



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELC CASE NO 394 OF 2017

MARY MUTHONI THEURI.....PLAINTIFF

VERSUS

NELSON NDOMO.....1st DEFENDANT

LEONARD NJOGU NJUGUNA.....2nd DEFENDANT

SETTLEMENT FUND TRUSTEES.....3rd DEFENDANT

JUDGEMENT

1. This case was filed at the Nakuru Environment and Land Court as Civil Suit No. 16 of 2010 on the 21st January 2010 wherein the Plaintiff sought for the following prayers:

i. A declaration that the purported transfer of land reference number Nyandarua/Silibwet/341 from the late Theuri Kabara as the lawful allottee to the late Eustace Njuguna Ndomo also known as Njuguna Ndomo is illegal, fraudulent, null and void and an order do issue canceling the name Eustace Ndomo also known as Njuguna Ndomo as the allottee of land reference number Nyandarua/Silibwet/341 and in its place thereof the late Theuri Kabara be reinstated as the allottee.

ii. An order do issue directing the 3rd Defendant under its statutory mandate to transfer land reference number Nyandarua/Silibwet/341 to the Plaintiff to distribute it to the beneficiaries of the estate of the late Theuri Kabara as per the confirmed grant issued on 18th October, 2002 in Nyahururu PM's Court Succession Cause No 146 of 2001.

iii. A permanent injunction do issue restraining the defendants their agents or any other person acting on their behalf from selling, disposing off or in any other manner so to do interfering with land reference number Nyandarua/Silibwet/341.

iv. The defendants do meet the cost of this suit plus interest.

v. Any other or further relief as this honorable court may deem just and expedient to grant.

2. The 1st and 2nd Defendants on the other hand filed their defence on the 30th March 2010 wherein they denied the averments made by the Plaintiff stating that the suit was bad in law, fatally defective, incompetent and an abuse of the process of the court to which their preliminary points of law would be raised at the hearing of the suit.

3. The 3rd Defendant did not enter appearance.

4. The matter proceeded for hearing at the Nakuru High court wherein the Evidence of the 1st Defendant was taken prior to the Plaintiff's evidence on the 2nd December 2011 for reasons that he had to travel back overseas.

5. Upon its transfer to this court parties took directions on the 10th October 2017 to the effect that by consent the matter proceed for hearing from where it had reached. The Plaintiff thus closed its case wherein the defence evidence was taken and they too closed their case.

Plaintiff's case

6. The Plaintiff had testified as the legal representative of the estate of the deceased Theuri Kaara who was her father and who died on the

26th March 1983. She produced the death certificate as Pf exh 1 and the letters of Administration as Pf exh 2. Wherein she stated that her father was the proprietor of Plot No. 341 having been allotted the same by the Settlement Fund Trustee in 1965, vide an allotment letter herein produced as Pf exh 3,.

7. It was her testimony that after the allotment of the land they had lived there from 1965 together with her brothers, Francis Watura, Peter Maina Theuri and Joseph Muratho. That at the time, her other brother, David Kafara (Kabara) lived in Meru and when their father became ill in 1982, he took him to Meru for treatment wherein he died and was buried there.

8. That they had continued to live on the parcel of land until the year 1987 wherein a man called Peter Gitahi Githu approached her and her brother Peter Maina and informed them that he and his sister Wamboi were desirous of buying the parcel of land, an offer they had turned down because it was family land and they had not procured the letters of grant. The same were however confirmed on the 18th October 2002. She produced a copy as Pf exh 4.

9. That the Administrators of her father's estate were herself and Francis Wangui Theuri. That after obtaining the grant, she had done on the land to subdivide it when their neighbor Peter Gitahi had reported to the police that they were trespassers. She had showed the police the grant wherein they had been released.

10. That when she had visited the Settlement office in Nyahururu, she found that there were documents of transfer of the suit land dated 4th June 1977 signed by their father and transferring the suit land to Eustace Ndomo. Alongside the transfer documents, there was also a signed letter of consent dated the 19th September 1977 which she produced as Pf exh 5 and the Transfer form as Pf exh 6 and the application for consent as Pf exh 7.

11. It was her evidence that since their father was illiterate, he could not sign any document and further that where the transfer showed the consideration of the land to have been Ksh 40,000/=, the consent on the other hand had indicated the consideration as Ksh 50,000/=

12. That vide a letter from the Settlement Fund Trustee, herein produced as Pf exh 8, they had been informed that the suit land had been transferred on the 26th January 1984 which was strange because as at that time, their father had already passed away.

13. The Plaintiff testified that despite the above state of affair, the Settlement Fund Trustee continued sending them notices demanding for money in the years 2001, 2002, 2003, 2006 and 2007 which notices were marked as Plaintiff identification 9.(MFI 9)

14. That subsequently, the dispute was lodged and arbitrated at the Ol joro Orok Land Disputes Tribunal who awarded them the land. No appeal was filed thereafter.

15. That on the 21st December 2009, she had conducted a search on the suit land, herein produced as Pf Exh 10, wherein she had discovered that the same was still registered to the Settlement Fund Trustee.

16. She also produced the Defendant's affidavit sworn on the Nairobi HCC 13 of 2003 as Pf exh 11.

17. On cross examination, she had testified that she had left her brothers on the land in the year 1987 and that they too had also left wherein she had not met them. That thereafter, their houses had thus been destroyed by Peter Gitau Gathu.

18. That they had discovered, upon receiving the demand notices that the loan had been paid for by somebody they did not know.

19. The Plaintiff's second witness, John Mukori Njuguna, confirmed that they had been allotted their respective suit land at the same time with Charles Theuri Kubara, by the settlement fund trustee in the year 1965 and whereas his land was No 346, Kabara's land was No 341.

20. He thus confirmed that after the death of Kibara, who had been taken for treatment to Meru by his son, somebody had laid claim to Mr. Kibara's land, Land upon which they used to graze their cattle. He disputed the fact that the deceased Kabara had sold the land to Gitahi Gathu who came on the land in 1971 and with whom they had had many disputes one of them being that he had encroached on his land.

21. On cross examination, he testified that upon Gitahi getting onto the land, he had destroyed the deceased Kabara's 4 grass thatched huts, the poles and grass.

22. The Plaintiff's third witness Pw 3, Maina Mwangi's evidence was to the effect that he was a proprietor of parcel No 344 which was a neighbor to parcel 341, a plot that belonged to Theuri Kabara who died in 1983.

23. That the said Kabara had lived on his land with his family until the years 1981-1983 where he had started living alone. That he was sure Kabara had not sold the land to anybody as he had not seen anyone being shown the beacons as a buyer.

24. The witness also testified that he knew Peter Gitahi Gathu who lived on his mother's land but who later returned to Kiambu because he was troublesome. That he did not live on that land in the year 1977.

25. In cross examination, he also confirmed that the said Gitahi had destroyed Kabara's houses after claiming that he had bought the land. At the time. Kabara's children had left for various destinations.

26. John Mwangi, Pw4's testimony was that he had lived on his father's land, Parcel No 342 since 1965 and that the same was adjacent to

plot No 341 which belonged to Theuri Kabara who died in 1983. Like Pw 2 and 3 above, he confirmed that the said deceased Kabara had not sold his land

27. He also testified that Gitahi Gathu lived on his mother's land, which was Plot No 340, since 1968 until he went to work as a driver in Kiambu in the year 1991 where he worked up to 1992 wherein he had gone back.

28. The witness also confirmed that the deceased, Kabara always thumb printed his documents as he did not know how to write. That is children had left him on the land in the year 1984 whereas Gathu had destroyed his house in the year 1992.

Defendants' Case

29. As earlier stated, the Defendants' first witness Ignatius Kamau Njuguna's evidence was to the effect that whereas Eustace Ndomo was his late father, both the 1st and 2nd Defendants were his brothers and Administrators of his father's estate as per the Certificate of confirmation herein produced as Df Exh 1.

30. That as per the Will left behind by his father, he was a beneficiary of parcel No 341 from here he had inherited 12 acres.

31. That it had been during one of his father's visits to one of the properties owned by Mukuruweni Co-operative societies where he was a secretary, that he had been introduced by the late Simon Mwaniki Kariuki to Theuri Kabara, who wanted to sell his land

32. That his father had negotiated with the late Kabara and sealing the deal which was witnessed by Simon Mwaniki. That subsequently, he had visited the suit land where he had found a newly constructed structure that had been put up by his father and the land had been fenced of. There were no other developments as the owner had pulled them down. That his father had then assigned Peter Gathi as the care taker of the land wherein he had planted trees and crops and was even grazing thereon.

33. The witness testified that the land had been sold for a consideration of Ksh. 44,000/= He produced documents used in the transaction between the two parties being, an Application for consent as Df exh 2, the consent as Df exh 3, the transfer as Df exh 4 and a transfer concern dated the 4th June 1987 relating to the suit parcel No 341/Silibwet/Scheme number 202 which he produced as Df exh 4. The charges to the suit land dated the 26th January 1894 and 26th January 1982 were marked for identification DMFI 6 and DMFI 7 respectively.

34. He also marked the demand notices dated the 10th February 1992 and 31st December 1992 for payment of rates which notices were addressed to is father as DMFI 8(a-c)

35. That following the issuance of the said demand notices, his father had paid the dues as evidenced in the production of receipts dated; 28th November 2001 for ksh 23359/35 herein marked as DMFI 9

i. Receipt dated the 29th December 1989 for Ksh 6,354 herein marked as DMFI 10

ii. Receipt dated the 15th June 2001 for khs 16,000/ herein marked as DMFI 11

36. That in the year 1994, he had been informed by Peter Gitahi that there were people on the land who were cutting down trees. He found out that members of the Kabara family and a neighbor namely Makori, were the culprits. He wrote a complaint letter to the area chief who vide his letter dated 9th December 1998, referred the matter which had now become a land dispute between Plot No 341 and 342, to the land tribunal where deliberations were conducted on the 9th May 2001 and findings were made on the 24th May 2001. He marked the documents as DMFI 12.

37. That there were other complaints regarding the parcel of land which complaints he produced as Df exh 13.

38. That the case for trespass which had been filed against Peter Gitahi and Nelson Ndomo Eustace Njuguna in Nyahururu Criminal Case No 3017 of 2003 had been withdrawn. The proceedings were produced as Df exh 14.

39. That he had subsequently obtained a letter dated the 16th June 2004 from the Ministry of Lands and Settlement which letter he produced as Df exh 15 and which letter had confirmed that indeed the owner of the land had been Eustace Ndemo Njuguna.

40. That the Plaintiff herein had filed the matter in the land disputes tribunal challenging the same and which proceedings had been quashed in the Nakuru HCCC Application No. 37 of 2008. He produced the proceedings as Df exh 17. That vide HCCC No.16 of 2010 herein produces ad Df exh 18, the family of Theuri Kabara had been ordered to vacate the land.

41. He testified that their family had been in occupation of the suit land since 1977 and that the present claim was brought as an afterthought, three years after his father's death. He sought for the same to be dismissed.

42. Dw 2, the Land Adjudication and Settlement Officer's testimony on the 11th June 2018 confirmed that indeed the letter dated 6th October 2004 herein marked as DMF 7 had emanated from their office. He also confirmed the parcel No 341 had been initially allotted to Theuri Kabara who sold it to Eustace Njuguna in the year 1977. The sale had been approved and the transfer documents executed on the 26th January 1984 in favour of Eustace Njuguna. He produced the said letter as Df exh 7.

43. The witness confirmed that he was not aware that Theuri Kabara had died on the 26th May 1983, and that the documents had been executed after his death but that it was in order for the same to have been executed after his death. He also confirmed that the transfer had been effected on the 4th June 1977 whereas the consent was granted on the 21st September 1977 and that a consent always came before the transfer. That in this case however the transfer that had been made before the 21st September 1977 could not be a valid transfer. When he was referred to the Pf exh 5, which was a consent dated the 19th September 1977, he confirmed that the same was not in tandem with their letter which had stated that the consent was dated 21st September 1977.

44. He also confirmed that the transfer herein was dated the 4th June 1977 and that he did not come across any sale agreement between Theuri Kabara and Eustace Ndomo and that Pf exh 4 and Pf exh 5 had a variation in the amount for consideration of the suit land.

45. That it had been wrong for the Settlement Fund Trustees to continue demanding money from Theuri when the land had already been discharged. He also confirmed that as per Pf exh 9, the land was still registered with the Settlement Fund Trustees as at the 31st December 2009.

46. He also confirmed that in 1956, Theuri had thumb printed on the allotment letter –Pf exh 2 but that the transfer herein produced as Pf exh 4 had been signed and further that the consent produced as Pf exh 5 had not been signed by the chairman of the Control Board.

47. The witness on re- examination testified that there had been a meeting held on the 19th September 1977 which had approved the transfer although he did not know if it was held on a Sunday, where the parcel of land had been discharged and that was the reason as to why he could not trace the parcel file since his office did not need it anymore. He also confirmed that the notices written to Theuri were not valid but that the transfer of the land had been legal.

48. Dw 3, Nelson Ndomo's testimony was that as a son to Eustace Ndomo and one of the Administrators of his father's estate as per the letters of Administration herein produced as Df exh 13, he was aware that parcel No 341 was bought from Mr Kibara in 1977 wherein they had taken possession and live on the land to date.

49. That after Mr Theuri had sold the land, he had moved to Meru wherein he had passed away and was buried there. He also confirmed that a dispute had been referred to the Disputes Tribunal where the matter was further escalated for Judicial Review where a ruling, herein produced as Def exh 15, was to the effect that the tribunal could not deal with Succession matters.

50. That the process for transfer had been duly followed after which there had been a discharge of the charge from the settlement Fund Trustees where the Land was discharged to his father Eustace after the payment of the outstanding loan due to the settlement Fund Trustees.

51. His evidence was that his younger brother Leonard Njogu Njuguna lived on the parcel of land, while Peter Gitahi was a neighbor and the caretaker since 1977. He confirmed that there had been a dispute between them and a neighbor Makori who had encroached on their land and put up a structure which they had demolished after the dispute had been settled by the elders.

52. He further testified that during the Succession Cause, the suit land had been listed as part of his father's estate wherein the Plaintiff had not raised any objection and that it was the only land that awaited distribution.

53. That the Plaintiff had brought this suit 27 years after the land had been purchased. He reiterated that the land had not been procured fraudulently and that Mr. Theuri Kabara had left on his own free will.

54. He confirmed that he had not seen the sale agreement between his father and Mr. Theuri and further that the land was about 12 acres and not 22 acres as depicted on the succession and application for consent documents.

55. In as far as the transfer was conducted and the discrepancy between the signed documents and the thumb printed documents, the witness's evidence confirmed the evidence adduced by Dw1.

56. When referred to their DMFI 6, the witness testified that he had witnessed the execution of the said document which was signed on the 2nd April 2002 by the Settlement Fund Trustees. That at the time, the letters for grant had not been granted. In reference to the discharge herein marked as DMFI 5, the witness confirmed that the name of Eustace did not appear therein.

57. The testimony of DW4, Peter Gitahi Githu was that he lived on his mother's Land which was No. 340. That the suit land was sold by Theuri Kabara to Eustace Ndungu in the year 1977, Thereafter, Theuri Kibara had moved to Meru leaving Ndungu in possession of the land. His children had also left. That he had then been asked to be the caretaker of the land.

58. That sometime later, Theuri's Children, the Plaintiff herein had come on the suit land and had started claiming ownership. He had thus informed Nelson Ndomo of the situation. That the matter had been reported to the chief wherein he had been arrested but released on bond thereafter. The matter had also been referred to the tribunal and in court at Nyeri before it was brought back to Nyahururu law court.

59. He also confirmed that after fencing the suit land, one Makori John the proprietor of No 346 had complained that he had trespassed on his land wherein the matter had been referred to the elders wherein it had been resolved.

60. He confirmed that he had gone to work in Nairobi between the years of 1977-1990 but that he had operated between Nairobi and Silibwet. However in the year 1977, he had been employed as the caretaker to the suit land where although he had been ploughing the land and grazing thereon, he and his family never lived on the said land. He so confirmed that he had served a term of 6 months in prison because of a traffic offence.

61. Dw5, Sabastian Nyaga Kihuta gave evidence to the effect that in the year 2001 he was a village elder wherein he had been summoned by the chief in the company of other 5 elders to solve a land dispute between parcels No 346, Makori's land and 341-Theuri Kabara's land.
62. At the time DW4 was the caretaker of parcel No 341 which had been bought by somebody from Theuri Kabara. That they had solved the boundary dispute therein.
63. That he had Known Theuri since 1965 and only came to know that he sold the suit land at the time they were called upon to solve the land dispute. He stated that he had not known to whom the land had been sold to.
64. He also confirmed that DW 4 was only caretaker and did not live on the suit land.
65. When DW 2 was recalled, he confirmed that he now had possession of the file to the suit plot and that the same had first been allotted to Theuri Kabara but there had been a transfer in the year 1977 which transfer had been executed by both parties necessitating the preparation of new documents in the name of Eustace Njuguna Ndomo. That among the said documents was the charge dated the 26th January 1984 for Ksh 3,309/= in relation to the suit plot which charge was produced as Df exh 4 following which payments were made by Eustace. He produced the receipts confirming the payment as Df Exh 10 (a-b) He also produced the demand notices sent to Eustace as Df exh 9.
66. That the transfer which was produced as Df exh 6 was executed by S.K Njuguna who represented the estate of Eustace Ndomo after the succession Cause
67. That once Eustace had completed the payments, they had issued him with a discharge of charge dated 2nd April 2002, herein produced as Df exh 5 following which their dealing with the suit property ended. That according to their records the owner of the plot was Eustace Ndomo.
68. On cross examination he reiterated his earlier evidence given on the 11th June 2018.
69. Dw 6, Benson Njoroge testified that he was an administrator in the office of the Chief in Huhoini sub location. He testified that the document dated the 9th December 1998 was a letter written to the agricultural officer by the Assistance chief in regard to a boundary dispute between parcels No 346 and 341. That the Assistant chief had sent elders to the disputed land parcels wherein after he had asked the Agricultural officer to visit the site too. That he had in turn written a report dated the 24th May 2001.
70. He produced the certified copies of the letters dated the 9th December 1998, the 9th May 2001 and 24th May 2001 as Df exh 19(a-c)
71. After the close of the defence case parties filed their respective submissions.

Plaintiff's submissions.

72. The Plaintiff's identical written submissions filed on the 30th April 2019 and 13th February 2019 were to the effect that her father was the original allottee of the suit parcel of land No. 341 and that the subsequent registration of the same in the name of Eustace Ndomo was fraudulent.
73. That they had proved the said fraudulent act by the defendants, which was composed of forgeries and falsification of documents, by producing in court Pf exh 5 which was a purported transfer form dated the 4th June 1977 signed by the late Theuri despite the fact that he was illiterate and only affixed his thumb print to documents as exhibited in the allotment letter dated the 6th April 1965 herein produced as Pf exh 3.
74. That the the said transfer form had been executed on a Saturday by officers from the 3rd Defendant's office, officers who it was demonstrated, did not work on weekends when the said document is said to have been counter signed proved their allegation of forgery. Further forgeries were exhibited through the alleged letter of consent dated the 21st September 1977 herein produced as Pf exh 6, which letter was not signed by the Chairman of the Land Control Board and lastly, that the purported meeting by the Land Control Board of the 18th September 1977 was indeed held on a Sunday a day which no Land Control Board has been heard to sit.
75. Their further submission of forgery was based on Pf exh 5 which they submitted that in comparison to Pf exh 6, the same was clear that the transfer was effected more than three months before the land Control Board ad allegedly sat to give its consent. That it was a known fact as testified by Dw 2, that the consent is given before a transfer can be effected.
76. The Plaintiff's further submissions was that at no point in time during their testimony, had the Defendants produced the sale agreement between Theuri and Eustace confirming that indeed the suit land had been sold as purported a fact which was in contradiction of the provisions of Section 3(3) of the law of Contract Act that stipulated that a contact for sale of land had to be in writing and signed by the parties.
77. The Plaintiff also took issue with the discrepancies of the consideration price that was exhibited on the Pf ex 7, to the effect that whereas the application for consent showed the consideration for the suit land to be Ksh 44,000/=, the consent letter on the other hand showed the consideration price to be Ksh 50,000/=
78. Further fraud was confirmed through Pf exh 8 being a letter dated the 6th October 2004 by the Director of Land Adjudication and addressed to the Land Tribunal Nyandarua confirming that the legal documents for transfer of the suit land from Theuri Kabara to Eustace

Ndomo were effected on the 26th January 1984 whereon in actual sense, Theuri Kabara had long passed away on the 26th May 1983.

79. That the Plaintiff did not discover the fraud until the 18th October 2002 when she was issued with the letters for administration.

80. It was the Plaintiff's submission that if indeed the suit land had been sold to the 1st and 2nd Defendant's father, then they ought to have known its acreage as well as the amount it had been sold for. That the fraud was further compounded with the fact that the Plaintiff continued to receive demand notices of the arrears on the suit land as late as 23rd October 2007, a land that purportedly been sold in the year 1977 and transferred thereafter. That save for the jurisdiction both the land Tribunal at Ol joro Orok and at the Nyeri appeals Tribunal had held in favour of the Plaintiff.

81. The Plaintiff also submitted that the present suit was not time barred for reason that the deceased Theuri had died on the 26th May 1983 as evidenced by the death certificate herein produced as Pf exh 1, where the Plaintiff obtained the letters of administration on the 8th March 2002. That by virtue of the provisions of Section 16 of the Limitations of Actions Act, time started running on the 26th March 2002. That the Plaintiff therefore had Twelve (12) years from 26th March 2002 to file a suit for the recovery of land which time run up to 26th March 2014. The Plaintiff filed her suit on the 21st January 2010 well within time.

Defendant's submissions.

82. The 1st and 2nd Defendants filed their written submissions on the 19th March 2019 in which they framed issues for determination in the matter as;

- i. Whether there was fraud involved in the transfer of ownership of the suit property from Theuri Kabara to Eustace Ndomo.
- ii. Who has been in possession of the suit land.
- iii. Does the Plaintiff has(sic) any cause of action against the Defendant herein.
- iv. Who should pay the cost of the suit.

83. On the first issue, the Defendants relied on the provisions of Section 107(1) of the Evidence Act to submit that for one to assert the existence of a fact they must offer proof of the same. That the Plaintiff herein had pleaded Fraud on the part of the Defendants yet she had not proved any of it. That the allegation that Mr. Theuri was illiterate could not be relied on since at the time when the agreement was entered into in 1977, the Plaintiff was very young hence her source of information was questionable. That secondly although the Plaintiff alleged that the consent was not signed by the relevant authority, yet DW2 had categorically stated that the document was valid even minus the signature

84. Further that no document that was expected to be executed by the late Theuri was executed after his death as claimed by the Plaintiff and that her allegations were a deliberate misinterpretation of the contents of the letter dated the 6th October 2004.

85. That the standard of proof on the issue of fraud was very clear in law wherein a party pleading the same is expected to go a notch higher than the mere balance of probability threshold as was held in the cases of **Mahendra Shah vs Barclays Bank International Ltd & Another [1979] eKLR** and in the case of **Davy vs Garrette [1978] Ch.473 at pg 469**, where it had been held that it was not allowable to leave fraud to be inferred from the facts.

86. That the Plaintiff did not believe in her own allegations as she did not even indulge the forensic experts to determine whether the documents were a forgery even after the suspicious discovery in the year 2003 which gave her sufficient time to investigate on her allegations before filing the matter in court.

87. The Defendants further relied on the decision in the case of **Jenifer Nyambura Kamau vs Humphrey Mbaka Nandi [2013] eKLR** to submit that since the Plaintiff had not discharged the onus placed on her to prove fraud, she could not be allowed to rely on that ground. That moving forward, they on the other hand, had provided overwhelming evidence to show that the documents in their possession were legitimate and above board. This was confirmed by the calling of DW2 to confirm the legality of the said documents.

88. That the discrepancies on the acreage of the suit land and the consideration paid for the same were not issues that went to the root cause of the matter in issue and did not mean that there were some irregularities involved.

89. That if at all it is shown that these were mistakes, the same could not be attributed to the Defendants or their father and neither could dishonest or fraud be deduced from the facts surrounding the transaction. In any event DW2 testified that all documents relied upon by the Defendants were authentic and effective to date.

90. On the second issue as to who was in possession of the suit land, it was the Defendant's submission that there was overwhelming evidence adduced in court to the effect that the Plaintiff and her family had lived on the suit land since 1965 wherein at some point they had all left the same. That as soon as the Plaintiff's father sold the Land in 1977, he had also left for Meru wherein the Defendants' father had taken possession of the same. Land which the Defendants continue to be in possession to date.

91. The third issue that was to be determined as per the Defendant's submission was the issue as to who was the lawful owner of the suit land. It was submitted that based on the records adduced in court as well as the evidence therein, it was clear that upon the sell and execution of all documents, the transfer of ownership of the suit land had shifted from Theuri to Ndomo.

92. The Defendant also submitted that the Plaintiff did not have any cause of action against the Defendant for reason that she had not proved any of the issues raised herein above. That further the suit was statutory barred by virtue of the provisions of Section 7 of the Limitation of Actions Act. That the ownership of the land had been transferred on the 4th June 1977 where upon 33 years later the present suit was filed on the 24th January 2010. That even if the Plaintiff raised claim of ownership in the year 2004 when she instituted the land dispute, time would have started running then making it 27 years which time was still time barred keeping in mind that the law prohibited anyone from claiming land 12 years after the cause of action arose.

93. Lastly the Defendant sought for costs while advocating for the dismissal of the Plaintiffs case for reason that it lacked merit.

Analysis and Determination

94. I have considered the matter before me the, evidence as well as the submission, the authorities and the applicable law. I find that the undisputed facts of this case being that the Plaintiff's father Theuri Kabara was allocated the suit land No 341 by the Settlement Fund Trustee on 6th April 1965 wherein he had taken possession and lived there with his family. That subsequently he had left the suit land in the year 1977 for Meru following which his family also left. He died on the 26th May 1983.

95. It is also not disputed that after the death of Theuri Kabara, the 1st and 2nd Defendant's father one Eustace Njuguna Ndomo, claimed ownership of the land by virtue of purchaser's interest and took possession of the land in the year 1977 wherein the name of Theuri Kabara was replaced with that of Eustace Ndomo in the records at the Settlement Fund Trustees' office. No title deed has however been issued

96. It is also not in dispute that the change of names notwithstanding, both parties continued to receive demand notices from the Settlement Fund Trustee. That further, despite the fact that Eustace Ndomo claimed ownership of the suit land by virtue of having purchased it from Theuri Kabara, no sale agreement was produced herein.

97. It is also not in dispute that the execution documents of the transfer of the suit land were made long after Theuri Kabara had died and that there was a discrepancy as to amount shown on the documents as consideration of the purchase price.

98. It is thus against this background, that I find the issues that arise for my determination as being:

- i. Whether the suit is time barred by virtue of the provisions of the Limitation of Actions Act.
- ii. Whether there was a sale agreement between the parties,
- iii. Whether the transfer of the suit land being Land parcel No. Nyandarua/Silibwet/341 was fraudulent.

99. Section 7 of the Limitation of Actions Act provides as follows:

"An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him..."

100. Section 16 of the Limitation of Actions Act provides as follows

For the purposes of the provisions of this Act relating to actions for the recovery of land, an administrator of the estate of a deceased person is taken to claim as if there had been no interval of time between the death of the deceased person and the grant of the letters of administration.

101. Section 16 thereof ordains that the administrator of the estate of a deceased person is taken to claim as if there had been no interval of time between the death of the deceased person and the grant of the letters of administration. This would, in effect, mean that the letters of administration would be taken to take effect from the time of the death of the deceased. In the instant case, the deceased Plaintiff's father died on the 26th May 1983 wherein the Plaintiff became the administrator of the estate of the deceased on the 8th March 2002 upon which the cause of action accrued, pursuant to Section 16 of Cap 22 (supra). The twelve years stipulated under Section 7 of Cap 22 (supra) thus began to run on the 8th March 2002. The suit was filed on the 21st January 2010, which was about eight years later which was not more than 12 years before the action was commenced, hence not offensive to the provisions of Section 7 of Cap 22.

102. On the second issue as to whether there was a sale agreement between the parties, Section 3(3) of the Law of Contract Act provides that no suit based on a contract of disposition of interest in land can be entertained unless the contract is writing, executed by the parties and attested. Section 3(7) of the Law of Contract Act excludes the application of Section 3(3) of the said Act to contracts made before the commencement of the subsection. Section 3(3) of the Law of Contract Act, came into effect on 1st June, 2003. There having been no dispute to the fact that Eustace Ndomo claimed ownership of the suit land by virtue of having purchased it in the year 1977 and thereafter took possession of the same, I find that Section 3(3) of the Law of Contract Act was not applicable in the circumstance as this transaction was made prior to the amendment of Section 3(3) of the Law of Contract Act in 2003, the subsection read as follows:

(3) No suit shall be brought upon a contract for disposition of an interest in land unless the agreement upon which, the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it;

Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee

who has performed or is willing to perform his part of a contract-

(1) Has in part performance of the contract taken possession of the property or any part thereof; or

(11) Being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract. '

103. Having found that Eustace Ndomo and his family took possession of the land hence took actual and or constructive possession of the suit property since 1977 by virtue of having purchasers interest, and that the possession was open, uninterrupted and continuous until the filing of the present suit by the Plaintiff in 2010, I find that since there was no sale agreement produced in this matter, that notwithstanding Section 3 (7) of the *Law of Contract Act* makes exception to oral contracts for sale of land coupled with part performance. That since Section 3 (3) of the *Law of Contract Act* came into effect in 2003 and does not apply to oral contracts for sale of land concluded before Section 3 (3) of the *Act* came into force, the provision of Section 3 (3) of the *Law of Contract Act* does not apply in this case.

104. On the third issue as to whether the transfer of the suit land being Land parcel No. Nyandarua/Silibwet/341 was fraudulent. The Plaintiff's case is that the registration of the Eustace Ndomo, the 1st and 2nd Defendants' father's registration with the Settlement Fund Trustee as the proprietor of the suit land was fraudulent. The 1st and 2nd Defendants' contention was that their father was the proprietor of the suit land having purchased the suit property from the Plaintiff's father. It is further pleaded that the documents at the Settlement Fund Trustee have been registered in the name of Eustace Ndomo after Theuri Kabara had passed on. That the official searches at the Lands Registry however revealed that the properties were still registered in the name of the Settlement Fund Trustees as at 21st December 2009 and no title deeds have been issued. It is also the Defendants' contention that the consent to transfer the properties from Theuri Kabara to Eustace Ndomo were granted by the Nyandarua North Land Control Board wherein upon purchase of the suit land, Eustace Ndomo took possession and has been in occupation since.

105. The Plaintiff had denied any knowledge of the alleged purchase and transfer of her father's land.

106. There was no appearance and Defence by the Hon Attorney General for the 3rd Defendant. But the evidence by Dw2, the Settlement and Adjudication Officer who testified on behalf of the defence was to the effect that every action taken by the 3rd defendant with regard to the suit properties was carried out in good faith without irregularities and in accordance with the law. He testified that the transfer was registered, legally and procedurally.

107. Having pleaded fraud and illegality on the part of the Defendants in the manner in which they obtained the suit land, the onus was on the Plaintiff to prove those allegations. Fraud is a serious matter which must be proved to the required standard. In **R.G Patel vs Lalji Makanji 1957 E.A 314**, the Court of Appeal stated as follows:

"Allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required".

108. In the case of **Arthi Highway Developers Ltd vs West End Buthery Ltd & Others C.A Civil Appeal No. 246 of 2013 (2015 e K.L.R)**, the Court of Appeal cited the following passage from **Bullen & Leake precedents pleadings 13th edition** at Page 427:

"The statement of the claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice".

109. I have no doubt in my mind that the Plaintiff herein has distinctly pleaded the facts on which fraud is alleged against the Defendants. The next step however was for her to prove those allegations to the required standard. I will therefore interrogate all those allegations of fraud, illegality and misrepresentation as submitted by the Plaintiff.

110. **To begin with, I shall take issue with the disputed signature of Theuri Kabara (deceased). It was the Plaintiff's testimony that** when she had visited the Settlement Office in Nyahururu, that she had found documents of transfer of the suit land dated 4th June 1977 purportedly signed by their father which documents had transferred the suit land to Eustace Ndomo. Alongside with the transfer, there was also a signed letter of consent dated the 19th September 1977. It was thus her evidence that since their father was illiterate, he could not sign any document and therefore the signature appearing on the transfer and application for consent of the Land Control Board could not be her father's. In regard to this allegation that the deceased could not write and therefore the signature appearing on the transfer and application for consent could not be his, I find that this fact could only be proved by the evidence of an expert witness in the nature of a forensic document examiner. No such witness was called by the Plaintiff to prove the allegation. As the provisions of Section 107 to 109 of the *Evidence Act* place the onus of proof on the Plaintiff, it was therefore her duty to do so. She did not even produce any document to demonstrate that she had reported the alleged crime to the police or that the matter was pending investigation. This allegation therefore remains un-proved.

111. On the issue of the discrepancy on the consideration of the purchase price in the sum of Ksh 40,000/= as indicated on the Transfer and Ksh 50,000/= as indicated on the consent form, my take is that it is settled law that consideration need not be adequate but only sufficient. Land can even be transferred as a gift where no monetary consideration is necessary. It cannot be said, without supporting evidence to the contrary, that where land is transferred for a consideration that is seemingly less than its market value or is transferred as a gift, then that transaction is fraudulent. Just like in the present case the discrepancies on the consideration price on the two documents does not go to the root cause of the matter, the transfer dated 4th June 1977 indicated that the transferor has accepted 40,000/ and that the transfer was subject to a charge of Ksh 5,000/ which had been created on the 6th April 1965 against the transferor. There having not been a sale agreement, which

was not mandatory at the time, or any document to the contrary, this issue rests at that.

112. The other issue the Plaintiff took with the Defendants on allegation of fraud was that the said transfer form was executed on the 4th June 1977 which day fell on a Saturday a day when officers from the 3rd Defendant's office did not work. That further, forgeries were exhibited through the alleged letter of consent dated the 21st September 1977 herein produced as Pf exh 6, which letter was not signed by the Chairman of the Land Control Board. That the purported meeting by the Land Control Board of the 18th September 1977 was indeed held on a Sunday a day which no Land Control Board has been heard to sit.

113. Indeed I have looked at the year calendar of 1977 and whereas the 4th of June 1977 fell on a Saturday, it cannot be said with certainty that officers in the 3rd Defendants office did not work on that day, suffice to say that as an Advocate, some of our offices operated on Saturdays on a half day basis, a practice that still goes on today in most companies, with no evidence to the contrary, I find that this is a non-issue.

114. The issue that raises doubt as to the legality of the consent comes about in the meeting that was held on the 18th September 1977 when the Land Control Board sat to deliberate on the application for consent. A look at year calendar of 1977, the same clearly shows that the purported day fell on a Sunday. Again as herein above stated, there having been no evidence to dispute the fact that there was no sitting on that day, this allegation is neither here nor there, and this point must also fail.

115. In fact let us for one moment consider that there was no meeting by the Land Control Board on that Sunday, it would therefore mean that the application for consent was not sanctioned and therefore there was as no consent.

116. The requirement of a consent in respect of a transaction on agricultural land is found at **Section 6 of the Land Control Act** which provides 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.

117. The Court of Appeal in the case of **Willy Kimutai Kitilit v Michael Kibet [2018] eKLR** stated 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.

118. In the present case, it is not in doubt that the Defendants took possession of the suit property immediately upon execution of the sale agreement where they have remained in such possession to date. I therefore find that although the agreement between the parties could be void for want of consent of the Land Control Board, it is still enforceable on the basis of constructive trust and proprietary estoppel. This issue rests at that.

119. Another issue raised by the plaintiff was that vide a letter from the Settlement Fund Trustee herein produced as Pf exh 8, they had been informed that the suit land had been transferred on the 26th January 1984 which was strange as at that time their father had already passed away. I find that since no evidence of sale was produced to demonstrate that there was a sale of the suit property, which written agreement was not a requirement at the time, the fact remains that the suit land it is still registered in the name of Settlement Fund Trustees and

therefore any sale of the property was an in-house arrangement between Settlement Fund Trustees, Eustace Ndomo, and Theuri Kabara

120. The court further finds that after Eustace Ndomo took possession of the suit land in 1977, he had been documented in the Settlement Fund Trustees office as the owner of the property but the transfer therein on the 4th June 1977 was not the legal transfer of property as per the law, because it was still registered in the names of Settlement Fund Trustees, it loosely meant that Mr Eustace Ndomo was entitled to the same

121. In the end, I find that the Plaintiff has not made out her case to the required standards and I hereby dismiss the suit with costs to the Defendants.

Dated and delivered at Nyahururu this 28th day of May 2019.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE