



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC NO 91 OF 2017

(FORMERLY NAKURU 373 OF 2013)

JEREMIAH MUCHERU NDIBUI.....PLAINTIFF/APPLICANT

VERSUS

DAVID GICHURE NGUGI.....DEFENDANT/RESPONDENT

JUDGEMENT

1. Before me for determination is a matter that was originally filed at the High Court of Kenya in Nakuru on the 21st May 2013 as Case No. 373 of 2013. The Defendant entered their appearance on the 11th June 2013 and filed their defence and counter claim on the 26th June 2013.

2. In the present case, the Plaintiff has sought for the following orders;

i. That an Eviction order be issued against the Defendant by himself, his agents and or servants and by removal of the said Defendant and (sic) any other developments he has made on Nyandarua/ Olaragwai 1/ 1919.

ii. Cost of the suit

3. In response to the Plaintiff's Complaint, the Defendant filed his Defence and counterclaim where he sought for orders that;

a) The Plaintiff's suit be dismissed with costs

b) That judgment be entered for the Defendant for

c) Specific Performance

d) In the alternative to (c) above, a declaration that the Defendant's right to occupy and use the land cited in the counter claim was lawful.

e) costs to the Defence and counterclaim

f) Interest on (d) and (e) above.

4. The matter was certified ready for hearing on the 5th May 2014 but with the establishment of this court the same was subsequently transferred to Nyahururu Environment and land Court on the 31st January 2017 where it was registered with the present number and placed before me on the 2nd May 2017 wherein hearing was scheduled for the 20th September 2019.

5. The same did not take place on the scheduled date owing to issues of representation of the Defendant wherein his counsel filed an application dated the 18th September 2017 to cease acting for him.

6. Both parties had no objection to the application wherein the Defendant sought for 2 months to instruct another counsel to represent him.

7. The court, after considering submissions by both parties, allowed the application directing the Defendant to instruct another counsel to represent him. The matter was thus set for mention for the 20th November 2017 to confirm compliance.

8. On the 20th November 2017, although there was no appearance for the Defendant's Counsel, yet, since the notice of change of advocates had been filed, a new date for hearing was set for the 8th February 2018 on which day the matter did not take off as counsel for the Defendant informed the court that they were pursuing an out of court settlement. The matter was adjourned to the 17th May 2018 so as to give time to the parties' to try and settle the same out of court.

9. On the 17th May 2018, the court was informed that parties were ready to proceed with the hearing of the case, upon which the Plaintiff was called to the witness box to testify.

Plaintiffs' Case.

10. The Plaintiff testified as PW1 to the effect that he was allocated the suit land No. Nyandarua/Olaragwai/1919 by the Government in the year 1964 wherein he was issued with a title deed, which he produced as Pf exhibit 1, proving that he was the proprietor of the same.

11. That after allocation of the land, he had taken possession of the same and had starting ploughing and keeping cattle thereon. That it was not true that he had sold the land to the Defendant as there was no written agreement to that effect.

12. He denied having given anybody consent to sell the land on his behalf and was categorical that the same was still his. He testified that he had even conducted a search on the suit land on 22nd April 2003 vide a search certificate which he produced as his exhibit 2, confirming the position.

13. The witness testified that there had been a time, on a date he could not remember, when he had been admitted in hospital for almost one (1) month. That upon his discharge, he had found that the Defendant had trespassed on his land and had started constructing thereon.

14. He had then given the Defendant notice to move out of his land, which notice had been ignored. He now sought intervention of the court to have the Defendant evicted from his land and also pay for costs of the suit.

15. On cross- Examination, it was the Plaintiff's testimony that he was over 60 years old and that he was telling the truth and was why he had been sworn.

16. He further testified that he was a church goer and worshiped at the Believer Apostolic Mission Church. That he knew the Defendant's father with whom they had been allocated the land together, in 1964.

17. That he had a family, his wife who was alive and with whom they lived together on the farm was called Wanjiku Mucheru or Mama Ndibui. He also confirmed that he had a son called Samuel Kinyanjui but that he did not know his age although he was an adult.

(At this point the court noted that the witness seemed hesitate at the mention of this son's name.)

18. He proceeded to testify that although he knew the Defendant's father, he had come to know the Defendant at the time he had entered onto his land, on a date he could not remember

19. He was categorical that he had given the Defendant notice to leave his land which notice he had ignored and had refused to leave the land. He also reiterated that he had not given the Defendant his land, rather, the Defendant had forcefully entered into the same.

20. He confirmed that he did not have any document proving that he had been admitted in hospital.

21. The Plaintiff testified that at first he had asked the Defendant verbally to leave his land but upon his refusal, he had sought the assistance of Counsel who had then written a demand letter to the Defendant. He confirmed however, that he had not carried the said demand letter to court.

22. He further stated that there had been no agreement between him, his son and family members to sell the land to the Defendant. However when he was referred, by the defence Counsel, to an agreement dated 1st April 2007, he refuted the signature on the agreement and disowned that document in total.

23. The original agreement dated the 1st April 2007 and drawn in Kikuyu language was marked as DMFI 1(a), while its translation was marked as DMFI 1(b). The acknowledgement dated 17th April 2004 as well as its translation were marked as DMFI 1(c).

24. The Plaintiff denied on cross examination to the question put to him as to whether the proceeds from the sale of the land had been used to defray the hospital bill.

25. He confirmed that apart from one building, the Defendant had also put up a posho mill on the suit land. He denied knowledge that the Defendant had registered a caution on the suit land dated the 2nd April 2012. Herein marked as DMFI 2,

26. When referred to a letter dated 30th March 2012, he confirmed to having chased away the chief when he came to solve the dispute between him and the defendant for reason that the land had a title deed and the matter would best be decided in court. The said letter was marked as DMFI 3.

27. The Plaintiff confirmed that a notice, marked as DMFI 4 and dated that 17th April 2012, was what had been served upon the Defendant and also confirmed that the suit land was at a place called Githuguri where he also had a posho mill. He however stated that he was not jealous that the Defendant's posho mill was doing better than his. That all he was interested in was getting his land back.

28. Upon being re-examined, the Plaintiff testified that the Defendant got onto his land in the year 2007 wherein he subsequently filed the present case in the year 2013 after the Defendant refused to leave the suit land.

29. When referred to the agreement marked as DMFI 1(a) and dated the 1st April 2007, the Plaintiff confirmed that unlike the name appearing on the same, he was Jeremiah and not Samuel. That the signature on the agreement was not his and that it was not true that the land was sold by Samuel because he was the proprietor and he was still alive. The Plaintiff closed its case.

Defence case

30. DW1, the Defendant herein testified in his defence to the effect that he came to know the Plaintiff on the 1st April 2007. That prior to coming to Nyahururu, he had been living in Enosopukia in Narok wherein he had been chased away during the clashes of 1992. That upon his arrival in Nyahururu in Murungaru, he had started looking for land wherein he had come across Mr. Peter Maina Wambugu who had informed him that a person by the name of Samuel Kinaynji Mucheru was selling land. That at the time, ¼ an acre was going for Ksh 30,000/= depending on how one negotiated with the vendor.

31. That he knew the Plaintiff as a pastor and that on the 1st April 2007, while accompanied by Peter Maina and Peter Macharia Mwangi, he had visited the Plaintiff at his home, wherein he had found him, his wife and their son Samuel.

32. That on arrival, Peter Maina had told the Plaintiff that Samuel their son was selling land wherein the Plaintiff had told them that he had allowed Samuel to sell his inheritance. That he had then taken him to inspect the land and informed them that he had the title deed to the same but that he would guarantee the procurement of their title.

33. That they negotiated the purchase price and subsequently settled on Ksh 32,500/= as the purchase price. That the land had blue gum trees planted thereon. That he in the presence of his witnesses had counted the money totaling to Ksh 30,000/= to which they had given to the Plaintiff. There remained a balance of Ksh 2,500/= which was to be paid on the 22nd April 2007.

34. That they had then signed the agreement wherein Samuel had signed as the vendor, while the Plaintiff had signed as a witness. That subsequently DW1 had got a casual job where he made some money and once again while accompanied by Peter Maina and Macharia, they had taken the balance to the Plaintiff. Upon their arrival at the Plaintiff's home they had met the Plaintiff's wife and their son Samuel Kinaynji. The party had then been informed that the Plaintiff was not at home as he had gone to hospital. The Defendant had thus given the balance of Ksh 2,500/= to the Plaintiff's wife wherein they had recorded an acknowledgement to that effect, at the back of the agreement and counter signed the same. He produced the agreement written in Kikuyu language as DF Exhibit 1 (a), the translated agreement as DF Exhibit 1(b), and the translated acknowledgement as DF Exhibit (c)

35. That thereafter, he had taken possession of the land, removed the tree stamps which the Plaintiff had taken and burnt charcoal. He then built his house in the year 2007. That they had lived in harmony with the Plaintiff and even shared a meal whenever either of them slaughtered an animal.

36. That he had subsequently brought a surveyor to the land but when he requested for the title deed so that they could go to the Land Control Board, the Plaintiff had told him that he had not sold the land to him.

37. That notwithstanding, on the 23rd January 2012, he had paid the surveyor Ksh.10,000/= wherein the land had been sub divided and beacons fixed thereon. That at the time, the Plaintiff had been present and had even participated by showing the surveyor the boundary to the Defendant's land.

38. It was the Defendant's evidence that he had lived on that land for 11 years. That after the Plaintiff had refused to issue him with the title deed, he had reported the matter to the elders wherein six of them had gone to meet the chief who had then asked both the Plaintiff and the Defendant to meet with elders so as to solve their issues. That the Plaintiff had however chased them away. Later, he had been served with a notice.

39. The chief had then advised him to register a caution on the suit land which he did because he was claiming ¼ acres out of the same. He produced the copy of the caution as Df Exhibit 2, a letter he had addressed to the land Registrar to place the caution as Df Exhibit 3, notice from Counsel as Df Exhibit 4, as well as a receipt dated the 23rd January 2012 depicting fee paid to the surveyor, New Land Ltd, as Df Exhibit 5.

40. He confirmed that he was on the land because he had bought it from the Plaintiff and his son and that he did not take it by force. That further, the Plaintiff had not asked him to vacate the land. He sought for the Plaintiff's case to be dismissed.

41. In cross examination, the Defendant had confirmed that that the suit land was his first piece of land to purchase. That before he bought the same, the Plaintiff had showed them a title deed for plot No. 1919 and informed him that his son was selling the land which was part of his inheritance. That the title was in the name of Jeremiah Mucheru the Plaintiff herein.

42. He confirmed that the agreement depicted that the land was sold to him by Samuel Kinyanjui the son of the Plaintiff and that last name Mucheru is not on the agreement.

43. He also confirmed that he had arrived in Murungaru in 1992 wherein on the 11th April 2007, Peter Maina had taken him to the Plaintiff's home.
44. That he had given Jeremiah Mucheru the money because he was the owner of the land.
45. That it had been the Plaintiff's idea to have the agreement written in his son's name so that his son would not claim later that he had not sold his inheritance.
46. He was categorical that at the time they drew the agreement, the Plaintiff was not in hospital. He also confirmed that the signatures appearing on the recorded statement and on the agreement were the same.
47. He confirmed that they had not gone to the Land Control Board because the Plaintiff had refused, reason for which they had gone to the chief.
48. The next defence witness, DW2, Peter Maina Wamburu testified that he that he was born in 1958 and that he knew the Plaintiff Jeremiah Mucheru Ndibui as they lived in the same village. He further testified that he was the chief's elder for 8 years. That he knew Daniel Gichure Nguni with whom he had lived with before he (David) moved to work as a casual laborer in another village.
49. That on the 8th March 2007, one Kinyanjui, the Plaintiff's son, had informed him that his father(the Plaintiff herein) had given him permission to sell ¼ acre being part of his (father's) land but which land was still registered in his father's name.
50. That after 3 days he had met the Plaintiff who had confirmed that he had given consent to his son to sell ¼ acre of the land. The witness had then informed the Plaintiff that he would look for a buyer for him.
51. On the 25th March 2007, he had met David Gichure the Defendant herein who seemed troubled. He had then informed him of the ¼ acre of land being sold at Murungaru for Ksh 35,000/- wherein he had asked him to move there.
52. That on the 1st April 2007, the Defendant had sought him out at his home and had inquired from him whether the Plaintiff could reduce the sale price as he could only afford Ksh.32,500/-. That together with Macharia, David Gichure, and Kamau, they had gone to the Plaintiff's home on the same day where they had found the Plaintiff, his wife and their two sons one who was called Kinyanjui and another whom he could not remember his name. That after some conversation, the Plaintiff had asked him whether he had found a buyer wherein he had pointed the Defendant to him.
53. That after negotiations, they had settled on Ksh 32.500/- as the purchase price. They had been informed that the land was Kinyanjui's inheritance, who was present at the time and who had agreed to the sale it.
54. That the Plaintiff had shown the party the piece of land, which had too many tree stumps wherein he had then asked the Defendant if he liked the land. The Defendant had liked the land and told the plaintiff that he would remove the stumps. That they had returned to the Plaintiff's home where they had written an agreement after the Plaintiff had showed them title to plot No 1919 Aragwai.
55. The witness confirmed that he had been the one who had written the agreement. That they had indicated Samuel Kinyanjui as the vendor of the land while the buyer was David Gichure. That parties had then signed the agreement wherein the 1st witness, the Plaintiff herein, had signed the same after giving them his identity card, because he was the proprietor of the title.
56. Thereafter, the Defendant had removed the money and given it to Macharia who had counted it and confirmed that it was Ksh, 30,000/=. Macharia had then given him the money wherein he had given it to the Plaintiff. That the Plaintiff had also counted the money which he did not give anybody. That there was a balance of Ksh. 2,500/= which was to be paid on the 22nd April 2007. He confirmed that DF Exhibit 1(a) was the agreement he had written.
57. That on the 18th April 2007 the three of them, Macharia and the Defendant included, had gone back to the Plaintiff's house to give him the balance of Ksh. 2,500/= where they had found the Plaintiff's wife, mama Ndibui and the son Kinyanjui. They had been informed that the Plaintiff was in hospital. The Plaintiff's wife had informed them that the money they had brought would help offset the Plaintiff's bill in hospital. That they had given her the balance wherein she had acknowledged the same by signing at the back of the agreement. That she had taken the money and given them her identity card which they had noted down its details.
58. The witness testified that the Defendant had been told to avail the surveyor after clearing the balance. That he was not there when the surveyor visited the suit land, but after some time, the chief had called him and asked him whether there was a problem in the village between the Plaintiff and the Defendant wherein he had told him that he was not aware of any problem but that he was the one who had written the agreement as a witness to the Defendant.
59. The Defendant had been asked to avail elders so that they could solve the case but the Plaintiff had refused to have the case heard at his home.
60. The witness testified that the Plaintiff was a reverend in his church and that he was very sad that he told lies to the court. That he was there when the land selling transaction was going on. That the Defendant had built on the suit land and had also put up a posho mill as well as planted trees thereon. He was categorical that the Plaintiff had not told the court the truth.
61. On Cross examination the defence witness, DW2 stated that he had known the Plaintiff for more than 40 years while he had known the

Defendant for more than 20 years. That he and the Plaintiff had lived in Murungaru since 1963. That he had lived with the Defendant in Murungaru before leaving for Narok.

62. That he had known Samuel Kinyanjui since his birth because he had been born in Murunguaru. He confirmed to having met the Plaintiff, his wife and two sons at their home wherein he (Plaintiff) had shown them the title to his land upon request.

63. That the title was in the Plaintiff's name and that Kinyanjui was his son. That the Plaintiff was the person who sold them the land. That the agreement stated that the land was sold by Samuel because the Plaintiff had told him to write Samuel's name so that it could be confirmed that it was his inheritance., he had sold. That the money was taken by the Plaintiff and that they did not know whether he had given it to his son or not.

64. That the balance of Ksh. 2,500/= had been given to the Plaintiff's wife. That although the agreement indicated that Kinyanjui had been given the money yet the same was given to his mother. That the agreement was the true reflection of what had transpired. He confirmed that the signature on the agreement belonged to the Plaintiff and that he was at home and not in hospital as he had wanted the court to believe. That the Plaintiff had lied to the court.

65. DW3, Francis Macharia Wainaina testified that he knew both the Plaintiff and the Defendant. That the Plaintiff was a pastor/reverend. He testified that he was familiar with Df Exhibit 1 the agreement herein.

66. That on 1st April 2007, the Defendant informed him that he was buying ¼ acre of land from the Plaintiff and that he had wanted him to witness the transaction.

67. That he had agreed to be his witness wherein the four of them had gone to the Plaintiff's home. The Plaintiff had showed them the land which had many tree stumps. The Plaintiff had informed them that he had given the land to his son but since the son did not have a title, he would stand in for him. He had showed them the title to plot No 1919 Olaragwai Scheme.

68. The witness's evidence was the same as that of DW 2 to the effect that indeed the purchase money of Ksh 30,000/= was paid to the Plaintiff in the presence of his wife and son at the Plaintiff's home and that it was not true that he was in hospital at the time.

69. He confirmed that the balance of Ksh 2,500/= was given to the Plaintiff's wife. That thereafter, the Defendant had taken possession of the suit land and developed the land by planting trees and putting up a posho mill. That the Plaintiff had informed them that he would stand surety for his son since he had no title. That nobody else had authority to sell the land other than the Plaintiff.

70. DW4, Daniel Gatogo Jani, a neighbor to the Plaintiff testified that he knew that the Defendant lived on the Plaintiff's ¼ acre of land.

71. That on the 22nd January 2012 the Defendant had sought for his help informing him that a surveyor was coming to measure the land he had bought from the Plaintiff. That indeed the surveyor called Jack had arrived on the suit land on the 23rd January 2012 wherein he had proceeded to take the measurements after being shown the suit land by the Plaintiff. That on site were the Plaintiff, his wife, their son Sammy Kinyanjui and his two siblings. That after the surveyor had measured the land, he (DW 3) had dug the holes where the surveyor had put the beacons. That there was no problem thereafter and the Defendant lived on that land for more than 10 years.

72. In cross examination, the defence witness confirmed that the Plaintiff had sold the land to the Defendant. That the Plaintiff, his wife, son Samuel as well as the Defendant were present when the surveyor visited the suit land. That further, he had witnessed the Defendant pay the surveyor Ksh 10,000/ after he had done his work.

73. The defence closed its case and parties were directed to file their submissions within 21 days. Highlight of the written submissions was scheduled for the 18th October 2018 on which date none of the parties appeared in court and the matter was fixed for judgment.

Plaintiff's Submissions.

74. The Plaintiff's submission in summary is to the effect that he was the sole proprietor of land parcel Nyandarua /Olaragwai/1919 and as such was protected under the provisions of Section 27(a) of the Registered Land Act. The Defendant therefore had no color of right to enter into and remain on his land.

75. That indeed the sale agreement was to the effect that one Samuel Kinyajui was the vendor of the suit in contravention of section 3(3) of the Law of Contract Act. The Plaintiff denied ever being present during the alleged time the agreement was drawn and therefore the same was invalid and the entire transaction null and void.

76. It was his further submission that the said void transaction between the parties was not sanctioned by the consent of the Land Control Board and relied on the following decided cases;

i. Nakuru Court of Appeal, Civil Appeal No. 58 of 2005 Daniel Nganga Kiratu vs Samuel Mbururu Kiratu

ii. Nakuru High Court (sic) ELC No. 472 of 2013 Margaret Muthoni Wanyee vs Mukenia co-operative Society Ltd

iii. Wamukota vs Donat [1987]KLR 280

iv. Kericho High Court(sic) ELC No. 1 of 2014 Wesley Rutto vs James Talam

77. That indeed the Defendant herein had admitted being in possession of the suit land and having developed the same, an act which the Plaintiff submitted, was a criminal offence since there had been no sanction from the Land Control Board. He relied on the decided case in **Nakuru Court of Appeal, Civil Appeal No. 32 of 2005** the parties being **Joseph Boro Ng'era vs Wanjiru Kamau Kaime & Karungari Kamau Kaime**

78. While relying on the case in **Eldoret ELC Case No. 170 of 2012 Danson Muniu Njeru vs William Kiptarbei & 6 Others**, the Plaintiff submitted that the only remedy for the Defendant in the present circumstance was for a refund of his money from whoever he had entered into the agreement with in which case it was not the Plaintiff. The Plaintiff sought for the court to decide the matter in his favour and to grant the orders as prayed.

Defendant's Submissions

79. The Defendant's submission, while opposing the Plaintiffs' suit, framed the following issues for determination:

- i. Whether the Plaintiff is the legal owner and proprietor of all that parcel of land known as Nyandarua/Ol-Aragwai/1919 measuring 1.62 Ha.
- ii. Whether the Defendant has illegally entered into the parcel of land owned by the Plaintiff (Nyandarua/Ol-Aragwai/1919) and denied the Plaintiff the exclusive rights and use thereof.
- iii. Whether the Plaintiff deserves the orders of eviction against the Defendant to remove him from the parcel of land known as Nyandarua/Ol-Aragwai/1919 for being a trespasser.
- iv. Whether there was any transaction (agreement in 2007) between the Defendant and Samuel Kinyanjui and if so was Samuel Kinyanjui an agent of the Plaintiff?
- v. Whether the Defendant has any right to occupy the Plaintiff's parcel of land.
- vi. Whether the Defendant deserves orders of specific performance as against the Plaintiff as sought in the counter-claim
- vii. Who should pay for the costs of this suit, the counter-claim included?"

80. On the first issues, as to whether the Plaintiff was the legal owner and proprietor of all that parcel of land known as Nyandarua/Ol-Aragwai/1919 measuring 1.62 Ha, it was the Defendant's submission that indeed it was not in contention that the Plaintiff was the registered proprietor of that parcel of land.

81. The Defendant tackled the matters of determination numbered as (ii-vii) together to the effect that although the Plaintiff had denied having signed the agreement produced as Df exhibit 1, selling part of his land to the Defendant, and that at the time it is said that he had entered into the agreement, he had been hospitalized, yet during cross examination, he had confirmed to the fact that the Defendant had entered onto the suit land in the year 2007 and further that he had a son by the name of Samuel Kinyanjui. He had also owned the signature on the agreement

82. It was the Defendant's submission that the evidence adduced in court was to the effect that the suit land was indeed the Plaintiff's land to which he had gifted ¼ an acre to his son Samuel Kinyanjui.

83. That the sale agreement dated the 1st April 2007 was drawn in the presence of the Plaintiff and his son, Pater Maina, Francis Macharia and Gibson Mburu Mwangi wherein the Plaintiff had received a down payment of Ksh 30,000/= towards the consideration. The number of his identity card, which number corresponds to the number indicated on the title deed herein produced as Pf exhibit 1 was recorded on the agreement. That at the time, the Plaintiff had directed that the sale agreement be written in the name of his son Samuel Kinyanjui as the seller since he was selling his inheritance. The Plaintiff oversaw the sale transaction.

84. That further the balance of Ksh 2,500/ had been given to the Plaintiff's wife while the survey of the suit land and excision of ¼ acre had been conducted by one J.M Kariuki of new Land Limited in the presence of the Plaintiff and his children wherein beacons were subsequently placed by DW 4. The Developments on the said suit land were not done overnight and further it took more than 6 years before the Plaintiff filed suit. It was the Defendant's submission that the Plaintiff's entry could not therefore said to be illegal as it was done with the Plaintiff's consent and full Knowledge, he was therefore estopped by his conduct from denying knowledge of the sale agreement.

85. The Defendant relied on the decided case of **Serah Njeri Mwobi vs John Kimani Njoroje [2013] eKLR**, to submit that the Plaintiff was refrained from seeking redress by virtue of his acquiescence to all developments on the suit land.

86. It was further the Defendant's submission that Samuel Kinyanjui acted as an agent to the Plaintiff and as such, the Plaintiff was bound by the sale contract entered into by the Defendant and his agent. In so submitting he relied on the case of **Industrial & Commercial Development Corporation (ICDC) vs Patheon Limited [2015]eKLR**

87. That the Plaintiff's words and conduct indeed contributed to the completion of the transaction and thereafter possession of the suit land by the Defendant. That he could not now turn around to say that his son had no authority to sell the land as the doctrine of estoppel as

stipulated under Section 120 of the Evidence Act would come into play.

88. That he had the right to occupy the Plaintiff's land because he had occupied it as a purchaser with consent from the Plaintiff after executing a sale agreement where the Plaintiff also participated.

89. The Defendant submitted that he was entitled to specific performance as against the Plaintiff. He thus relied on the following cases to support his submission.

i. Macharia Mwangi & 87 Others vs Davidson Mwangi Kagiri [2014]eKLR

ii. Willy Kimutai Kitilit vs Michael Kibet [2018] eKLR

90. The Defendant sought for the Plaintiff's case to be dismissed with costs and his counter claim be allowed in its entirety.

Analysis and determination.

91. I have considered the evidence on record as well as the submission by counsel for both parties and the matter that is not in contention is that land parcel No Nyandarua/Ol-Aragwai/1919 measuring 1.62 Ha, was registered to the Plaintiff herein.

92. It is also not in contention that since the year 2007, the Defendant herein has been in occupation of $\frac{1}{4}$ an acre of the said parcel of land and has substantially developed the same.

93. What is in contention however, is how the Defendant came into possession of the suit land. Whereas the Plaintiff states on one hand that the Defendant is not legally in occupation of $\frac{1}{4}$ acre of the suit land and therefore ought to be evicted from therein, on the other hand, the Defendant has laid claim to $\frac{1}{4}$ acre of the suit land stating that he is legally in occupation of the same by virtue of having purchased it from the Plaintiff. He has thus sought for specific performance in his counter-claim

94. The issues for determination herein thus flow as follows;

i. Whether the sale agreement dated 1st April 2007 is invalid, null and void.

ii. Whether Defendant had performed all his obligations under the agreement and if so, whether specific performance as a remedy was available to him.

iii. Whether the agreement is void for want of consent of the Land Control Board.

95. It was the Plaintiffs evidence that as at the time the sale agreement herein produced as Df Exh 1 was entered into, he had been admitted in hospital and therefore was not party to the same. Although it is not disputed that he was in hospital at one time, however he did not adduce any evidence proving that at that particular time when the agreement was entered into, he was indeed admitted. On the contrary the evidence as adduced in court by the defence witnesses, whom I found to be candid and truthful, was to the effect that he participated in the transaction and even received part of the consideration money.

96. Section 3(3) of the Law of Contract Act provides that no suit shall be brought on a contract for a disposition in an interest in land unless the contract upon which the suit is founded is;

(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:

97. I find that the agreement in question on the face of it was signed by the parties to it and the signatures of the parties attested to by a witness who verified that indeed the Plaintiff was paid part of the purchase price, as required under section 3(3) (b). I therefore find the same to have been a valid contract.

98. The section is worded in mandatory terms however it does have a proviso as follows;

“Provided this subsection shall not apply to a contract made in the course of a public auction by an Auctioneer within the meaning of the Auctioneers Act nor shall anything in it affect the creation of a resulting, implied or constructive trust.”(Emphasis is mine).

99. The Plaintiff in his evidence has denied selling the suit property to the Defendant which in essence means that there was never a sale and therefore no need to question the validity of the agreement. The Defendant's evidence was that the Plaintiff had signed the agreement as a witness because although he was the proprietor of the land and held the title deed yet he had given his son permission to sell the same as part of his inheritance. That the Plaintiff was the one who had actually sold the land.

100. I find that from the evidence adduced and having noted the demeanor of the Plaintiff at the hearing, that he was not truthful, that the

circumstance presents the facts that the Plaintiff knew that he had passed his interest on the property to the Defendant, but for selfish reasons now, he wishes to use the fact that his name did not appear on the agreement as the vendor but rather, it was his son's name that appears, to unduly benefit himself. I find that the Respondent having been put and is in actual occupation of the suit property, had acquired equitable rights thereon. There was therefore constructive trust created in favour of the Defendant, which was enforceable in law.

101. In **Ayoub vs Standard Ban of S.A (1963) E.A 619**, the Privy Council said at page 623 par A, it was held that;

“The Courts will not imply a trust save in order to give effect to the intention of parties. The intention of the parties must be clearly determined before a trust will be implied”

102. I found the evidence of the Defendant and his witnesses to be truthful. It is not in doubt that money exchanged hands between the Defendant and the Plaintiff herein wherein in fact the Defendant paid the whole purchase price and was put in actual possession by the Plaintiff who even guided the surveyor on the placing of the beacons as he excised ¼ acre of land from his land for the benefit of the Defendant. Being so satisfied, I find that these actions by the Plaintiff was done with the intention to pass part of his interest in the original title No Nyandarua/Ol-Aragwai/1919 to the Defendant.

103. I further find that evidence was led to the effect that the Plaintiff had asked his son Samuel Kinyanjui to look for a buyer for the suit land which was his inheritance. That pursuant to finding a buyer, who happened to be the Defendant herein, the Plaintiff not only pointed out the specific area to be excised both to the defendant and the surveyor, but also received the purchase price and further directed the Defendant and his witnesses to draft the agreement in his son's name. I find that Samuel Kinyanjui played a minimal role in the transaction because save for the fact that his name was used in the agreement with the knowledge and express directives from the Plaintiff, the Defendant had at all times dealt directly with the Plaintiff and therefore the Plaintiff is estopped from going back on the representation he made to the Defendant was decided in the case of **Serah Njeri Mwobi v John Kimani Njoroge [2013] eKLR** where the court of Appeal held:

It therefore follows that where one party by his words or conduct, made to the other party a promise or assurance which was intended or affect the legal relations between them and to be acted on, the other party has taken his word and acted upon it, the party who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relationship as if no such promise or assurance had been made by him but he must accept their legal relations subject to the qualification which he has himself introduced.

104. On the second issue, the Defendant has sought for an order of Specific Performance which is an equitable remedy which means that the Court has to satisfy itself that on facts presented to it, it is equitable and in the interest of both parties to grant the reliefs sought.

105. In the case of **Gurdev Singh Birdi & Anor –vs- Abubakar Madhbuti C.A. No.165 of 1996** held as follows;

“It cannot be gainsaid that the underlying principle in granting the equitable relief of specific performance has always been under all the obtaining circumstances in the particular case, it is just and equitable to do with a view to doing more perfect and complete justice. Indeed, as is set out in paragraph 487 of volume 44 of Halsbury's Laws of England., Fourth Edition, a Plaintiff seeking the equitable remedy of specific performance of a contract:

‘ must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action. However, this rule only applies to terms which are essential and considerable. The court does not bar a claim on the ground that the Plaintiff has failed in literal performance, or is in default in some non- essential or unimportant term, although in such cases it may grant compensation. Where a condition or essential term ought to have been performed by the Plaintiff at the date of the writ, the court does not accept his undertaking to perform in lieu of performance but dismisses the claim.’

106. A party cannot run away from the terms of its agreement. It has often been stated that the Court's function is to enforce contracts that the parties enter into. The court cannot rewrite the party's agreements.

107. In the case of **Shah -vs- Guilders International Bank Ltd [2003]KLR** the Court in considering the terms of the parties contract stated that;-

“The parties executed the same willingly and they are therefore bound by it.”

108. In the present case, I find in favour of the Defendant.

109. The Plaintiff's submission was to the effect that further to the fact that the Agreement herein relied upon by the Defendant was null and void, the sale transaction between the Defendant and the vendor was also rendered null and void by the operation of the law by reason of failure to obtain the consent of the land control board as required in mandatory terms by the Land Control Act.

110. The requirement of a consent in respect of a transaction on agricultural land is found at **Section 6** of the **Land Control Act** which stipulates as follows:

(1) Each of the following transactions that is to say—

(a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;

(b) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 (L.N. 516/1961) for the time being apply;

(c) the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area, is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.

111. Pursuant to **Section 8** of the Act, the application for consent is to be made within six months of the making of the agreement. The said provisions give the High Court power to extend the six months period even where the period has expired, if sufficient reasons are given. This court is established pursuant to **Section 4** of the **Environment and Land Court Act** and **Article 162 2(b)** of the **Constitution of Kenya, 2010**. The court has the same status as the High Court. It follows therefore that this court can extend time for seeking consent of the land control board.

112. The latest decision of the Court of Appeal on the import of failure to obtain the consent was stated recently in 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)). The Land Control Act prescribes the time within which the application for consent should be made to the Land Control Board but does not prescribe the time within which the Land Control Board should reach a decision or the time within which any appeal should be determined. The process from the time of the making the application to the time of the determination of the appeal, if any, may obviously take time. However, the requirement that an application for the consent should be made within six months of the making of the agreement and the provisions of Section 7 of the Land Control Act for recovery of the consideration is an indication that Parliament intended that controlled land transactions should be concluded within a reasonable time.

*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.*

*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.....*

*.....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.*

113. I find and hold that the transaction between the Defendant and the Plaintiff was not voided for want of consent of the Land Control Board as the Consent was not sought for and denied

114. The Plaintiff having received the deposit as agreed, had no valid reason for failing or refusing to apply for consent. In the case of **Willy Kimutai Kitilit** (supra), the court affirmed the applicability of principles of equity and natural justice in a scenario such as the present one. The Plaintiff's failure to obtain and sign application forms for purposes of obtaining consent of the Land Control Board constitute sufficient reason for this court to intervene and issue an order for the extension of time to apply for consent of the Land Control Board in the circumstance.

115. The Defendant having paid the whole purchase price and having taken possession of the suit immediately upon execution of the sale agreement and he still remains in such possession, in terms of the agreement, the plaintiff had an obligation under the agreement to obtain the consent among other consents.

116. I find that although the Plaintiff still remains the registered proprietor of the suit land, he does so as a trustee to the Defendant and is estopped from denying the Defendant's claim to the land.

117. In essence I make the following orders:

- i. I dismiss the Plaintiff's suit.

ii. I uphold the Defendant's counterclaim

iii. Time within which the Plaintiff shall apply for the consent of the Land Control Board in respect of the transaction comprised in the Land Sale Agreement dated 1st April 2007 is hereby extended by a period of 6 (six) months. The extended period to run from the date of delivery of this judgment.

iv. The Plaintiff is herein directed to execute within 30 days of this judgment, all the necessary documents and take all necessary steps to ensure the transfer of the right, title and interest in land parcel No. Nyandarua/Ol-Aragwai/1919 measuring ¼ acre to the Defendant as comprised in the Land Sale Agreement dated 1st April 2007 in default to which the court's executive officer do execute all the necessary transfer forms, Land Control Board forms or any other relevant forms as will ensure that Defendant is registered as the absolute proprietor of the subject land.

v. The Defendant is also awarded costs of the suit plus interest thereon from the date of filing of the suit till payment in full.

118. It is so ordered.

Dated and delivered at Nyahururu this 24th day of January 2019.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE