweru Njenga** had purchased the suit property **Githunguri/Kimathi/659**, in **1994**, from the Plaintiff (Respondent) at an agreed consideration of **Kshs.400,000/=**. That her husband only paid **Kshs.100,000/=** upon which the Respondent (Plaintiff) gave him vacant possession of the suit premises and therefore she denied that she was a trespasser as alleged by the Respondent (Plaintiff). It was her contention that her husband was a genuine purchaser of the suit property pursuant to a sale agreement dated **29<sup>th</sup> May 1994**. The Appellant (Defendant) further contended that she has been in possession of the suit land from **1994**, whereon she has extensively developed the land and has planted coffee and engaged in dairy farming. The Appellant (Defendant) had denied the jurisdiction of the Court and had urged the Court to dismiss the Respondent's (Plaintiff's) case.

The case proceeded via viva voce evidence whereon the Respondent (Plaintiff) gave evidence for herself and called no witnesses.

The Appellant (Defendant) too gave evidence for herself and called no witness.

In her evidence, the Respondent (Plaintiff) adopted her witness statement and averred that she is the registered owner of the suit property and she produced the Certificate of title to the suit property as exhibit in Court. She also admitted that she does not live on the suit land, but the Appellant (Defendant) who is the wife of **Stephen Waweru** lives thereon. It was her testimony that she bought the land in **1980** and allowed her brother-in-law, one **Kibe** to use it. However, in **1994**, **Stephen Waweru**, the husband to the Appellant (Defendant) trespassed on the suit land. That the said **Stephen Waweru** filed a case against her at the **High Court**, but the same was dismissed. It was her further testimony that she had bought the land from the Defendant's grandfather and that **Stephen Waweru** was her cousin. She also testified that the said **Stephen Waweru** entered into the suit land by force and she filed a case at **Githunguri Land Disputes Tribunal**, which ruled against her. Further that she appealed at the **Provincial Land Disputes Tribunal** at **Nyeri**, and she still lost. However, she filed a **Judicial Review Application** at the High Court and the **High Court** overturned the decisions of the Land Disputes Tribunals. However, the High Court did not rule on the issue of ownership or order the said **Stephen Waweru** to vacate the suit land, and thus the **Civil Case** at **Githunguri SPM Court**. She reiterated that she did not sell the land to **Stephen Waweru**, but he trespassed on the suit land and that the land does not belong to the Defendant (Appellant). She confirmed that she has a title deed to the suit land and that **Stephen Waweru** died in the year **2011**, and she denied having signed the sale agreement between herself and the said **Stephen Waweru**. The Respondent (Plaintiff) also denied having received any money from the Defendant's late husband and urged the Court to order for her eviction.

On her part, the Appellant (Defendant) **Jennifer Ngendo Waweru** also adopted her witness statement which was dated **24<sup>th</sup> November 2017**, and averred that she is the wife of the late **Stephen Waweru Njenga**, who had entered into a sale agreement with the Plaintiff herein on **29<sup>th</sup> May 1994**, for the purchase of the suit property **Githunguri/Kimathi/659**, and the consideration was **Kshs.400,000/=**. Further that her husband paid **Kshs.100,000/=** and the balance was to be paid upon receipt of consent from the **Land Control Board** to transfer the land. She contended that both parties executed the sale agreement on **29<sup>th</sup> May 1994**. That her husband took possession of the suit premises in **1994**, as per the terms of the agreement and her family has been in possession for the last **23 years**. She further testified that during the **23 years**, her family has extensively developed the suit land by building a **semi-permanent house** for workers has planted over **2000 mature coffee trees**, has **grade cows** and **pigs**. That the family has also grown **blue gum trees**, **Eucalyptus trees**, and **subsistence crops** and has also installed an irrigation system on the land.

It was her contention that the Respondent (Plaintiff) failed to respect the agreement that she had entered with the Appellant (Defendant's) husband as the Respondent decided to sell the land to someone else. That the said breach of sale agreement triggered several suits such as **LDT NO. 16/20/31/2008**, wherein the tribunal found in favour of her late husband. That the Respondent (Plaintiff) appealed against the said decision at the **Provincial Land Disputes Appeals Tribunal** at **Nyeri**, which also found in favour of her late husband. She denied that her husband trespassed on the Respondent's (Plaintiff's) parcel of land and also denied that she is a trespasser on the suit premises.

It was her contention that the Respondent is not honest as she concealed the circumstances that led to her husband to occupy the suit property **Githunguri/Kimathi/659**. It was also her contention that she was willing to pay to the Respondent (Plaintiff) the balance of the purchase price over the suit land which belongs to her.

In cross examination she admitted that she was not party to the sale agreement and that she did not witness any of the parties sign the agreement. Though she alleged that the Plaintiff (Respondent) was paid **Kshs.100,000/=** as part of the purchase price, she did not have any prove of such payment. She also admitted that she did not include the suit property as any of the assets of her late husband, during the Succession cause and that the Plaintiff (Respondent) has never been charged with any offence of giving false information. She also admitted that the land is in the Plaintiff's name and she did not seek the Plaintiff's consent to develop the same. She contended that she did not put the suit land in her husband's estate because she did not have title to the said land.

The parties thereafter filed their written submissions and upon considering the evidence presented before him, the learned trial Magistrate held:-

***"I am satisfied therefore that the Plaintiff has proved that the Defendant entered the suit property without her consent. The Defendant is therefore a trespasser on the suit property and the Plaintiff is entitled to judgment against the Defendant for an injunction to restrain the Defendants from committing further act, remaining continuing in occupation of the suit land. An order for eviction is also issued compelling the Defendant to remove all illegal structures erected on the suit land .....***

***..... In conclusion, I do therefore enter judgment for the Plaintiff against the Defendant as follows;....."***

Aggrieved by the above decision of the learned trial Magistrate, the Appellant appealed against the said Judgment on the following grounds:-

- 1) That the learned trial Magistrate erred in law and fact in failing to appreciate that the Appellant's husband had bought the parcel of land Githunguri/Kimathi/659, from the Respondent.***
- 2) The learned Principal Magistrate erred in law and fact in failing to appreciate that the Appellant's husband had executed a valid sale agreement with the Respondent.***
- 3) The learned Principal Magistrate erred in law and fact in disregarding obvious evidence that the Appellant's husband had made part payment of the purchase price to the Respondent.***
- 4) The learned Principal Magistrate erred in law and fact in failing to appreciate that the Appellant and her deceased husband had vacant possession of the parcel of land number Githunguri/Kimathi/659 since 1994.***
- 5) The learned Principal Magistrate erred in law and fact in finding that the appellant was a trespasser.***
- 6) The learned Principal Magistrate erred in law and fact for totally disregarding the evidence of the Appellant.***

7) *The learned Principal Magistrate erred in law and fact for giving undue weight to the evidence of the Respondent.*

8) *The learned Principal Magistrate erred in law and fact for taking into account and relying on irrelevant evidence which was detrimental to the Appellant's case.*

9) *The Judgement of the learned Principal Magistrate was against the weight of the evidence advanced by the Appellant.*

The Appellant urged the court to allow the Appeal and set aside the **Judgment** and **Decree** of the Principal Magistrate, Githunguri SPMCC delivered on **24<sup>th</sup> January 2019**.

The Appeal was canvassed by way of written submissions.

The Appellant through the Law Firm of **Ndungu Mwaura & Co. Advocates** submitted that the Appellant's late husband **Stephen Waweru Njenga** purchased the suit property **Githunguri/Kimathi/659**, in **1994** from the Respondent at an agreed price of **Kshs.400,000/=**. That upon execution of the agreement, the Respondent gave the said **Stephen Waweru Njenga**, vacant possession of the suit property. Further that the Appellant's deceased husband was a genuine purchaser of the suit property pursuant to the sale agreement dated **29<sup>th</sup> May 1994**. That the Appellant's deceased husband took possession of the suit property in **1994**, as per the terms of the agreement and that they have extensively developed the said piece of land and the investment are in the tune of millions.

The Appellant further submitted that though she was not a party to the agreement between the Respondent and her late husband, she is aware that her late husband paid **Kshs.100,000/=** to the Respondent. That the Appellant is willing to pay the balance of **Kshs.300,000/=**. Though the Respondent is the registered owner of the suit property, there is a valid sale agreement dated **29<sup>th</sup> May 1994**. That the Appellant has developed the suit property and the investment is in the tune of **Kshs.10,000,000/=**. However, the learned trial Magistrate disregarded the evidence brought in Court by the Appellant that the trial Magistrate failed to give proper findings on the sale agreement presented by the Appellant. It was her submissions that the trial Magistrate was expected to look into the contents of the sale agreement and deduce its validity not just on the surface. Further it was submitted that the trial Magistrate gave undue weight to the Respondent's evidence while ignoring the Appellant's evidence which would have had an impact on the case. That though the Appellant was not party to the sale agreement, she expected the Magistrate to look into the intentions of the authors of the agreement and the contents of the same while making the Judgment. The Appellant relied on the case of **G. Percy Trentham Ltd -vs- Archital Luxfer Ltd [1993]**, where **Steyn LJ** stated:-

*“It is important to consider briefly the approach to be adopted to the issue of contract formation .....It seems to me that four matters are of importance. The first is that ..... law generally adopts an objective theory of contract formation. That means that in practice our law generally ignores the subjective expectations and the unexpressed reservations of the parties instead the governing criterion is the reasonable expectations of honest men.....”*

It was the Appellant's further submissions that after looking at the sale agreement and seeing that it was valid and that part payment of purchase price was made, then the trial Magistrate would have deduced that though title was not transferred, there were legal relations that were created between the parties. For this, the appellant relied on the case of **RTS Flexible Systems Ltd vs Molkerei aloise Muller GmbH & Co. KG (UK Production) [2010] UKSC14, [45]** where it was held:-

*“The general principles are in doubt whether there is a building contract between the parties and if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires is essential for the formation of legally binding relations”.*

The appellant wondered on what basis the agreement was disregarded as evidence and that it was unfair for the learned trial Magistrate to ignore the most crucial piece of evidence by the Appellant and solely depending on the evidence of the Respondent. It was the Appellant's submissions that the trial Magistrate did not say anything concerning the content of the agreement and he did not give the analysis of the agreement to support the decision that he made in the judgment. That the trial Magistrate did not point out the exact error of the sale agreement and what laws were breached.

It was finally submitted that the Appellant's right to be heard and fair trial was undermined by the trial Courts judgment is the disregard of the sale agreement produced by the appellant was a blow to the Appellant as this was the only evidence she was relying on to salvage her parcel of land. The Appellant urged the Court to allow the Appeal with costs.

On behalf of the Respondent, the **Law Firm of Gaita & Co Advocates** filed their written submissions dated **18<sup>th</sup> June 2020**, and urged the Court to dismiss the appeal with costs.

According the Respondent, in **1994**, the Appellant's late husband trespassed into the suit property **Githunguri/Kimathi/659**, and when the Respondent confronted him, he moved to the High Court vide **Nairobi HCCC No. 12 of 1995**, seeking injunctive orders against the Respondent by alleging that he had entered into a sale agreement with the Respondent and that he had paid her **Kshs.100,000/=** as down payment for the purchase of land leaving a balance of **Kshs.300,000/=** It was her submissions that the said **Nairobi HCCC No. 12 of 1995**, was dismissed with costs on **29<sup>th</sup> June 2006**.

It was her further submissions that after the dismissal of **Nairobi HCCC No. 12 of 1995**, the Appellant's husband moved to Court again vide **Kiambu SPMCC No. 138 of 2006**, which suit sought for a refund of **Kshs.100,000/=** that the Appellant's husband had allegedly paid to the Respondent. Again the said case was dismissed on **19<sup>th</sup> March 2008**. She also submitted that the matter later proceeded to the **Land Disputes Tribunal at Githunguri** which tribunal resolved the matter in favour of the Appellant's husband. However, the Respondent was

dissatisfied with the said decision and she moved to the High Court vide **Nairobi Civil Application JR No. 74 of 2011**, seeking to quash the decision of the Land Disputes tribunals. That the said decision of the tribunals was quashed on **18<sup>th</sup> March 2014**.

Further that in the meantime, the Appellant's husbands died in the year **2011**, and his trespass died with the Appellant's husband. That the Appellant took out Letters of Administration in respect of the Estate of her deceased husband, but she did not include the suit property as among the properties of the deceased estate.

The Respondent further submitted that the Appellant's husband having died in **2011**, his trespass on the land in question was extinguished and the Appellant's presence thereon is a further trespass and not as an Administrator since the Appellant did not include the suit property as among the assets of the deceased estate then. Further that the Appellant is not an administrator and/or the beneficiary but a trespasser and her trespass began in **2011** after the death of her husband. It was submitted that the Respondent did not prove that she is the registered owner of **LR No. Githunguri/Kimathi/659**, by producing of a copy of the title deed and the same was not challenged by the Appellant.

Further that the land is an agricultural land whose transactions are controlled by the **Land Control Act** in particular **Sections 6, 7 and 8**. However, no **consent** to transfer the land was sought and obtained as prescribed by the law, particularly within a period of 6 months. Further the Appellant's husband did not move to the High Court to seek for extension of the said period and when the appellant's husband sought for the said extension in Nairobi **HCCC No. 12 of 1995**, the suit was dismissed. Therefore, failure to seek the consent of the **Land Control Board** rendered the transaction **null and void** and thus the learned trial Magistrate was correct in finding for the Respondent.

The Respondent relied on the case of **Danson Muniu vs William Kiptarbess Konir & Others Eldoret ELC No. 170 of 2012**, where the Court held that any transaction was **null and void** for all purposes where the consent of the Land Control Board had not been given. Therefore, it was the Respondent's submissions that since on **consent** of the **Land Control Board** was sought, then for all intents and purposes, the whole transaction is **null and void**.

The Respondent further submitted that she denied having entered into any sale agreement with the Appellant's deceased husband nor having received **Ksh.100,000/=** as down payment as alleged by the Appellant. That since it was the Appellant who introduced the sale agreement, then the burden of proof was upon her and she did not discharge the said onerous task. It was further submitted that since the Appellant was not present when the agreement was made and did not sign it and did not witness any party signing the sale agreement, and did not witness any money change hands, then she needed to call an independent witness to support her allegations which she failed to do. For this the Respondent relied on the case of **Isaak Ngatia vs Paul Kaiga Nyeri ELC No. 56 of 2014** where the Court held that:-

***“..... despite having been given an opportunity to prove that the Defendant had indeed received the said amount, the Plaintiff failed to do so by failing to call the advocate who endorsed the document through which the Respondent allegedly acknowledged having received the said amount.”***

According to the Respondent, since the Appellant was not able to name any person who witnessed payment of the money or any instalment in respect thereof, then the trial Magistrate was right in holding that the Appellant had the burden of proving that the Respondent received the money and which the Appellant failed to discharge.

Further that the Appellant did not discharge the burden of proof that there existed an agreement between her late husband and the Respondent and also failed to prove that money had changed hands, since she was not present when the transaction allegedly took place.

The Respondent maintained that the Appellant entered into the suit land in **2011**, after the death of her husband and she should not confuse the Court that she has been on the suit land since **1994**. Therefore, even if the Appellant has developed the suit land, the said development is without the consent of the Respondent and this clearly makes her a trespasser.

Though the Appellant testified that she was ready to reconcile with the Respondent by offering an alternative land, the respondent submitted that she should not be allowed to dispossess the Respondent off her land and then coerce the Respondent to take an alternative land. Further the Appellant's action is done in bad faith and is an illegality and the Court was urged to dismiss the Appeal entirely with costs to the Respondent.

The above being the available evidence and submissions by the parties, the Court notes that this is a first appeal and it is therefore the duty of this Court to evaluate the evidence afresh as adduced before the trial Court in order to arrive at its own independent conclusion. However, the Court will take into account that it never saw nor heard the witnesses as they testified. See the case of **Selle v Associated Motor Boat Co. [1968] EA 123** where the Court held that:-

***“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan(1955), 22 E. A. C. A. 270).***

It is not in doubt that the evidence adduced at the lower court was to the effect that the Respondent is the registered owner of the suit property and she allegedly sold the suit land to the Appellant's husband one **Stephen Waweru Njenga** on **29<sup>th</sup> May 1994**. That the consideration was **Kshs.400,000/=**, but the Appellant's husband only paid **Kshs.100,000/=**. There is a balance of **Kshs.300,000/=** which the Appellant alleged that she is ready and willing to pay. However, it is not in doubt that the Respondent has alleged that she never entered into any sale agreement with the Appellant's late husband. It was her testimony that the said **Stephen Waweru Njenga** was a trespasser. Further

it is not in doubt that the suit land has been a subject of several litigations which culminated in the quashing of the decision of **Provincial Land Disputes Appeals Tribunal**, which had found in favour of the Appellant's late husband.

What is also clear is that the Respondent is the registered owner of the suit property and according to the copy of Certificate of title, she was registered as such on **16<sup>th</sup> September 1986**, under **"The Registered Land Act Cap 300 (now repealed)**. Under **section 27** of the said Registered Land Act (now repealed)." The Respondent was the absolute and indefeasible owner who had a right to enjoy all the rights appurtenant thereto:-

**"Subject to this Act –**

**(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;"**

Further it is evident that such rights or ownership could only be defeated by operation of the law. **Section 28 of Cap 300.**

**"The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever."**

The above provisions of law have now been reiterated in **sections 24, 25 and 26** of the **Land Registration Act**.

The Appellant alleged that her late husband purchased the suit property from the Respondent. She produced a sale agreement dated **29<sup>th</sup> May 1994**. The said sale agreement has been disputed by the Respondent. For a sale agreement to be enforceable, it has to give description of the parcel of land, the purchase price and must be signed by all the parties. See the case of **Nelson Kivuvani...Vs...Yuda Komora & Another, Nairobi HCCC No.956 of 1991**, where the Court held that:-

**"the agreement for sale of land which contains the names of the parties, the number of the property, the purchase price and the conditions attached thereto, the obligations, express or implied, of each of the parties and signed and witnessed by two witnesses who signed against their names amount to a valid contract."**

However, in the sale agreement produced by the Appellant, the same was disputed by the Respondent. The Appellant was not party to the said sale agreement and she did not call an independent witness to confirm that indeed the said sale agreement was signed by the Respondent herein and that she received part of the purchase price.

As the Court observed earlier, there have been several litigations over the suit property and the Appellant cannot allege to have enjoyed quiet possession without interference.

The trial Magistrate considered all the evidence in totality and found that the Respondent (Plaintiff) had proved her case on the required standard of balance of probabilities and allowed the Respondent, case in totality. The Appellant herein wanted to upset the said decision of the trial Magistrate.

The Court will now turn to the grounds of Appeal. On grounds **No. 1 and 2** the Appellant alleged that the trial Magistrate erred in law and fact in failing to appreciate that the appellant's husband had bought the parcel of land from the Respondent and that both parties had executed a valid sale agreement. The sale agreement in issue is the one dated **29<sup>th</sup> May 1994**. It has been disputed by the Respondent and the trial Magistrate did not err when he held and found that the Respondent had disputed the description of the parties on the sale agreement and that the Defendant (Appellant) failed to explain the discrepancies in the said sale agreement. Further there was no proof of receipt of **Kshs.100,000/=** by the Respondent.

Further, it is evident that the suit property was on agricultural land and being an agricultural land, the **consent** of the **Land Control Board** was required. The parties herein admitted that there was no **consent** obtained from Land Control Board. The trial Magistrate correctly held that **section 8(c)** of the Land Control Act is **mandatory**, that a consent is to be obtained within **six** months of signing the sale agreement. The agreement was signed in **May, 1994** and six months expired in **November, 1994**. There is no evidence of extension of time. See the case of **Samuel Kirubi Njuki v Margaret Wangari Macharia [2014] eKLR:-**

**"The court finds this to have been in breach of the mandatory and imperative provision of Section 8 (1) of the Act. The plaintiff slept on his rights by failing to move the court for extension of time pursuant to the proviso to Section 8(1) of the said Act.**

**It is clear that the last agreement between the plaintiff and the 1st defendant was made on the 9/7/2013 when parties agreed to remove the caution and subdivide the land and thereafter obtain consent to transfer. This court finds that by the time of coming to court, the time limit for application for consent had lapsed on the 9 of January 2014. There was no application to extend the same albeit the law applies for it."**

Failure to obtain Consent from Land Control Board rendered the transaction null and void. See the case of **Willy Kimutai Kitilit v Michael Kibet [2018] eKLR** as follows:

**A contract for the sale of land to which the Land Control Act applies is not void from inception nor is it an illegal contract. It**

*becomes void when no application for consent of the Land Control Board is made or if made, it is refused and the appeal from the refusal, if any, has been dismissed (see Section 9 (2)).*

Further in the case of Samuel Kirubi Njuki v Margaret Wangari Macharia (supra) the court held that:-

***“This court holds that the use of the word shall in section 8(1) of the Land Control Act cap 302 laws of Kenya is mandatory and imperative and therefore failure to make the application within 6 months is a serious breach of the provision of the law and therefore any transaction undertaken under the said provision will be a nullity. It is clear from the record that no application for consent from the Land Control Board by either the plaintiff or 1st Defendant was made within six months after the execution of the sale agreement.”***

The trial court having found that there was no consent obtained from the land Control Board, then this Court finds that the learned trial Magistrate did not **err** in failing to appreciate that the appellant’s husband had executed a valid sale agreement with the Respondent. Infact the validity of this sale agreement is challenged by the Respondent.

On ground **No. 3** and **4**, that the learned trial Magistrate erred in law and in fact by disregarding obvious evidence that the Appellant’s husband made part payment of the purchase price to the Respondent, it is evident that the appellant adduced evidence to the effect that she was not party to signing of the sale agreement and she never saw the money change hands. There was no independent witness who testified that she saw the Respondent received the money or was there any documentary evidence produced in form of cheque or bank deposits in favour of the Respondent to confirm that indeed the Respondent did receive **Kshs.100,000/=** from the Appellant’s late husband.

The Respondent alleged that the Appellant and her husband were trespassers on the suit land and that she did not allow them vacant possession. The Respondent had even filed a case at **Githunguri Land Disputes Tribunal** against the Appellant’s late husband. There was no evidence that the Respondent granted the Appellant and her late husband vacant possession. In any event, the alleged sale was between the Appellant’s husband and the Respondent and when the Appellant’s husband died, the Appellant did not become an administrator or beneficiary of the suit property; because the suit property was never made part of the Appellant’s husband estate. Therefore, the Appellant became a trespasser in **2011**, and not **1994** and the trial Magistrate did not **err** when he found that the appellant herein is a trespasser on the suit property.

On ground **No. 5**, the appellant alleged that the learned trial Magistrate erred in law and fact in finding that the appellant is a trespasser. It is not in doubt that the Respondent is the registered owner of the suit property. As a registered owner, she has the right to enjoy all the rights of such registered proprietor as provided by **Sections 27 and 28** of the **Registered Land Act Cap 300 (now repealed)** and later captured in **Section 24 and 25 of Land Registration Act**. She cannot enjoy such right when there is someone in occupation of the said property without the registered owner’s permission. The trial Magistrate was right in finding that the Appellant is a trespasser. Trespass is described by **Clerk and Linsell on Torts, 18<sup>th</sup> Edition at page 23** as:-

***“any unjustifiable intrusion by one person upon the land in possession.”***

On ground **No. 7**, the Appellant alleged that the learned trial Magistrate erred in totally disregarding the evidence of the Appellant. However, the Court has considered the Judgement of the learned trial Magistrate and has noted that the trial Court considered both the evidence of the Plaintiff/Respondent and Defendant/Appellant and found that the Defendant/Appellant did not prove to the required standard that **Kshs. 100,000/=** had been paid to the Respondent/Plaintiff, by the Appellant’s late husband. In any event the transaction in issue is **null** and **void**, for lack of Consent from the Land Control Board,

On ground **No. 7, 8** and **9**, the Court finds that the learned trial Magistrate did not give undue weight to the evidence of the Respondent who is the registered owner of the suit property. There was **no Consent** from **Land Control Board** to sell and transfer the suit property to the appellant’s husband. Therefore, the transaction in issue is **null** and **void** and the Respondent’s case ought to have succeeded on that ground alone.

Further, there is no evidence that the trial Magistrate gave undue weight to the evidence of the Respondent who is the registered owner of the suit property and whose right could only be defeated as provided by **section 28** of Registered Land Act. See the case of Samuel Kamere v Lands Registrar, Kajiado [2015] eKLR the Court of Appeal held that:-

***“The registration of the Plaintiff as the proprietor of the suit parcel of land, having acquired it for valuable consideration, was until 5<sup>th</sup> April 1991 protected by the provisions of sections 27 and 28 of the Registered Land act. His rights could only be defeated through the provisions of the Registered Land Act. Otherwise his title in the land was indefeasible.”***

***‘Since the plaintiff did not transfer his property to the appellant, having regard to sections 27 and 28 of the Act, he retained an absolute and indefeasible title.’***

On ground **No. 8**, this Court has not found any reasons to find and hold that the learned trial Magistrate relied on irrelevant evidence which was detrimental to the appellant’s case. The trial magistrate relied on the sale agreement which he found to have had some discrepancies and no explanation of these discrepancies were given. Further there was no independent witness to support the validity of the sale agreement and there was also no evidence adduced to prove that the Respondent herein received **Kshs.100,000/=** from the Appellant’s late husband. The Respondent is still the registered owner of the suit property and there was no evidence adduced to the effect that such registration has been cancelled or challenged.

On ground **No. 9**, the Court finds that the Judgement of the learned trial Magistrate was based on the weight of the available evidence as

adduced by both the Appellant and the Respondent. The said Judgement was not against the weight of the evidence adduced by the Appellant, but was arrived at after weighing all the available evidence as adduced by both parties.

After analyzing and evaluating the evidence adduced before the trial Court and after considering the Judgement that was arrived by the said learned trial magistrate, this Court finds **no** reasons to fault his analysis of the evidence before him and further the Court finds that the trial Magistrate did not err in both in law and fact in arriving at the decision that he did arrive at. This Court finds that the learned trial Magistrate made a correct determination.

For the above reasons, the Court finds the instant appeal **lacks** merit and consequently this Court dismisses the instant Appeal entirely with costs to the Respondent.

It is so ordered.

***Dated, signed and Delivered at Thika this 15<sup>th</sup> day of October 2020***

**L. GACHERU**

**JUDGE**

**15/10/2020**

**Court Assistant – Lucy**

**ORDER**

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15<sup>th</sup> March 2020**, this **Judgment** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

**With Consent of and virtual appearance via video conference – Microsoft Teams Platform**

**Ndungu Mwaura for the Appellant**

**Mr. Momanyi holding brief for Mr. Gaita for the Respondent**

**L. GACHERU**

**JUDGE**

**15/10/2020**