



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT NYAHURURU**

**ELC CASE NO 199 of 2017**

**ESTHER NYAMBURA KARIUKI.....PLAINTIFF**

**VERSUS**

**SIMEON MUTHUKU MUNJUGA.....DEFENDANT**

**JUDGEMENT**

1. Before me for determination is a matter wherein the Plaintiff filed her plaint on the 14<sup>th</sup> April 2015 and sought for an order of injunction restraining the defendant from interfering with her quiet possession of the property known as Nyandarua/Sabugo/6486 and further that orders do issue that the Caution placed on the said suit land be lifted. Along with the said prayers, the plaintiff had sought for costs of this suit.
2. The pleadings as well as summons to Enter Appearance were served upon the defendant who filed their statements of defence and counter claim on the 19<sup>th</sup> June 2015 seeking for orders of injunction to restrain the Plaintiff (now Defendant) and her agents, servants and/or employees from interfering with his quiet enjoyment of 4 acres excised out of parcel title No. Nyandarua/Sabugo/6486.
3. That further, an order for cancellation of title deed for Nyandarua/Sabugo/6486 issued to the Plaintiff (now Defendant) do issue and in the alternative an order declaring that the Plaintiff (now Defendant) and the Defendant (now Plaintiff) are co-owners of parcel Title Nyandarua/Sabugo/6486. A reply to the defence and counterclaim was filed on the 26<sup>th</sup> June 1991.
4. It is on record that alongside with the plaint, the Plaintiff filed an application under certificate of urgency dated the 30<sup>th</sup> April 2015, seeking injunctive orders against the Defendant, pending the hearing and determination of the suit herein. Directions were taken that the Application be disposed of through written submission. Pending the determination of this Application, the Plaintiff filed a similar application dated the 19<sup>th</sup> June 2015 seeking the same orders against the Defendant wherein the court gave directions that both applications be canvassed together on the 23<sup>rd</sup> September 2015.
5. Subsequently both applications were compromised by the recording of a consent on the 23<sup>rd</sup> September 2015 on the terms that the 4 acres claimed by the Defendant be left fallow until the hearing and determination of the suit
6. Parties then complied with the provisions of Order 11 of the Civil Procedure rules and the matter was set down for hearing for the 17<sup>th</sup> October 2017, on which day the Counsel for the Plaintiff called to stand one Wachira Kariuki Kamiriro to testify instead of the plaintiff herself. The defence Counsel raised an objection to the effect that they had been served with the statement of the Plaintiff and not that of the witness who was about to testify.
7. In response, Counsel for the Plaintiff submitted while complying with Order 11 of the Civil Procedure Rules, the defence had been aware that the Plaintiff was going to call one witness to testify, the present witness herein. Counsel further submitted that the Plaintiff was very old, sickly and had memory lapse.
8. The court delivered a ruling overruling the objection while confirming that indeed parties had complied with the provisions of Order 11 of the Civil Procedure Rules wherein the Defence had been served with the witness statement and as such they could not raise an objection at this time.
9. The witness then proceeded to testify to the effect that he was the Plaintiff's son and that the suit land was where they lived. He further testified that whereas the Defendant herein was their neighbor, yet he did not reside on the suit land.
10. He testified that the Plaintiff had instituted suit against the Defendant because he had placed a caution on her land. That after his father's death, some people had gone on their land claiming that they had hired the same from the Defendant after it had been sold to him but the witness had sent them away.

11. It was later discovered, after being shown an agreement dated the 17<sup>th</sup> February 1989 that the Defendant was claiming to have bought the land from the witness's father.
12. The witness testified that they had never seen the Defendant on that land, even after he had allegedly purchased it in 1989, he had only appeared there in the year 2015.
13. The witness testified that he knew Josephat Ngugi Mwangi as the person who had sold the suit land to his father. That after the purchase, his mother and siblings had procured the transfer from the said Josephat which had then enabled them to procure the title to the land. That the original number of the land was 627 but upon procurement of their title, the number had changed to 6486.
14. The witness confirmed to not having gone to the Land Control Board or their mother having sold the suit land to the Defendant herein.
15. On cross examination, the witness testified that Nyandarua/Sabugo/6486 and 6485 resulted from a subdivision of Nyandarua/Sabugo/627 which was initially 25 acres. His father had bought 13 acres therefrom and the Defendant had also bought some land from parcel No. 627 although he did not know the acreage.
16. The witness testified that although he had seen the agreement dated the 17<sup>th</sup> February 1989, he could not confirm whether or not the signature on it was his father's signature since his father never went to school.
17. He further testified that it was not true that the Defendant herein had bought 4 acres of land from his father to add to his own 12 acres. He also denied any knowledge of the consent dated the 23<sup>rd</sup> October 1987 in regard to Nyandarua/Sabugo/627.
18. When the witness was referred to the agreement between the Defendant and his father, where one of the witness was one Jeremiah Mwangi, he confirmed that Jeremiah Mwangi was his brother but that he did not know his signature and whether he had been a witness to the sale of the 4 acres by his father to the Defendant or not.
19. He also testified that after the death of their father, his mother had processed the Succession Cause wherein she had been issued with the letters of administration to which she had given the Land Registrar to process the title in her name.
20. That when the land was being subdivided in the year 2014 they had not involved the Defendant as it was up to the vendor to inform him and not the Plaintiff.
21. The witness testified that although he had been referred to the agreement between his father and the Defendant he doubted the same to be authentic but that they had not gone to report the forgery to the police since they had preferred to file the present case after they had reported the matter to their area chief. Pursuant to this report, it had been decided that both parties keep off the 4 acres until the suit was heard and determined in court. The witness confirmed that they had paid for the rates for parcel No.627 although he had no documents proving the same as he did not think it was necessary to carry them to court.
22. He denied that his family mislead Josephat Ngugi into transferring 9 acres of land and not 13 to the Plaintiff and as such it was also not true that they held the 4 acres in trust for the Defendant in parcel No. Nyandarua/Sabugo/6486.
23. When the witness was re-examined, he confirmed that the land Consent that he was referred to, dated the 23<sup>rd</sup> October 1987 had been issued before the sale of the land in the year 1989.
24. He further testified that the consent referred to the whole parcel of land No 627 which was being transferred from Josephat Ngugi to Simon Muthuku Munjua.
25. That the letter dated the 7<sup>th</sup> March 1997 was addressed to his father and the Defendant and the same did not refer to the sale of the suit land by his father to the Defendant.
26. He confirmed that his family were still in possession of the 13 acres of land and that apart from the agreement dated 1987, he had not been shown anything else to show that the suit land (4 acres) and belonged to the Defendant.
27. The Defendant's case on the other hand was to the effect that he knew the Plaintiff herein one Esther Nyambura who was his neighbor in plot no. Nyandarua/Sabugo/627.
28. He testified that in the year 1987, he had bought about 13 acres of land from one Josephat Mwangi Ngugi which acres were to be excised from land parcel No. Nyandarua/Sabugo/627 which measured about 25-26 acres. That they had gone Githua Advocate on the 1<sup>st</sup> September 1987 wherein they reduced their transaction into an agreement which he produced as defence Exhibit 1.
29. That the remaining land was sold to David Kariuki Kamirio who was the Plaintiff's husband. That on the 23<sup>rd</sup> October 1987, the three parties went to the Land Control board so as to be given the consent wherein he was put in charge of the whole land being No.627 and the District Commissioner signed the said consent wherein he remained with Original copy. He however produced a copy of the said consent as Defence exhibit 2. The Defendant testified that after the signing of the said agreement, the parties agreed that the Plaintiff's husband would get 13 acres while the Defendant would take the rest of the land.
30. That two (2) years later, the Plaintiff's husband David and his mother sold to him 4 acres of their land for ksh. 84,000/= and the same was

subdivided by somebody called 'agriculture' and added to his share of the land. That the Plaintiff's husband was now left with 9 acres of land on Nyandarua/Sabugo/627B

31. That pursuant to this transaction, they visited Githua Advocate's office wherein they deduced their transaction into a written agreement on the 17<sup>th</sup> February 1989 wherein both parties had signed the said agreement which he produced as Defence Exhibit 3.

32. That he had paid part payment of the purchase price wherein subsequently the Plaintiff's husband and his children had gone to his house to collect the balance of Ksh 24,000/= together with the cost for the trees, fruits plus the fence that they had planted and/or put on the said land. The total was now Ksh. 125,000/=. That one of the Plaintiff's son by the name Jeremiah had signed the agreement which he produced as Defence exhibit 4(a) in Kikuyu language and 4(b) the translated version.

33. That after the payment of the above captioned costs the Defendant herein took possession of the 4 acres of land. They had then informed the vendor of the land Mr. Ngugi of the new development.

34. The defendant produced a letter written by the Land Adjudication and settlement scheme dated 7<sup>th</sup> March 1997 as his Defence exhibit 5 informing both he and the Plaintiff's husband to fulfill conditions of the sale and transfer of Plot No. 627 to both of them

35. That at the time, his land was known as Nyandarua/Sabugo/627A while the Plaintiff's husband's land was known as Nyandarua/Sabugo/627B.

36. That thereafter they had applied for the title deeds which took so long to be processed that the Defendant returned to Nakuru because of health issues.

37. That it was while he was in Nakuru, that the Plaintiff and her children got a surveyor and subdivided the land into two in the year 2015, the Plaintiff's Children, known as Jeremiah and Macharia trespassed onto his four acres and started farming thereon which caused a lot of hostility between the two families which necessitated them to go before their Chief to try and solve the case which was decided in favour of the Defendant, but parties were advised not to use the 4 acres but to file suit in court. The minutes of the meeting held at the chief's office on the 5<sup>th</sup> May 2015 were produced as Defence Exhibit 6.

38. The Defendant testified to the effect that when Nyandarua/Sabugo/627 was subdivided into two, his land measured 12 acres and that upon the plaintiff's husband selling to him an additional 4 acres, his land was now supposed to measure 16 acres while the Plaintiff's would measure 9 acres.

39. He produced the Mutation for Nyandarua/Sabugo/627 dated the 29<sup>th</sup> August 2014 as his defence exhibit 7.

40. That upon the turn of events, he had conducted a search on the 9<sup>th</sup> February 2015 (defence Exhibit 8) and a second search on the 27<sup>th</sup> February 2015,( defence Exhibit 9) wherein he placed a caution on the plaintiff's land Nyandarua/Sabugo/6486 because the plaintiff was in possession of his land measuring 4 acres.

41. He further testified that indeed the Plaintiff had no problem releasing to him his four acres of land but the problem was with her children Wachira and Jeremiah who were against it.

42. He further testified that indeed he and the Plaintiff were of the same age of 72 years old and unlike the evidence that had been adduced by her son, she was not sickly but was strong and was farming on her land, that the witness here had left her at home on purpose so that he could come to court to give false testimony.

43. The defendant prayed that the court orders the Plaintiff to release to him his 4 acres and also that the plaintiff meets the cost of the suit.

44. In reexamination, the Defendant was referred to his exhibit 3 wherein he testified that the balance of 24,000/=was to be paid to the Land Control Board.

45. He further testified that that he was to oversee the whole land being land Nyandarua/Sabugo/627 comprising of 25 acres.

46. He also confirmed that after buying the extra 4 acres, he took immediate possession of the land on the same day. That further when they had gone to the chief to ventilate their issues the Plaintiff had not attended the meeting, but had sent her son Jeremiah.

47. In re-examination, the defendant confirmed that the Plaintiff did not attend the meeting at the chief's office but her sons were present. He also confirmed that he had been given consent by the Plaintiff's deceased husband and the vendor Mr. Ngugi.

48. When he was questioned by the court, the Defendant informed the court that he had been with the Plaintiff the previous day and that she was well and strong and that all that was said about her health was not the truth.

49. The Defendant called his second witness Mr. Josephat Ngugi who testified that he had sold plot No. Nyandarua/Sabugo/627 to both the dDefendant and one Daudi. (this witness who did not seem to remember his age)

50. After the court noted that the witness was aged and tended to forget his evidence after being examined on the same, the defence counsel sought to adopt his statement which was recorded in the year 2015 and filed in court on the 19<sup>th</sup> June 2015 after the witness having

confirmed that the signature on the mutation form to be his. He however testified that he did not know whether Nyandarua/Sabugo/627 was subdivided or not.

51. The 3<sup>rd</sup> defense witness was the Land Registrar Nyandarua District who testified to the effect that he had the certified copy of land register to No. Nyandarua/Sabugo/6486 measuring 5.4 hectares, approximately 13.4 acres and which was opened on the 26<sup>th</sup> November 2014 in the name of Josephat Ngugi Mawngi. On the 27<sup>th</sup> November 2014 the said land was transferred to Esther Nyambura Kariuki and the title issued in her name.

52. That on the 16<sup>th</sup> February 2015, a caution was registered on the said land by Mr. Simeon Muthuku claiming purchaser's interest.

53. The witness testified that on the first entry of the register, there was no title issued as it was a sub-division of Plot No. 627 and the owner had never taken the title. That on the second entry, the transfer was from Josephat to Esther. That in effecting the transfer, there must have been a consent from the Land Control Board that was presented to the Land Registrar.

54. He also confirmed that Defence exhibit 2 was a consent that was issued by the Ol Kalou Land Control Board on the 23<sup>rd</sup> October 1987. The same transferred No. Nyandarua/Sabugo/627 from Josephat to Simeon Muthuku Munjuga the defendant herein, at a consideration of Ksh 150,000/= with the transferee being Josephat.

55. That this consent for No. Nyandarua/Sabugo/627 was not presented to the Land Registrar who did not know of its existence in the circumstance.

56. On cross examination the witness testified that no interest had been registered against the land and that the consent produced as defence exhibit 2 had not been presented to the Land office but that the owner had proceed to sub-divide the land before the transfer was presented to the land Registrar. As per records Josephat had transferred the land to Esther on the 27<sup>th</sup> November 2014.

57. In re-examination the witness testified that the transfer effected in 1987, was supposed to have been presented to them by the person who had bought the land, however what was presented was the sub-division of that plot number.

58. The Defence then closed its case and counsel filed their written submissions thereafter.

59. The plaintiff's written submissions which were filed on the 13<sup>th</sup> February 2018 were based on the following framed issues:

- i. Whether the failure to call the Plaintiff to testify in person was fatal.
- ii. Whether the Defendant bought four acres of land from the Plaintiff's late Husband.
- iii. Whether the Plaintiff is the absolute owner of the parcel of land Known as Nyandarua/Sabugo/6486

60. On the first issue, the Plaintiff submitted that there was no provision in the Civil Procedure Act or Rules that stipulated that the Plaintiff had to testify in person and as such the failure by the Plaintiff to testify in person was not fatal as her case could still be proved by the evidence of another witness and in this case was her son. In so submitting, the plaintiff relied on the case of **Stamm vs Tiwi beach Hotel Ltd EALR [1995-98] 2EA 378**.

61. Further submission were that the evidence by the Defendant to the effect that it was the Plaintiff's sons who were out to interfere with his enjoyment of the four acres was a fabrication and if he wanted the plaintiff to testify, he ought to have summoned her as his witness.

62. On the second issue as to whether the Defendant bought four acres of land from the Plaintiff's late Husband, it was the Plaintiff's submission that the Defendant only produced one sale agreement as exhibit 1 as between him and one Josephat Ngugi Mwangi for the purchase of 11 acres of land measuring 11 acres from land parcel No. Nyandarua/Sabugo/627 and a letter of consent as exhibit 2 dated the 23<sup>rd</sup> October 1987 showing that the land in question was agricultural land where consent from the Land Control Board was a necessary prerequisite before registration of any disposition.

63. That although the defendant wanted the court to believe that when the Plaintiff's husband sold to him the 4 acres, from his share of land, the title was supposed to read 11 acres plus 4 acres, the Plaintiff wondered if indeed that was the position, the Defendant ought to have registered the land in his name and/or subdivided it between him and the plaintiff's husband, when the consent was obtained on the 23<sup>rd</sup> October 1987.

64. Further that according to the 3<sup>rd</sup> Defence witness the consent from the Land Control board was never presented to the Land Registry for the transfers to be effected. That if the defendant was an honest purchaser, he should have transferred the whole land to himself and later carve out his portion and transfer to the plaintiff's husband his share. That the transfer to the Plaintiff's husband on the other hand was done not fraudulently.

65. That indeed the Defendant's second witness confirmed to having signed the transfer forms transferring 13 acres to the plaintiff's husband. He also signed the mutation forms that led to the subdivision of the parcel of land. That if he knew that the Defendant had bought a further 4 acres, he would not have transferred the whole land to the Plaintiff's husband. The claim by the defendant that he had bought 4 acres of land from the Plaintiff's husband was false.

66. That even if we at one moment assumed that there was indeed such a transaction, the same was void by virtue of the provisions of Section 6 of the Land control Act and such action was criminal and punishable going by then provisions of Section 22 of the same Act.

67. That the letter of consent produced by the Defendant was specific as to which transaction it related to. That there was no consent from the Land Control Board produced relating to the transaction between the Defendant and the Plaintiff's husband.

68. The Plaintiff relied on the case of David **Sironga Ole Tukai v Francis Arap Muge & 2 others [2014] eKLR** where it was held that a contract for the disposition of land which had been entered into without the consent from the Land Control Board was void and unenforceable. The Defendant had therefore not demonstrated that he owed a right in the suit land that was protected by the law and that his counter claim ought to be dismissed.

69. The third matter that the Plaintiff submitted on was that the Plaintiff is the absolute owner of the parcel of land Known as Nyandarua/Sabugo/6486 and relied on the defence exhibit 9 which was a search certificate indicating that indeed the Plaintiff was the registered proprietor of the suit land and as such there was no adverse interest which was registered against the Plaintiff's title in favour of the Defendant. Further that pursuant to Section 26 of the Land Registration Act, the Plaintiff's right was protected and her proprietorship could only be impeached if fraud was pleaded particularized and proved. In the present case no fraud had been pleaded and the rule were very velar to the effect that a party could only lead evidence to prove the substance of its pleadings.

70. The Defendant had not pleaded fraud and further that the DW 3 had testified to the effect that the Plaintiff's husband had acquired the suit land free from any fraud.

71. The Plaintiff submitted that indeed they had proved their case and that the Defendant had not demonstrated that he owed a right to the suit land which right could be protected by the law. That in the circumstance, his counter claim should be dismissed with costs and since he had trespassed onto the Plaintiff's land, and an order of injunction be issued against him restraining him from interfering with the Plaintiff's quiet possession. The Plaintiff submitted that the caution placed on her land should be lifted and the Defendant to pay costs.

72. The Defendant's submission on the other hand were pegged on their issues for determination which included.

i. Whether Defendant was a co-owner of land parcel Title Nyandarua/Sabugo/6486. And if so, should the court cancel the title issued to the Plaintiff and order the issuance of title deed for 4 acres to the Defendant.

ii. Whether the plaintiff obtained grant of letters of Administration intestate with respect to the Estate of Daudi Kariuki Kamirio before obtaining the deed for parcel No. Nyandarua/Sabugo/6486.

iii. Whether the Plaintiff illegally and fraudulently obtained title deed and consent for parcel No. Nyandarua/Sabugo/6486.

73. On the first issue for determination, the Defendant's contention was to the effect that he was the lawful and legal owner of 4 acres out of parcel of land No. Nyandarua/Sabugo/6486 having lawfully purchased the same from the Plaintiff's deceased husband one Daudi Kariuki Kamirio which land was to be excised form Plot No. Nyandarua/Sabugo/627B. He relied on Section 3(3) of the law of contract that stipulated that;

*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*

74. That on the 17<sup>th</sup> February 1989 the Defendant herein entered into an agreement with the Plaintiff's deceased husband for the sale of 4 acres of land to be excised from Nyandarua/Sabugo/627B and that the said agreement was reduced into writing, attested and duly executed as required by the law wherein Defendant had paid the purchase price in full and the Plaintiff's husband acknowledged receipt of payment therein.

75. Reliance was placed on the case of **Joseph Kahura Kaniaru and another vs Samuel Kimondo Theuri [2017]eKLR** where Justice Obaga adopted the holding of Justice Mabeya in **ELD City Ltd vs. Corn Products Kenya Ltd and Another [2013] e KLR** to the effect that

*that it is trite law that in deciding disputes , it is the court's duty to give effect to the intention of the parties. The parties' intention is discernible from the documents and conduct of the parties. However, onerous a document or contract may be the court's duty is to give effect to it.*

76. Justice Obaga also adopted the holding In the case of **Storer Vs Manchester City Council (1974) 1 W.L.R 1403, where Lord Denning M.R** stated as follows:-

*“ In contracts you do not look into the actual intent in a man’s mind, you look at what he said and did. A contract is found when there is, to all outward appearances, a contract. A man cannot get out of a contract by saying “ I had no intend to contract” if by his words he has done so. His intention is to be found only in the outward expression which his letters convey. If they show a concluded contract that is enough”.*

77. That in the said agreement the vendor was specific that the 4 acres were to be excised from his land No. Nyandarua/Sabugo/627B to be joined to the purchaser’s Plot.

78. The Defendant further relied on the decided case of **Macharia Mwangi Maina and 87 other vs Davidson Mwangi Kagiri [2014] eKLR** to submit that “If one party to an agreement stood by and let the other party incur expense or prejudice his position on the faith of the agreement being valid he will not then be allowed to turn around and assert that the agreement is unenforceable”.

79. That there was an agreement between then Plaintiff’s husband and the Defendant where it was clearly stated in the agreement that 4 acres would be excised from the Plaintiff’s husband parcel of land No. Nyandarua/Sabugo/627B, for the purchase price of Ksh 84,000/= wherein the deceased’s husband acknowledged receipt of 60,000/=. The plaintiff could not turn around and state that there was no relation of the suit land with Nyandarua/Sabugo/627B and should be stopped from denying the validity of the said agreement.

The Defendant further relied on the following cases:

**i. Esther Wanjiru Mutuu vs Muiruri Gachanja [2017] eLKR**

**ii. Joseph Kabugi Karanja vs Benson Mugo Mukunya & 2 Others [2015 eKLR**

**iii. Julius K Atunga vs Naunmy Jebyegon Kemboi [2014] eKLR** to submit that indeed the Defendant herein was the absolute legal owner of 4 acres of land be excised out of land parcel No. Nyandarua/Sabugo/Block 6486

80. On whether the plaintiff obtained a Grant of letters of Administration intestate with respect to the Estate of Daudi Kariuki Kamirio before obtaining the deed for parcel No. Nyandarua/Sabugo/6486, it was the Defendant’s submission, while relying on the decided case of **Teresia Wairimu Kirima vs Father Romeo & Another [2013] eKLR**, that since the plaintiff had not obtained the letters of administration to enable her administer her late husband’s estate, she had no capacity to deal with the estate of the deceased and as such, the suit herein was incompetent and ought to be struck out.

81. The Defendant further submitted that Plaintiff had illegally and fraudulently obtained title deed and consent for parcel No. Nyandarua/Sabugo/6486.

82. In so submitting, they relied on Section 26 of the Land Registration Act which stipulated as follows:

*The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—*

*(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or*

*(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.*

83. It was the Defendant’s further submission that the Plaintiff herein had deceived him into signing the transfer forms so as to enable her transfer the parcel of Land but she had instead applied for the subdivision for the suit land without the Defendant’s knowledge thereby illegally obtaining the title to the suit land in her name. That the Defendant was never involved in the sub-division and registration process of the land despite the Plaintiff having had knowledge of his interest in the suit land and therefore her title ought to be cancelled.

84. That the only consent issued in the present instance was the one obtained on the 23<sup>rd</sup> October 1987 which was issued to the defendant for the whole land originally registered as Nyandarua/Sabugo/627 which in essence meant that the Defendant was the owner of the whole piece of land.

85. The defendant also relied on section 8 (1) of the Land Control Board in submitting that he had obtained the consent for the entire Plot 627 within the requisite period of 6 months which was duly acknowledged by the Plaintiff’s late husband and there was no need for the Defendant to obtain a further consent.

86. That the Plaintiff came to court with unclean hands and deserved no orders from this court. The Defendant prayed for the suit against the defendant to be dismissed and further that injunctive orders be issued restraining the Plaintiff and her agents, servants and/or employees from interfering with his quiet and peaceful enjoyment of the suit land. The Defendant also prayed for the cancellation of the Plaintiff’s title deed for parcel No. Nyandarua/Sabugo/6486 and a title for 4 acres be issued in his name.

#### **Analysis and determination:-**

87. It is worth noting that at the hearing of this suit the Plaintiff did not come to court to testify but rather one of her sons Wachira Kariuki Kamiriro testified as her witness.

88. It is not in dispute that one Josephat Ngugi Mwangi (DW2) was the proprietor of suit land No. Nyandarua/Sabugo/627 measuring approximately 24 acres wherein he had sold 11 acres to the Defendant vide an agreement dated the 1<sup>st</sup> September 1987(Df Exh 1) at a purchase price of Ksh 330,000/=

89. It is also not in dispute that the same vendor Josephat Ngugi Mwangi sold the remaining 13 acres of land to the plaintiff's deceased husband, one Daudi Kariuki Kamirio (there was however no documentary evidence produced to prove this transaction)

90. That following this sale, a consent dated 23<sup>rd</sup> October 1987 and produced as defence exhibit 2 was issued by the Land Control Board at Olkalaou for parcel No. Nyandarua/Sabugo/627 for Absolute transfer on sale from Josephat Ngugi Mwangi to Simion Muthuku Munjuga for a consideration of ksh. 150,000/=.

91. A mutation form produced as Defence exhibit 7 was thereafter signed by the vendor.

92. That upon the issuance of the above captioned consent the three parties namely Josephat Ngugi Mwangi,(vendor) Simion Muthuku Munjuga and Daudi Kariuki Kamirio the purchasers herein, agreed that upon sub-division, the defendant herein would transfer the 13 acres of land to the Plaintiff's husband (Daudi Kariuki Kamirio.)

93. That the two parties then took possession of their respective pieces of land which they named as Nyandarua/Sabugo/627A and B respectively.

94. That although the Plaintiff's witness denied this fact, it was the Defendant's evidence that upon both parties having settled on their respective pieces of land, the Plaintiff's husbands had approached the Defendant and sold to him a further 4 acres of land from his share of 13 acres of land. The sale agreement dated the 17<sup>th</sup> February 1989 was produced as Defence Exhibit 3 to this effect showing that the Defendant had bought 4 acres (which were to be excised from the Plaintiff's husband piece of land No Nyandarua/Sabugo/627 B) for the purchase price of 84,000/=.

95. That the Plaintiff's husband had received 60,000/= and the balance of Ksh 24,000/= was to be paid upon the Land Control Consent being granted.

96. According to the defence Exhibit No 4(a) and (b) the balance of Ksh 24,000/= was subsequently paid to the Plaintiff's husband on the 7<sup>th</sup> February 1992 and thus there was no balance remaining. The said payment and agreement was done at the Defendant's house and witnessed by Kungu Kironyo and Samuel Kanyi who for some reason were not called to testify.

97. From the evidence adduced as well as the pleadings herein filed, it is not in dispute that Daudi Kariuki Kamirio the plaintiff's husband herein passed away although there is no documentation to that effect, and when the Defendant herein tried to take possession of the 4 acres of land sold to him by Daudi, he was repulsed by the Plaintiff's sons.

98. This turn of events then led him to conduct a search on the 9<sup>th</sup> February 2015 wherein he was shocked to find that Nyandarua/Sabugo/627 had been closed on subdivision giving raise to Nyandarua/Sabugo/6485 and 6486. The certificate of official search was produced as Defence exhibit 8.

99. That on the 27<sup>th</sup> February 2015 the Defendant had conducted yet another search only to find that the Plaintiff had been issued title to parcel Nyandarua/Sabugo/6486 comprising of the full 13 acres instead of 9 acres and that is when he had registered a caution on the said title claiming purchaser interest. The certificate of official search was produced as Defence exhibit 9.

100. I find that Nyandarua/Sabugo/6485 and 6486 were as a result of the subdivision of the mother land being Nyandarua/Sabugo/627

101. The filing of the said caution thus led to the filing of the present suit by the Plaintiff and the response in the form of defence and counterclaim by the defendant.

102. After having analyzed the case as it were, I find the matters for determination as being;

- i. Whether there was interest registered against Parcel number Nyandarua/Sabugo/627 in the name of the Defendant.
- ii. Whether the transaction between the defendant herein and the Plaintiff's husband on the subject matter of this suit was enforceable.
- iii. Whether this suit commenced by the Plaintiff was competent.

103. On the first issue, as it was rightly stated, the Land Control Act remains one of the most litigated statutes in Kenya where the Courts have had to interpret applications of various provisions of that statute with the resultant in the emergence of numerous authorities and/or decisions.

104. The consistent decisions of the courts in Kenya have given full effect to the provisions of the Land Control Act to the effect that once the land in question was proved to be agricultural land within a controlled area, transactions affecting it are controlled transactions which in law become void in the absence of consent from the land control board. These provisions of the Land Control Act are of an imperative nature to the extent that there is no room for the application of any doctrine of equity to soften its provisions.

105. The court of Appeal in the case of **David Sironga Ole Tukai v Francis Arap Muge & 2 others [2014] eKLR** found the following five fundamental conclusions to be self-evident and flowed directly from the express provisions of the Land Control Act:

*i. All transactions involving agricultural land situate in a land control area are void for all purposes unless the land control board within that land control area has sanctioned them.*

*ii. Even declaration of a trust in agricultural land situated in a land control area is not spared; without consent of the land control board, it is also void.*

*iii. Consent of the relevant Land Control Board must be obtained within six months of the making of the agreement relating to agricultural land. The High Court however has power, for good reason, to extend the period for applying for consent.*

*(iv) Where the transaction is ultimately void for lack of consent, any money or consideration paid by a would-be purchaser is recoverable as a debt.*

*(v) It is a criminal offence punishable by imprisonment or fine or both to pay or receive payment in respect of a void transaction or to take possession or remain in possession of land, which is the subject of such void transaction.*

106. Further the Court of Appeal in the case of **David Sironga Ole Tukai** (supra) held that:

*We can quote a few consistent decisions of the courts in Kenya that hitherto have given full effect to the provisions of the Land Control Act. In **Leonard Njonjo Kariuki vs Njoroge Kariuki alias Benson Njonjo, CA. NO. 26 OF 1979** this Court affirmed that once the land in question was proved to be agricultural land within a controlled area, transactions affecting it were controlled transactions which in law became void in the absence of consent from the land control board. And in **Karuri vs Gitura [1981] KLR 247** the Court concluded that the provisions of the Land Control Act are of an imperative nature to the extent that there is no room for the application of any doctrine of equity to soften its provisions.....*

*“Lastly, we do not share the view that the express provisions of the Land Control Act can be equated to procedural technicalities that can be overlooked by virtue of Article 159 (2) (d) of the Constitution and the overriding objective under the Appellate Jurisdiction Act”.*

107. It is not in dispute that the agreement executed between the parties herein and one Mr. Josephat Ngugi (DW2) imposed an obligation on the parties to obtain the consent of the relevant Land Control Board the suit land herein being an agricultural land within a controlled area thus making transactions affecting it controlled transactions herein.

108. That indeed although consent to transfer of Nyandarua/Sabugo/627 was given to the defendant as a consideration of 150,000/= by the Ol kalaou Land Control board to the effect that Josephat was transferring the said land to the defendant, however since the said consent was not presented to the land Register, according to the evidence of DW3, for issuance of title, I find that no interest was registered against Parcel number Nyandarua/Sabugo/627 in the name of the Defendant as explained by DW3, that the Land Registrar was not made aware of the existence of this Consent or Transfer.

109. On the second issue as to whether the transaction between the defendant herein and the Plaintiff's husband on the subject matter being Nyandarua/Sabugo/627B was enforceable, my finding is that the agreement between the parties dated 17<sup>th</sup> February 1989 by which the Plaintiff's husband was to sell 4 acre of out of the suit land to the defendant did not obtain the necessary consent as required by Section 6 of the Land Control Act. It was therefore null and void and un-enforceable.

110. When the Plaintiff's husband received the purchase price for the 4 acres and placed the Defendant on the suit land, without obtaining the consent of the relevant control board, the act constituted a criminal offence, illegal to that extent, such occupation could not, with respect, constitute an overriding interest under the Land Control Act to render valid and lawful conduct, which is otherwise declared by the Act to be void for all purposes.

111. From the above it is clear that the transaction between the defendant and the Plaintiff's husband was null and void and therefore un-enforceable.

112. On the last issue as to whether the present suit which was commenced by the Plaintiff was competent, it is not in dispute that the suit property being No. Nyandarua/Sabugo/627B had been purchased by the Plaintiffs husband.

113. That upon his death the Plaintiff herein caused it to be subdivided giving rise to Nyandarua/Sabugo/6486 which registered in her name. There was however no evidence tendered to support the fact that the Plaintiff, in so dealing with her late husband's land had filed a succession cause.

114. In the case of **Trouistik Union International vs. Mbeyu & Another [1993] eKLR** the Court of Appeal emphasized that that personal representatives are people who have obtained grant and not blood relations. That if an administrator brought an action before obtaining Grant, the same would be incompetent from inception. That a suit commenced by a party who has not obtained letters of Administration was therefore incompetent as the party filing it lacks the locus standi to present and prosecute the suit. The court had relied on their own decision in the case of **Otieno v Joash Ochieng Ougo & another (1987) eKLR** to hold that;

*“The administrator is not entitled to bring an action as administrator before he has taken letters of administration. If he does, the*

*action is incompetent at the date of its inception”.*

115. There having been consensus by parties that the Plaintiff herein instituted the present suit without having obtained letters of Administration, I find the issue of locus standi not being a technicality but the law and that the same does not offend the provisions of Article 22 and 159 of the Constitution to the effect that a party needs to have capacity or locus standi before bringing a claim in court.

116. In the circumstance thereof, I find that the suit filed herein is incompetent and bad in law.

117. After having found as above, I find that:

i. The Plaintiff's suit commenced through a plaint dated on the 13<sup>th</sup> April 2015 and filed in court on the on the 14<sup>th</sup> April 2015 is unenforceable and is hereby struck out.

ii. I also find that the counter claim dated the 19<sup>th</sup> June 2015 and filed on the same day is herein dismissed.

iii. The Plaintiff herein to refund to the Defendant the purchase price of 4 acres of Ksh. 84 ,000/= forthwith

iv. Both parties to bear their own costs.

It is so ordered.

**Dated and delivered at Nyahururu this 25<sup>th</sup> day of April 2018.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**