



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 361 OF 2017

KURIA MBUGUA.....PLAINTIFF

VERSUS

DICK WAWERU.....DEFENDANT

JUDGMENT

By an **Amended Plaintiff** dated **29th May 2017**, the Plaintiff herein brought a suit against the Defendant seeking for orders that;

- a) The Defendant to transfer an equal portion of land from parcel of land Title No.Githunguri/Giatheko/740.***
- b) Mesne profits***
- c) Costs of the suit***

In his statement of claim the Plaintiff averred that he was the registered and equitable owner of parcel of land **Title No.Githunguri/Giatheko/739** while the Defendant is the registered and equitable owner of the adjacent parcel of land **Title No.Githunguri/Giatheko/740**. He averred that they are brothers and sometimes in **2003**, they agreed to exchange their parcels of land that they had inherited from the Estate of their late father. He averred that he subdivided his parcel of land **Title No. Githunguri/Giatheko/739** into two portions being **Title No. Githunguri/Giatheko/833** and **Githunguri/Giatheko/834**. The Plaintiff was to give the Defendant his parcel of land being **Githunguri/Giatheko/834**, and the Defendant was to give him an equal portion from his parcel of land title **No.Githunguri/Giatheko/740**.

It was his contention that he has tried to resolve the issue with the Defendant but the Defendant has always refused to resolve the issue by failing to subdivide and transfer an equal portion of his parcel of land being title **No.Githunguri/Giatheko/740**, to him as agreed. The Plaintiff therefore urged the Court to order the Defendant to transfer an equal portion of land to him from parcel **No.Githunguri/Giatheko/740**.

The suit is contested and the Defendant filed a Defence and Counterclaim dated **6th June 2017**, and sought for orders against the Plaintiff for;

- a) permanent injunction restraining the Plaintiff either directly or through his agents, servants or any other persons claiming through him from trespassing, clearing or cutting crops, tilling or otherwise dealing or interfering with title Number Githunguri/ Giatheko/740 except the portion shown on the Mutation Form serial number 115452 and given possession to him in 2001.***
- b) A declaration that the Plaintiff is only entitled to 0.076 of a hectare as demonstrated in mutation form serial number 115452 and given possession to him in 2001.***
- c) General damages for trespass and/or mesne profits.***
- d) Costs of the suit and counter claim with interests at Courts rate until payment in full.***

In his Defence, the Defendant averred that he is the registered owner of title **No.Githunguri/Gaitheko/740**. He further averred that the Plaintiff who is his brother, caused parcel title **No.Githunguri/ Gaitheko/739**, to

be subdivided into two parcels being title **No.Githunguri/Giatheko/833**, and title **No.Githunguri/Gaitheko/834**. It was his contention that the Plaintiff owed money to a third party and he wanted to sell a $\frac{1}{2}$ acre of his land title **No.Githunguri/Gaitheko/739**, to raise money to pay

the loan. It was then that he approached the Plaintiff to buy the ½ acre instead of selling it to an outsider. He averred that on the 27th February 2001, they entered into a sale agreement for purchase of ½ an acre to be excised from title **No.Githunguri/Gaitheko/739**, for a consideration of **Kshs.280,000/=** that was reduced into writing and witnessed by their siblings, **Margaret Bibi** and **Dave Day Kimotho**. He further averred that the land portion of **L.R 739** which lies between the two Gakoe roads was slightly above ½ acre and it was further stipulated in the agreement that the Defendant would compensate the Plaintiff for the extra portion which was later ascertained to measure **0.074 acre** by excising off a similar portion from land **Title No. Githunguri/Giatheko/740**, on the side facing Kairi village and transferring it to the Plaintiff. He averred that he then paid the full monetary considerations of **Kshs.280,000/=** and the Plaintiff caused his title **No. Githunguri/Giatheko/739**, to be subdivided into two portions being title **No.833 & 834**, and the Plaintiff transferred title **No.834** to him on or around 1st April 2003.

He further averred that the Consent from **Land Board Control** was obtained in regard to transactions regarding **L.R 833 & 834**, while he also obtained a 2nd consent for subdivision of his land title **No.Githunguri/ Gaitheko/740**, into two portions measuring approximately **0.94ha & 0.076 ha**, with the intention of transferring the latter portion to the Plaintiff followed by a formal subdivision of his parcel.

He alleged that the Plaintiff was shown his portion after demarcation of **L.R 740**, and despite prior agreement with the Plaintiff for the surveyor to undertake the transfer process, to conclusion, the Plaintiff demanded consent documents for the transaction from the surveyor. He denied that the Plaintiff transferred to him his parcel in exchange for his land. He reiterated that only an agreed portion was transferred to him.

He particularized attempted fraud by the Plaintiff as demanding the transfer and consent for the intended registration to his name from the surveyor and deliberately failing to book the documents only claiming they were lost and renegeing on the agreement entered on 27th February 2001. Further that round 4th March 2016, the Plaintiff filled and submitted to the **Githunguri Land Control Board** an Application for **Consent** of the **Land Control Board** in respect of title **No.Githunguri/Giatheko/740**, stating that the Defendant intended to transfer the said land to him in whole and contrary to the term of the agreement with full knowledge that he had entrusted him to start the process for an intended transfer of only a portion measuring approximately **0.076 ha**. He averred that he only came to know of the Plaintiff's intention when he was called by the Secretary to

the **Githunguri Land Board Control**, to sign his part of the Application and that the Plaintiff has frustrated the transfer of the portion of land and he is therefore not sincere in approaching the Court.

In his Counterclaim, the Defendant reiterated the contents of his Defence and further averred that around **November 2016**, the Plaintiff attempted to fraudulently transfer his entire land to himself and has been trespassing into his land and occasionally harvests his crops including bananas, uproots some of his crops including coffee bushes and has been wasting structures erected therein by removing timber and building blocks from the Defendant's cattle shed and interfering with school practical and demonstration farm. He further averred that he has always been willing to transfer the portion. He alleged that he has constructed and runs a boarding school on **Githunguri/Giatheko/834**, and part of **Githunguri/Giatheko/740**, and further intends to develop the school by constructing dormitories, staff quarter and playing field on remaining part of **Githunguri/Giatheko/740**, in particular the part the Plaintiff is now trespassing. He averred that the Plaintiff's actions are illegal and if not restrained their relationship will be adversely affected and that he will suffer irreparable loss and damage. Despite attempts for reconciliation the same have failed.

The matter proceeded for hearing wherein the Plaintiff gave evidence for himself and called no witness and the Defendant gave evidence and called two witnesses.

PLAINTIFFS CASE

PW1 Kuria Mbugua, the Plaintiff herein adopted his witness statement dated 20th March 2017, and testified that he subdivided **LR No. Githunguri/Giatheko/739**, and he was to give the Defendant a portion of it so that he could build his school and for the Defendant to give him a portion from his land being **LR No.Githunguri/Giatheko/740**. He testified that he gave the Defendant a Portion from **739**, measuring **36 by 85**, or equivalent to **0.281ha** and that the Defendant was also to give him **0.281 ha** from his portion. They appeared before the Land Control Board and he transferred the portion to the Defendant. The Defendant was to pay **Kshs.40,000/=** subdivision fee.

He further testified that **L.R 739**, was then subdivided into **833 & 834**, and he gave the Defendant **834**, and it was registered in his name in the year 2003. However, the Defendant failed to subdivide his land as per their agreement and give him his portion of **0.281 ha**. He further testified that their agreement was verbal but the Defendant's wife was involved. He denied that he sold the land to the Defendant as per the agreement dated 27th February 2001, and denied signing the said Agreement.

He denied being called **John Kuria**, and confirmed that his name is **Kuria Mbugua** as evidenced by his **Identity Card No.309732**. He further testified that the parcel of land was initially **L.R.No.Githunguri/ Giatheko/**

739, in the name of **Kuria Mbugua**, while the initial one was **Githunguri/ Giatheko/833**, in the name of **Peter Mbugua Kuria**. He further testified that the Defendant gave him **Kshs.300,000/=** to move his homestead as he had built his homestead on the suit land and denied that he sold the suit land to the Defendant for **Kshs.280,000/=**. It was his testimony that when the Defendant failed to live to his part of the bargain he was summoned by the Chief but he failed to appear. He further denied that the Defendant secured his land from **Githunguri Dairy Farmers** as he is the one who paid the loan and not the Defendant. He urged the Court to allow his claim and order the Defendant to return his portion.

On cross examination, the Plaintiff testified that he had a loan with **Githunguri Dairy Farmers Cooperative Society**. He however paid the loan and was granted a discharge. He acknowledged having seen the agreement produced by the Defendant. However he denied entering into the said agreement and denied being paid **Kshs.280,000/=** by the Defendant to pay the loan and sell his portion of land to him. It was his

testimony that he changed the land to the Defendant's name in exchange for his portion and denied that he attempted to exchange it with one **Mr. Njoroge Baiya**. He further testified that he transferred the suit land to the Defendant in **2003**, and before that, he had conducted a search that confirmed that the land was in his name. He confirmed that from the transfer document, the

acreage is **0.276 ha**, and the Defendant was to give him an equal portion from his parcel of land but he has failed to subdivide the land at all. It was his testimony that in the year **2016**, he visited the **Land Control Board** alone and the Clerk at the Board helped him fill the forms.

It was his testimony that the Defendant was summoned by the **Land Control Board**, but he declined to sign the transfer of the land to him. It was his testimony that the form before Court shows that the Defendant was to transfer the whole of **L.R 740** to the Plaintiff. He acknowledged that he was baptized as **Charles John Kuria**, though his name is **Kuria Mbugua**. It was his testimony that when they appeared before the village elders, he signed for his presence but no agreement of whatever nature was discussed. He acknowledged that he utilizes a portion of land from **L.R 740**, which was the portion that was to be transferred to him.

On re-examination Plaintiff denied signing the agreement nor knowing about the agreement. It was his evidence that he saw the transfer of **LR 740** to him from the Defendant. The consideration was indicated as a gift as the same was a gift as no money was paid. He further testified that on **26th April 2016**, he attended a meeting called by the Defendant and he informed the Defendant which parties that he wanted to be present. However, the Defendant did not bring the parties that he had suggested and it was then that he signed for attendance and not agreement. The Defendant disputed the acreage of land to be transferred and hence did not sign it.

DEFENCE CASE

DW1 - Dick Waweru Mbugua, the Defendant herein adopted his witness statement and relied on his Defence. It was his testimony that he runs a school at **Githunguri** called **Sunrise Royal Academy**. He denied that he was to give the Plaintiff half of his portion of land. He further testified that through an agreement, he bought half an acre from the Plaintiff at **Kshs.280,000/=** and he compensated him with **0.1 acre** of his piece of land and that his brother and sister were his witnesses. It was his testimony that however he paid the Plaintiff over **Kshs.300,000/=**.

He further testified that he got a transfer after going to the **Land Control Board**, and obtaining the consent. He then proceeded and registered the land in his name and that on the excess portion, he was to compensate the Plaintiff with a portion of **0.01 acre**. He then excised **0.01 acre** from his land and gave it to the Plaintiff. It was his testimony that he involved a **Geo Date Surveyor**, who conducted the exercise. The Plaintiff was then given possession of the land in the year **2001/2002**, and he planted Napier grass and coffee on the said portion of land and is still in possession. Further that he has tried to transfer the portion of **0.01 acre** to the Plaintiff and **Land Control Board** approved the subdivision. However, the Land Registrar advised them that one could not transfer the **0.01 acre** and the best way was to amalgamate the same with the Plaintiff's land. It was then that he gave the Plaintiff money to carry on the process of amalgamation as per the mutation forms in Court.

He testified that **Geo Date Surveyors** signed the forms and the same was done before a Lawyer. However the transfer was never done as the Plaintiff frustrated the process. The Plaintiff had filled the forms to show that the Defendant was transferring the whole of the land to him but that was not the case. He further testified that the Plaintiff has frustrated his expansion of the school and he urged the Court to bar the Plaintiff from encroaching on his parcel of land. It was his evidence that the Plaintiff had cut down his trees and destroys crops on his land. He further testified that they have tried to reconcile the issue as they are brothers, but they have not been able to. He acknowledged that he was willing to transfer **0.0176 acres** to the Plaintiff. He stated that the elders had proposed that the Plaintiff continues cultivating **0.176 acres**, and he was asked to add another **Kshs.40,000/=** to which he did, but the Plaintiff later refunded the money to him.

On cross examination, he testified that the Plaintiff and himself executed the agreement dated **22nd February 2001**, at their home in Gakoe. That their sister **Margaret Bibi** and brother **David Kimotho** were present as it was a family affair and the witness acted for both of them. He testified that the Plaintiff wanted to sell his land to **Njoroge Baiya**, the Chairman of **Githunguri Dairy** to repay a loan, but they decided to buy the

Plaintiff's portion of land to save it from being sold to an outsider. Therefore he gave the Plaintiff **Kshs.215,000/=** for the purchase of his land and the agreement was a verbal agreement. It was his testimony that he also paid school fees for the Plaintiff's children. That the Plaintiff used part of the money to buy bricks for putting up a home on the said property. Further that the Plaintiff was to move from the piece of land that the Defendant had purchased but denied that he was to facilitate the Plaintiff's movement. He further testified that he drafted the agreement but did not indicate the Identity Card Numbers of the parties as it was a family affair and he did not envisage there would be disputes. It was his testimony that his brother is known as **John Kuria Mbugua** but he signed as **Kuria Mbugua** and he included his name as **Dick Waweru** and the consideration for the transfer was indicated as a gift as the Advocates advised them so that he could transfer the **0.0176 acres**.

That he took out the **Land Control Board's Consent** on **18th February 2003**, two years after their agreement. It was his testimony that when they had a reconciliation meeting in the year **2016**, he said that he paid the Plaintiff **Kshs.240,000/=** though he paid the Plaintiff according to his needs being more than **Kshs.300,000/=**

In re-examination, he testified that in **2001**, the witnesses were for both of them and that the seller of the property was **John Kuria Mbugua** and that though his name is **Dick Waweru Mbugua** he has been sued as **Dick Waweru** and that does not mean that he is not the same person. He testified that he had paid **Kshs.215,000/=** at the time of the agreement and the balance was later paid to the Plaintiff. He further testified that the instrument of transfer is clear that he was to transfer **0.0176 acres** to the Plaintiff.

DW2 Margaret Bibi Mbugua, adopted her witness statement and stated that both parties are her brothers. She further testified that Plaintiff was selling land to the Defendant and she was called in as a witness together with her brother one **David Kamotho**. She further testified that the Plaintiff agreed to sell the land to the Defendant and they both signed the agreement as the Defendant had already paid some money to

Githunguri Dairy Farmers. Further that the Defendant was to compensate the Plaintiff with **0.0176 acres**.

On cross examination, she testified that both parties called her in to be their witness. It was her testimony that although on the said date no money exchanged hands, the Defendant had paid some money to **Githunguri Dairy** on the said date. It was her testimony that the Plaintiff wanted to sell the suit land to one **Njoroge Baiya**, and move to another area though she did not know what they talked about moving out. She further testified that she was present when the Plaintiff signed the agreement and the Plaintiff admitted to selling the land when they were called for a meeting in the **year 2016** with the elders. It was her testimony that the Plaintiff was to be compensated with **0.0176 acres**, by the Defendant which was next to the Defendant's land.

DW3 - Dave Day Kamotho, adopted his witness statement and testified that he witnessed the agreement over the suit land wherein the Plaintiff was selling the land to the Defendant. He further testified that he was the Administrator of his father's Estate and he was involved in the survey of the land. Further when the land was surveyed, it was slightly more than $\frac{1}{2}$ **an acre by 0.176 acres** and the Defendant was to pay **Kshs.280,000/=** for the suit land. He further testified that by the time the agreement was being executed, the Plaintiff had been paid **Kshs. 215,000/=** and the Defendant was to compensate him with **0.0176 acres** of his portion and that he was present when the said portion of **0.0176** acre was excised.

He further testified that the Plaintiff is in possession of the suit land and has planted nappies grass. He stated that a meeting with elders was called, and it was agreed that the Plaintiff has sold the land to the Defendant and it was further agreed that the Defendant was to give the Plaintiff **Kshs.40,000/=** on top of the **0.0176 acres** and a surveyor was to be brought to survey the land with each party bringing in their own surveyor. He further testified that the Plaintiff has encroached onto the Defendant's parcel of land and is destroying his crops.

On cross examination, he acknowledged that he is not on talking

terms with the Plaintiff but he has no problem with him. He acknowledged that he did not see the Plaintiff receive the money on the suit land. Further that the Plaintiff was to move out, but he did not know if he was given money to move out as there was no discussion on how to move out and he denied that the **Kshs.215,000/=** was meant for moving out. He further testified that the Plaintiff sold the land for **Kshs.280,000,000/=**.

On re-examination, he testified that there was no payment for the movement as the agreement does not talk about the movement.

Thereafter parties filed written submissions and the Plaintiff through the **Law Firm of Chege Kibathi & Co. Advocates**, filed his submissions on **18th February 2019**, and a further supplementary submissions on **21st May 2019**, and submitted that the agreement produced by the Defendant did not meet the statutory requirements and that the Consent of the **Land Control Board** was not obtained within the required timelines and therefore the disputed agreement is void from the onset. He relied on various provisions of the law and decided authorities and urged the Court to allow his claim.

The Defendant on the other hand through the **Law Firm of Mwangi Wambugu & Co. Advocates**, submitted that the Plaintiff failed to prove the existence of verbal evidence for exchange of equal portions and that their evidence was credible and corroborated. He therefore urged the Court to allow his Counter claim.

The Court has now carefully read and considered the pleading of the parties, the evidence thereto and the written submissions and finds that the issues for determination are;

- 1. Whether the parties entered into a sale agreement dated 27th February 2001.**
- 2. Whether the sale agreement was valid and enforceable in Court.**
- 3. What portion of the property Title No.Githunguri/Giatheko/ 740 is the Plaintiff entitled to.**
- 4. Whether the Plaintiff is entitle to the Reliefs sought.**
- 5. Whether the Defendant is entitled to the reliefs sought.**
- 6. Who Should bear the Cost of the suit.**

1. Whether the parties entered into a sale Agreement dated 27th February 2001

The Defendant herein in his bundle of documents has produced as exhibit a sale agreement dated **27th February 2001**, between himself and the Plaintiff. The sale agreement was to the effect that the Plaintiff sold part of his portion of land to the Defendant. The Plaintiff on the other hand has denied that he signed the agreement and further that while the person who signed the agreement was one **John Kuria Mbugua**, he is called **Kuria Mbugua** as per his National Identity Card. The Defendant has reiterated that the plaintiff is the one who signed the said agreement and that the two names refer to one and the same person. The Defendant had also testified that his two siblings had witnessed the signing of the said agreement and were present when the Plaintiff signed the agreement. The Plaintiff did not dispute this fact.

Section 107 of the **Evidence Act** provides that whoever alleges a fact must prove. In order to prove his claim, the Defendant called his siblings to testify. DW2 and DW3 are sister and brother to the parties herein. They testified that they were present when the two signed the agreement and confirmed that indeed there was an agreement and the same was signed by both parties. This Court has also seen a letter date **16th March 2016**, addressed to one **John Kuria** by the Defendant and it is the Court's finding that there is a possibility that the Plaintiff

has an *alias* of **John Kuria**. This Court therefore finds that the testimonies of DW2 and DW3 and the Defendant together with other documents referring to the Plaintiff as John, are enough proof that Plaintiff is also called **John Kuria Mbugua**. As such this Court holds and finds that there was an Agreement between the two that was executed on **27th February 2001**, as the Defendant's testimony has been collaborated.

2. Whether the Sale Agreement was valid and enforceable in Court.

In order to determine whether a Sale Agreement for purchase of land is valid, the Court is required to interrogate whether it has met the threshold as envisaged under **Section 3 (3)** of the **Contract Act**.

The Defendant has alleged that he entered into a Sale Agreement for the purchase of the Plaintiff's portion of land being $\frac{1}{2}$ **An Acre**. Though the said Sale Agreement had been disputed by the Plaintiff, this Court has already held that a sale agreement was executed between the parties.. Further that the same was reduced into writing and signed by all the parties. **Section 3 (3)** of the **Contract Act** provides that;

“3(3)No suit shall be brought upon a contract for the disposition of an interest in land unless—

(a) the contract upon which the suit is founded—

(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:

Provided that 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 (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.

The Court has carefully perused the sale agreement produced as Exhibit by the Defendant and noted that the same is in writing and is signed by the parties. It thus met the requirements of **Section 3(3)** of the **Contract Act**.

Further the agreement for sale contains the names of the parties, the description of the property, the purchase price and the conditions thereto. A look at the said sale agreement confirms that the same is a valid sale agreement which is enforceable by the parties. See the case of **Nelson Kivuvani...Vs...Yuda Komora & Another, Nairobi HCCC No.956 of 1991**, where the Court held that:-

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

The Sale agreement having met all the requirements, is therefore the **valid** and it thus met the requirements of **Section 3(3)** of **Contract Act**.

However the Plaintiff has further submitted that the sale agreement is void as there was no consent of the **Land Control Board**, that was obtained as envisaged under the Law within the stipulated time of six months. This Court has seen the sale agreement and the same was executed on **2nd February 2001**, and that would mean that by **2nd August 2001**, the time within which the **Consent** of the **Land Control Board** was required to be obtained had lapsed. However from the documents produced as evidence before this Court, it is clear that the Application for the consent of the **Land Control Board** was sought on **18th February 2001**, and the same was obtained on the same date. It is important to note that before the consent is obtained, it was a requirement that both parties are to sign the Application. Since the Consent was obtained, it would then mean that the Plaintiff had consented to the same. Further this Court does not have any information on why it took long for the parties to seek the consent of the **Land Control Board**.

The Plaintiff has placed high reliance on various Court of Appeal decisions that concluded that **Section 6** of the **Land Control Board Act** is a mandatory provision and no principle of equity can soften or change it. See the case of **Hirani Ngaithe Githire ...Vs... Wanjiku Munge [1979] KLR 50** where the Court held that;

“The position is simple and clear. Section 6 of the Land Control Act is an express provision of a statute. It is a mandatory provision, and no principle of equity can soften or change it. The Courts cannot do that; for it is not for us to legislate but to interpret what parliament has legislated. So, in this case that agreement between the parties having been entered in June 1969 became void for all purposes (including the purpose of specific performance) at the expiration of three months from the date of making it; and, since no consent had been obtained within that time, nothing can revise or resurrect such agreement. Failure to obtain the necessary land control board consent automatically vitiates an agreement to be a party to a controlled transaction. Section 6 prohibits any dealing with agricultural land in a land control area unless the consent of the land control board for the area is first obtained and any such dealing is not only illegal but absolutely void for all purposes.”

Further the Court have in the past concluded that if no Consent is obtained, the transaction is held to be void and no complaints of any nature can be entertained. See the case of **Moses Kamande Nyambura ...Vs... Francis Munyua Ngugi [2018] eKLR**

“Once a transaction relating to agricultural land is held to be void, no complaints of any nature, such as trespass, remained to be resolved and that the words “void for all purposes” used in the statute must be interpreted to mean what they say. Section 7 bars the entertainment of mesne profits as pleaded by the Defendant.”

However there has been a shift in the said conclusion as recent as 2018, wherein the Court of Appeal held that a contract that lacks the Consent of the Land Control Board, is not void at inception and a Court has discretion to apply the principles of equity and natural Justice. See the case of Caroline Cheron Kirui...Vs...Liner Cheron Towett [2018] eKLR, where the Court held that:-

“The above decision of the Court of Appeal was made on 17th May 2018 and as far as I know, it constitutes the latest position taken by the Court of Appeal on this issue. I am alive to the fact that counsel for the defendant placed reliance on an earlier decision of the Court of Appeal in David Sirona Ole Tukai v Francis Arap Muge & 2 others Nairobi Civil Appeal No. 76 of 2014 and submitted that in the absence of consent, such a contract is void and that principles of equity and natural justice are not applicable. Suffice it to say that the Court of Appeal discussed the David Sirona Ole Tukai decision at length and came to a conclusion that an extension can be granted and that principles of equity and natural justice are applicable.”

The issue of the consent of the Land Control Board has been discussed by the Court of Appeal in the case of Willy Kimutai Kitilit... Vs... 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.

[23] The Land Control Act does not, unlike Section 3 (3) of the Law of Contract Act and Section 38 (2) of the Land Act save the operation of the doctrines of constructive trust or proprietary estoppel nor expressly provide that they are not applicable to controlled land transactions. Although the purpose of the two statutes are apparently different, they both limit the freedom of contract by making the contract void and enforceable. Since the doctrines of constructive trust and proprietary estoppel apply to oral contracts which are void and enforceable, in our view, and by analogy, they equally apply to contracts which are void and enforceable for lack of consent of the Land Control Board especially where the parties in breach of the Land Control Act have unreasonably delayed in performing the contract. However, whether the court will apply the doctrines of constructive and proprietary estoppel to a contract rendered void by lack of the consent of Land Control Board will largely depend on the circumstances of each particular case.

The doctrines of equity are part of our laws although Section 3 of the Judicature Act subordinates common law and the doctrines of equity to the Constitution and written law in that order. Sections 3(3) of the Law of Contract Act and Section 38 (2) of the Land Act as amended clearly stipulate that the requirement that contracts for disposition of an interest in land should be in writing does not affect the creation or operation of a resulting, implied or constructive trust. The equity of proprietary estoppel is omitted but as the decision in Yaxley v. Gotts [2000] Ch. 162 (Yaxley’s case) on which the Court in Macharia Mwangi Maina Decision relied, amongst others, shows that the doctrine of constructive trust and proprietary estoppel overlaps and both are concerned with equity’s intervention to provide relief against unconscionable conduct.

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.

For the reasons in paragraphs 20, 21, 22, 23, 24 and 25 above, we are in agreement with the Macharia Mwangi Maina decision that the equitable doctrines of constructive trust and proprietary estoppel are applicable and enforceable to land subject to the Land Control Act, though this is subject to the circumstances of the particular case. Upon the application of the equitable doctrines, the court in its discretion may award damages and where damages are an inadequate remedy grant the equitable remedy of specific performance.

By the time the appellant caused himself to be registered as the proprietor of the whole piece of land he was a constructive trustee for the respondent and it would be unjust and inequitable to allow the appellant to retain the 2 acres that he had sold to the respondent in the circumstances of the case.

As we have held in essence that, the lack of the consent of Land Control Board does not preclude the court from giving effect to equitable principles, in particular the doctrine of constructive trust, we find that the trial court reached the correct decision and therefore the appeal has no merit.”

With the above in mind, this Court must therefore look as to whether this particular case warrants the Application of the principles of natural Justice and equity to come into a conclusion. It is not in doubt that though beyond the six months that is required in law, the Defendant eventually obtained the **Consent** of the **Land Control Board**. Further the Plaintiff was part and parcel of the process of applying for the Consent. This Court therefore finds that it would be unfair for the plaintiff to now take a turn and have the time limit of the **Land Control**

Board, as his shield. Further it is not in doubt that the Defendant upon acquiring the Plaintiff's portion of land, built a school and the same is currently in use and the defendant has even taken possession.

If this Court was to void the transaction between the parties, it would therefore mean that the Defendant's investment that has taken him some time to build as per the agreement entered into in the **year 2001**, would go down the drain. It is therefore this Court opinion that that would not be fair to the Defendant. From the agreement, it is clear that the Plaintiff had received some amount of money as the purchase price and he testified as much. That would also be the reason as to why he would give possession and even transfer the suit land. This Court therefore finds that in this instant case, it would not be in the interest of Justice to **void** the Contract. Furthermore the consent of the **Land Control Board** was later obtained. This Court therefore holds and finds that the Agreement for Sale was **valid** and **enforceable** in Court.

3. What portion of the property Title No.Githunguri/ Giatheko/ 740 is the Plaintiff entitled to?

The Plaintiff has testified that he had verbal agreement with the Defendant that there would be an exchange of the portion of land with the Defendant giving him the same portion being half an acre. The Defendant dispute this fact and testified that the Plaintiff was only supposed to get **0.076 ha** of his portion of land as the portion that he had sold to him exceed the half an acre agreed upon. Once against the testimony by the Defendant was collaborated by the evidence of DW2 and DW3 who acknowledged that indeed it was agreed that the Plaintiff would be given **0.076 ha** of the Defendant's suit land which he is currently in possession of.

In the absence of contrary evidence by the Plaintiff, this Court is inclined to believe the evidence of the Defendant and therefore finds and holds that the Plaintiff is entitled to **0.076ha** of **L.R Githunguri/Giatheko/740**, being the Defendant's land. With the Court having the discretion to give further orders it is also this Court's opinion that the Plaintiff is entitled to the **Kshs.40,000/=** to be paid by the Defendant, which had been agreed by the elders but the Plaintiff refunded the same to the Defendant.

4. Whether the Plaintiff is entitled to the Reliefs sought.

In his Plaint the Plaintiff had urged the Court to order the Defendant to transfer an equal portion of land from parcel of Land Title **No. Githunguri/Giatheko/740**. However this Court has already come to conclusion that the Plaintiff is only entitled to **0.076 ha** of the said piece of land and therefore the said prayer is disallowed.

The Plaintiff has also sought for mesne profits. Mesne profits are special damages and as such they must be specifically pleaded and proved. He did not specifically plead the same. Even if he had pleaded the same, He would not be entitled to it. **Section 2** of the **Civil Procedure Act Cap 21** of the **Laws of Kenya** defines '**mesne profits**' as follows:-

"mesne profits", in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession"

With the above definition, the Plaintiff has failed to prove that the Defendant was in wrongful possession. This Court therefore finds that the Plaintiff is not entitled to the said reliefs.

5. Whether the Defendant is entitled to the reliefs sought.

In his Counterclaim the Defendant had sought for a Declaration that the Plaintiff is entitled to **0.076 ha** from his land to which the Court has already made a finding. Further the Defendant had sought a permanent Injunction against the plaintiff from trespassing on his land except the portion that he has been given possession of. In his testimony the Plaintiff acknowledge that he had entered into the Defendant's parcels of land and occupied a larger part as he was entitled to. The Court has already held that the Plaintiff was only entitled to a portion of **0.076 ha** and therefore his entry into other part of the suit land was illegal.

In **Clerk & Lindell on Torts (17th Edition)** para 17-01, '**Trespass**' is defined thus;

"An unjustifiable entry by one person upon the land in possession of another. Removing any part of the soil of land also constitutes trespass"

Having held that the Plaintiff had no reason to enter on to the Defendant's land it would therefore mean that he is a trespasser.

The Defendant had also sought for damages for **mesne profits** and damages for trespass. It has been held that a Court cannot grant the two damages at ago. Further, the Defendant did not plead Mesne profits specifically and so he is not entitled to the same. He is however entitled to Damages for trespass as with regards to trespass a party need not prove damages suffered, but must prove that indeed there was trespass. Furthermore, this Court cannot measure the damages and therefore the Defendant can only be granted the nominal amount See the case of **Hilip Aluchio vs Crispinus Ngayo [2014]eKLR**, where the Court held that;

"..... The plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage. It has been held that the measure of damages for trespass is the difference in the value of the Plaintiff's property immediately after the trespass or the costs of restoration, whichever is less"

The plaintiff herein did not adduce any evidence as to the state of his property before and after the trespass. It therefore becomes difficult to assess general damages for trespass...."

The court proceeded to award a nominal figure of **Ksh. 100,000/=** as damages for trespass.

Equally in this case, the Court finds that the Defendant is entitled to an award of **Kshs.100,000/=** for trespass.

6. Who Should bear the Cost of the suit.

Costs normally follow events and whilst this Court has discretion to grant costs and bearing in mind that the parties are siblings, this Court will also note that there has been efforts to solve the issues but the same have not been fruitful. The Defendant therefore being the successful litigant is entitled to costs of the Suit and the Counterclaim.

The Upshot of the foregoing is that the Plaintiff has failed to prove his case on balance of probabilities while the Defendant has proved his case on the required standard of balance of probabilities.

Having now carefully read and considered the pleadings of the parties, the evidence adduced and the written submissions, this Court finds that the plaintiff has failed to prove his case and therefore the same is dismissed with costs to the Defendant.

However the Plaintiff is entitled to payment of **Kshs.40,000/=** by the Defendant as had been decided by the elders.

Further the Court finds that the Defendant has proved his claim in the Counter-claim and the same is allowed in terms of **prayers No.(a) & (b)** together with general damages of **Kshs.100,000/=** for trespass but no award for mesne profits. The Defendant is also entitled to costs of the suit and the Counter-claim.

It is so ordered.

Dated, Signed and Delivered at Thika this 4th day of October, 2019.

L. GACHERU

JUDGE

4/10/2019

In the presence of

Mr. Murgor holding brief for Mr. Juma for the Plaintiff

Mr. Gachimu for the Defendant

Lucy - Court Assistant

Court – Judgment read in open court in the presence of the above advocates.

L. GACHERU

JUDGE

4/10/2019