IN THE COURT OF APPEAL AT NYERI

(CORAM: KARANJA, KANTAI & ALI- ARONI, JJ.A.) CIVIL APPEAL NO. E027 OF 2021

BETWEEN

DAVID GITONGA MUNGANIA
(*Sued as the legal Representative of the Estate of*
LIVINGSTONE M'MUNGANIA (DECEASED).....APPELLANT

AND

MBOGORI BAICHU.....RESPONDENT

(*Being an appeal against the Judgment of the Environment and Land Court at Meru (L. Mbugua, J.) delivered on 30th September, 2020*

in

E.L.C. No. 14 of 2018
Formerly
HCC No. 71 of 1995 and Nyeri HCCC No. 60 of 1987.)
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JUDGMENT OF THE COURT

By an agreement made in writing dated 13th day of April, 1988 between **Livingstone Mungania Mbogori** (as vendor) and **Mburugu Mbogori Baichu** (as purchaser – the respondent herein) it was agreed by the parties that an agreement dated 23rd October, 1981 (made by them) be varied to the extent that the purchaser was to buy from the vendor 15 acres of land to be excised from the Plot known as Plot 84, Timau Settlement Scheme (the suit land) in consideration of Kshs.83,500 instead of the previous 11 acres in the earlier agreement. The purchaser was to

take possession of the land after paying an agreed deposit of Kshs.40,000.

By a letter dated 11th June, 1982, the Chairman, North Imenti Land Control Board informed the respondent that consent to subdivide and transfer 15 acres from the suit land had been given but was to await the area being registered.

Lawyers acting for the vendor vide a letter dated 7th July, 1986 stated that their client was ready to transfer the purchased land and the respondent should call on them to sign the transfer documents and pay for transfer fees. Matters were moving smoothly but went south when transfer of the land did not happen.

By a plaint which was amended filed at the Environment and Land Court (ELC) at Meru the respondent sued the vendor (he died and was replaced by the appellant David Gitonga Mungania) where the agreement for sale was restated; it was stated that the purchase price had been paid in full; that consent to subdivide the land and transfer 15 acres to the respondent had been given; that the deceased had breached the agreement by failing to subdivide and transfer as per the agreement; that the respondent had suffered loss and damage for paying for land and being refused to occupy it or utilize the same for over 37 years; that the respondent had been given possession of the land by the deceased for 1 year and had harvested 60 bags of wheat and it was prayed that an order of specific performance be made and the Land Registrar, Meru, be ordered to have the respondent's name registered as proprietor of Timau Settlement Scheme 192; mesne profits be awarded from 1981 *"...to date..."* and costs of the suit be awarded.

Livingstone M’Mungania (the deceased) filed a defence in person where he stated in material part that he had not refused to undertake his part of the agreement:

> **“…denies that he is in breach of the sale agreement and states that the delay to subdivide and transfer to the plaintiff of the suit land is an administrative delay and not the Defendant's fault. The Defendant denies that he has been paid the consideration in full and states that there is a balance of Shs.7,700/ the Plaintiff has yet to pay...”**

The deceased pleaded in the defence that there was no cause of action and that the suit had been filed prematurely.

Prosecution of the suit took a while and in the course of time the appellant David Gitonga Mungania moved the court and was allowed to be substituted to be the defendant in place of his father after he satisfied the court that his father was old and was incapable of defending the suit.

The appellant instructed his lawyers who amended the defence where the whole claim was totally denied and the appellant, in a witness statement, stated that he knew that his late father had entered into an agreement with the respondent:

> **“…The said agreement however was entered into fraudulently and discreetly and when the deceased's family came to know about, we objected to the sale…”**

The appellant stated in the said statement that the agreement had been made in a bar where his father had been bought alcohol but had not been paid purchase price for the land and only

Kshs.3,700

had been paid which he was ready to refund; that the family objected to sale of land which had been made fraudulently and that the suit was incompetent.

The suit was heard by Mbugua, J. who in a judgment delivered on 30th September, 2020 gave orders of specific performance directing the Land Registrar, Meru, to put the respondent's name as proprietor of land known as Timau Settlement Scheme 192 while cancelling the names therein; the respondent was awarded Kshs.6,120,000 to attract a sum of Kshs.180,000 yearly until the time when the judgment debtor gave vacant possession of the suit land to the respondent and the appellant was ordered to pay costs of the suit and interest therein at court rates. Those orders provoked this appeal.

There are 16 grounds of appeal in the Memorandum of Appeal drawn for the appellant by his lawyers **M/s Mbaabu M'Inoti & Company Advocates** where it is stated that the Judge erred in law and fact by failing to adhere to the provisions of section 6 and 7 of the Land Control Act; that the Judge erred by failing to dismiss the suit on the ground that it had been filed long after the cause of action had arisen; that the Judge had erred by failing to interpret the sale agreement and not finding that provisions of the Land Control Act had been breached by the respondent; that the plaint had not set out the claim in clear terms; that the Judge should have found that the suit was an afterthought on the part of the respondent; that it was not proved that the deceased was the owner of the suit land and could be

sued; that a case for specific

performance had not been made and the order for specific performance was wrong; that the Judge erred by awarding damages based on wrong principles; that the Judge erred in assessment of acreage claimed by the respondent; that the Judge erred in relying on valuation report and loss of user report that were not filed or produced by an expert to warrant an award of mesne profits of Kshs.6,120,000 and that the judgment is against the law. We are asked to allow the appeal by setting aside the whole judgment and dismiss the suit and award costs to the appellant.

When the appeal came up for hearing before us on 16th June, 2025 the appellant was represented by learned counsel **Mr. Muia Mwanzia** while the respondent was represented by learned counsel **Miss Maureen Githinji**. Both sides had filed written submissions which they fully relied on without finding it necessary to highlight any point at all.

The appellant in written submissions submits that the Judge ignored provisions of the Land Control Act which provides that consent of Land Control Board has to be obtained within 6 months in controlled transactions; that consent of Land Control Board was obtained over 2 years after the date of the agreement for sale - **Civil Appeal No. 76 of 2014**, ***David Sironga Ole Tukai vs. Francis Arap Muge*** is cited for the proposition that an agreement for sale of land without consent of Land Control Board is void. It is submitted in support of other grounds of appeal that the case was not proved as required in law; that specific performance should not have been ordered because the

agreement for sale was defective;

that mesne profits were not proved as no evidence in support was tendered. We are asked to allow the appeal.

In written submissions in opposition to the appeal the respondent cites the case of ***Hassan Zubeidi vs. Patrick Mwangangi Kibaiya & Another*** **[2014] eKLR** for the proposition that the duty of the Court is to enforce the intentions of parties in a contract. It is submitted that the respondent fulfilled his part of the contract; that consent of Land Control Board was obtained. It is submitted on the issue of mesne profits that a case was made in that regard to justify the award. We are asked to dismiss the appeal.

There are only two issues that we discern in this appeal for our consideration: whether there was a valid contract for sale of land and whether the respondent was entitled to an award of damages "mesne profits".

On the first issue there is no doubt that the deceased and the respondent entered into a valid agreement for sale on 23rd October, 1981 for the sale by the deceased to the respondent of 11 acres of land to be excised from Plot 84 Timau Settlement Scheme. That agreement which was duly executed as required by the Law of Contract Act was varied by the agreement dated 13th April, 1988 where the parties agreed that a further 4 acres be added to make in all 15 acres. The area where the suit land was to be excised was then unregistered as was stated by the Chairman, North Imenti Land Control Board. By his letter of 11th June, 1982 the said officer stated that consent to subdivide and

transfer had been given by

Land Control Board but was to await registration of the area. That registration took place leading to the letter of 7th July, 1986 where lawyers acting for the deceased informed the respondent that the deceased was ready to transfer the land and the respondent should call on them to execute transfer documents and pay transfer fees. This concatenation of events leads to the inescapable conclusion that the purchase price was paid in full and that the deceased was ready and willing to transfer the land to the respondent.

The record shows that because the deceased became old and incapable of handling his affairs, the appellant approached ELC and was allowed to be substituted and became the defendant in the suit. He then instructed his lawyers to change the nature of the defence where the claim was denied in *toto.* But it is on record as we have seen that his father had in the defence he had filed denied that he had failed to transfer the suit land to the respondent claiming that there were administrative issues that had caused delay in transferring the suit land and that there was a small unpaid balance. That unpaid balance must have been paid in view of the letter by the vendor's lawyers dated 7th July, 1986 where they confirmed that purchase price had been paid in full and the respondent should call on them to execute transfer documents. When the deceased became incapable of mind and body and later died the appellant failed or refused to take out a grant of letters of representation thereby frustrating prosecution of the suit which was delayed for many years leading to various attempts by the respondent to have the appellant appointed as

the administrator of his father’s estate. This action by the appellant appears to have

been made solely to ensure that the transaction entered by his late father was not completed but was frustrated.

The transaction between the vendor and the respondent became voidable under the Land Control Act at the instance of the vendor when consent of that Board was not obtained within 6 months but was validated when the vendor applied for and received consent to subdivide and transfer from the North Imenti Land Control Board.

We find that there was a valid sale agreement between the deceased and the respondent; consent of Land Control Board was obtained. The grounds of appeal on that issue are dismissed.

On the issue of award of mesne profits this is how the claim was made in the amended plaint.

> **"8A) The plaintiff avers that when he was put into possession by the defendant for one year- He was able to harvest 60 bags of wheat for sale…"**

The respondent prayed for:

> **"Mesne profits from 1981 to date…"**

The respondent did not produce any document to show any loss to prove mesne profits. He only stated that he had harvested 60 bags of wheat in the one year he was given possession. He did not provide any document in proof of this claim. This was in the nature of a special damage claim which required to be specifically pleaded and proved. In ***Hahn vs. Singh*** **[1985] eKLR**:

> ***"Special damages must not only be specifically claimed (pleaded) but also strictly proved…for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."***

There was no proof of the special damage claim and we think that the trial court erred in making an award for loss of mesne profits. To that extent only does the appeal succeed.

We find in the main that the appeal has no merit and is dismissed but the appeal succeeds only to the extent that the award of mesne profits is set aside. The appellant will have ¼ costs of the appeal.

Dated and delivered at Nyeri this 11th day of December, 2025.

W. KARANJA

.....
JUDGE OF APPEAL

S. ole KANTAI

.....
JUDGE OF APPEAL

ALI - ARONI

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JUDGE OF APPEAL

I certify that this is a true copy of the original
Signed

DEPUTY REGISTRAR