REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELCA NO 4 OF 2018

(FORMERLY NYAHURURU ELCA 13 OF 2017)

JOHN MUTAHI GITONGA.....APPELLANT

VERSUS

GEOFFREY THUKU

MWANGI JAMES MURIITHI

BANCY WACHUKA MAINA sued in their capacity as

the office bearers and on behalf of Kiangoru

Self Help Water Project.....RESPONDENTS

Being an appeal against the Judgment of the Honorable Principal Magistrate D MIKOYAN in the Nyahururu Principal Magistrate's Court delivered on 27th January 2016

in

PMCC No. 66 of 2012

JUDGEMENT

1. What is before me for determination on Appeal is a matter which was heard and decided by D MIKOYAN Principal Magistrate in the Principal Magistrate's Court at Nyahururu, in Civil Case No. 66 of 2012 where the learned trial Magistrate, upon taking the evidence of both parties, delivered his judgment on the 27th January 2016 where he found that the agreement dated the 28th June 2006 was vitiated by the 16th October 2009 agreement.

2. The learned Magistrate further dismissed prayer (a) of the Plaint as well as prayer (b) of the counterclaim that sought for a refund of Ksh 76,100/=

3. Further orders directed.the parties to fulfill their part of the bargain. That the Plaintiff was entitled to a balance of Ksh 44,100/= based on the deductions on all payments based on the October 2009 agreement including Ksh 21,000/= balance carried forward from the June 2006 sale agreement.

4. Learned magistrate also ordered parties to proceed to execute fully the sale agreement and to avoid further breach of the same.

5. The Appellant, being dissatisfied with the judgment of the trial magistrate has filed the present Appeal before this court.

6. The grounds upon which the Appellant has raised in his Memorandum of Appeal include:

i. That the learned Magistrate erred in law and in fact in failing to find that the sale agreement dated the 16th October 2009 between the parties herein was null and void for lack of the Land Control Board Consent.

ii. That the learned trial Magistrate erred in law and in fact in failing to find that the only remedy available to the parties was for refund of the purchase price paid in the sale agreement dated the 16th October 2009.

iii. That the learned trial Magistrate erred in law and in fact in failing to find that the Land Control Board had declined to give consent for excision of the portion subject matter of the sale agreement dated the 16th October 2009, and as such the sale transaction was frustrated, unenforceable and incapable of further performance.

iv. That the learned trial Magistrate erred in law and in fact in holding that the Appellant had obtained Land Control Board Consent but declined to transfer the subject portion on the ground of a breach of contract of the sale.

v. That the learned trial Magistrate erred in law and in fact in failing to find that the Respondent had deviated from their pleadings.

vi. That the learned trial Magistrate erred in law and in fact in failing to find that the Appellant had proved his case on a balance of probabilities.

vii. That the learned trial Magistrate erred in law and in fact in dismissing prayer (a) and (b) of the Appellant's prayer in the plaint.

viii. That the learned trial Magistrate erred in law and in fact in failing to award the Appellant the cost of the suit.

The Appellant thus sought for;

i. The instant appeal be allowed and the judgment delivered on the 27th January 20159(sic) in the Nyahururu CMCC No. 66 of 2012 be set aside, and for judgment to be entered as prayed in the Plaint dated the 26th March 2012.

ii. Appellant's Appeal be allowed.

iii. That the Respondent be ordered to pay the cost of this appeal and of in (sic) Nyahururu CMCC No. 66 2012.

7. By the consent, this Appeal was heard by way of written submissions wherein the Appellant filed his submissions on the 9th August 2018 while the Respondent filed his submissions on the 11th September 2018.

8. The Appellant's case as per his written submission and highlight thereof is to the effect that the subject matter before the trial court had been in respect to a sale agreement between the parties wherein they had sought for the nullification of the said sale agreement for reasons that the Land Control Board had refused to give consent for the sale and transfer of a portion of land measuring 50 x100 out of LR No. Laikipia Mutara Block 2/1235(Uruku) for reasons that suit portion did not have a road of access.

9. That the Appellant had subsequently informed the Respondents vide a letter dated the 28th April 2011 on the refusal by the Land Control Board to give consent but they neither Appealed from the refusal nor bought a bigger portion of land as advised by the Appellant.

10. That the refusal by the Land Control Board to give consent for the sale and transfer of the portion of the suit land rendered the whole transaction executed on the 16th October 2009 void therefore making the continued occupation on the suit land by the Respondents illegal.

11. It was the Appellant's submission that as at the time the parties were entering into the agreement on the 16th October 2009, their sole intention was to have a portion of land excised from land parcel No. Laikipia Mutara Block 2/1235(Uruku) and transferred to the Respondents. However, due to the denial, by the Land Control Board, of a consent to transfer the same, for reason that there was no access road which in turn would inhibit the accessibility by the Respondents to their parcel of land, the intentions of the parties could not be accomplished.

12. That the principles of equity could not apply in the circumstance. That the refusal by the Land Control Board to give consent did not create any constructive trust in favour of the Respondents.

13. The Appellants relied on the decided case in the Court of Appeal being **Willy Kimutai Kitilit vs Michael Kibet Civil Appeal No 51 o 2015.**

14. That the Respondents counter claim in the trial court, for a declaration that the registration of the Appellant as the Proprietor of parcel No. Laikipia Mutara Block 2/1235(Uruku) was subject to an overriding interest comprised in the constructed water intake on the riparian land along the Mutara River and five Kiosks was displaced. That had this been the case then, they did not require any declaration over the Appellant's parcel of land which was not on a riparian area.

15. That pursuant to the decided case in **Pauline Wambui Ngari vs John Kairu & Another [1997] eKLR**, it had been held that the omission by the Respondents to state under which sub-section of the repealed Registered Land Act they were basing their claim for overriding interest was bad in law.

16. That subsequently even if an order on declaration of overriding interest were to be issued, the same would be in vain knowing that there is no access road to the excised portion of land.

17. That the Appellant had obtained a consent for sub division and admitted as such. The issue of consent was specific. The Respondents had been made aware of the refusal by the Land Control Board but they did not react. They did not apply for an extension of time within which to apply for consent for sale and transfer.

18. Counsel for the Appellant further submitted that the consent required both parties to appear before the board because a claim of overriding interest could only be sustained if the Respondents could prove that they could access the portion of land in issue. As it stood, they could not access the suit land.

19. Counsel submitted that the appeal had merit and urged the court to allow it as prayed

20. The appeal was opposed by the Respondents who submitted that they had filed their written submissions dated the 11th September 2018 to which they asked the court to consider since it had not heard the evidence adduced in the lower court. Counsel submitted that the court was duty bound to have a review of the pleadings and evidence so as to come up with its own conclusions.

21. Their written submissions as well as highlight on the same was to the effect that the Appellant in the trial court had sought for the nullification of an agreement for sale for want of consent. That the plaint was silent on the kind of consent the Appellant had meant. That nowhere in the plaint had the Appellant stated that he had applied for the consent and that the said application had been refused. That the Appellant could not now shift from his pleadings which are binding on him.

22. That the Appellant had contradicted himself on the issue of the consent when at one hand, three (3) years later, he had stated that it has been refused by the Land Control Board yet no evidence had been adduced to substantiate that allegation.

23. At the same time, at page 158 line 26 on the record of appeal, the appellant on the other hand had stated that he did process the consent for the sale. That at page 155 lines 20-23 of the record of Appeal, the Appellant informed the court that he had already secured the consent. This in fact proved that the Appellant had already sought for and obtained the consent , a statement that was the opposite of the earlier statement that the consent had been denied.

24. That the appeal was grounded on the issue of consent and that it was based on that ground that it ought to fail.

25. The Respondent relied on the decided case of **Joseph Mathenge Kamithi** in **ELC No 102 of 2014- Nyeri** to submit that it was not the failure to apply for consent within the stipulated time that rendered the controlled dealing void but rather the denial of the same by the Land Control Board. In the present case, the Appellant/Plaintiff had testified that they had secured the consent for sale.

26. It was the Respondent's contention that long before the Appellant was registered as the proprietor of the suit land on 20th January 2004, the same had been registered in the name of Government of Kenya and later on in the name of Fredrick Ndiangui Njuguna.

27. That it was during the period when the land was in the name of the Government of Kenya, that it had been allotted to Fredrick Ndiangui Njuguna who had allowed the Respondents entry onto the same to construct a water in-take and five (5) water kiosks or points. That the Respondents were to pay the then allottee Ksh 10,000/= as compensation.

28. That when the subsequent persons were registered thereafter, the water in-take constituted an overriding interest over the land which overriding interest cannot be taken away as it remains binding over the land.

29. The Respondents further assertion was that the water in-take and five (5) water kiosks or points serve the community at large and were exempted from the requirement of any Land Control Board Consent under Section 6(3) (b) of the Land Control Act and as such, when Fredrick Ndiangui Njuguna become registered as the sole proprietor of the suit land, his registration was subject to the overriding interest in the nature of an easement or a water in-take and 5 water kiosks or points attaching the suit land pursuant to the provisions of Section 30 (a) (b) and (g) of the Registered Land Act (now repealed) reliance was placed on the case of **Makangu vs Mbui [2000] LLR 4317(CAK).**

30. On the issue of the effect of the lack of consent from the land Control Board, the Respondent relied on the decided case of **Macharia Mwangi Maina & 87 other Vs Davidson Mwangi Kagari [2014]eKLR**

31. It was the Respondent's contention that the Appellant had sold to the Respondents a portion of land measuring 50 x 100ft of which he had been paid a total sum of Ksh 156,000/= upon which he was to put the Respondents in possession of the said land but failed to demarcate and/or sub-divide the same despite having procured the consent to do so. That instead he had embarked on enriching himself by demanding for a further sum of Ksh 385,000=/ .He had failed to transfer the portion of land or deliver good title for no justifiable reason.

32. The Respondent prayed that the court do render equitable justice to the Appeal by dismissing it with costs to them.

33. That in the event that the court was inclined to allow the Appeal then it orders the refund of Ksh 189,000/= or 156,000/= received by the Appellant in the agreements of the years 2006 and 2009 together with the liquidated damages.

34. I have anxiously considered the record, the judgment of the trial Magistrate's Court, the submissions by learned counsel, the authorities cited on behalf of the respective parties and the law. Conscious of my duty as the first appellate Court in this matter, I have to reconsider the evidence, assess it and make my own conclusions on the evidence, subject to the cardinal fact that I did not have the advantage singularly enjoyed by the trial magistrate, of seeing and hearing the witnesses as they testified. ***(See Seascapes Ltd v. Development Finance Company of Kenya Ltd [2009] KLR, 384).*** *I* also remind myself that this Court will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the magistrate is shown demonstrably to have acted on wrong principle in reaching the findings he did. (***See Ephantus Mwangi & Another v Duncan Mwangi Wambugu [1982-88] 1 KAR 278).***

35. The basis of the Appellant's claim according to the evidence adduced at the trial court, was that he was at all material times the registered proprietor of parcel of land Plot No LR No. Laikipia Mutara Block 2/1235(Uruku) having bought the same from one Fredrick Ndiangui Njuguna in the year 2004.

36. That prior to the purchase of the land, a Self Help group had constructed a water intake thereon and a sum of Ksh 10,000/= was to be paid as a one off payment to Fredrick Ndiangui Njuguna. That after purchasing the land, he had paid the vendor the ksh. 10,000/= so as to recover the same from the Self Help group.

37. Subsequently, on the 28th June 2006 he had entered into a sale agreement with the Respondent herein, the Self Help Water Project group, wherein he agreed to sell to them a portion of his land measuring 50 x 100ft, to be excised from his larger parcel of land, for a consideration of Khs. 80,000/=

38. On that date, the 28th June 2006, he was paid Ksh 59,000/= with a balance of Ksh 21,000/= to be paid later. That he then procured a consent to sub divide the land but the respondents failed to pay the surveyor's fee and fee to process the title.

39. That the sale agreement had a penalty of 30% which amounted to Ksh. 24,000/=.

40. That upon the Respondent's failure to honour the agreement he had written to them a demand letter dated the 18th November 2006 seeking for a total of Ksh 47,000/= broken down as follows: balance of Ksh 21,000/=, penalty of Ksh 24,000/=, Ksh 1,500/ for service and ksh 600/ for other expenses. That when there was no payments made, he had sent the Respondent several other demand letters which were not acted upon.

41. Later, on the 16th October 2009 he had entered into another agreement with the officials of the group wherein they had agreed that that the group now buys the same parcel of land at the current rate of Ksh 132,000/= and he was given a down payment of Ksh.32,900/=. Another Ksh 50,000/= was also acknowledged making it a total of Ksh 82,900/=

42. The Appellant had testified that Ksh 26,000/ was applied to the breach of the previous agreement and now what was owed to him by the group was a total of ksh. 50,000/= which was payable after 18 months. The same was yet to be paid.

43. That he did not seek for a consent to transfer as the group had not finalized on the payment. That he subsequently wrote to them a demand letter dated the 3rd June 2010 wherein he had wanted to refund to them the Ksh 82,900/= paid so that they could vacate the land.

44. The Respondents had been adamant that they would only pay the balance once the transfer was effected. That when he tried to procure a transfer consent he was informed by the Land Control Board that he had to sell to the Respondents additional land so as to cater for an access road because as it were at that moment, the land had no access road. The consent had been denied and the Appellant was willing to refund to the Respondents the Ksh. 82,900/= minus the 30% penalty for breach of contract.

45. The Respondent's evidence in their defence was to the effect that the water intake was constructed in the year 2001-2002 outside the marine area. That the construction had cost approximately Ksh. 998,123.50/= with the groups contribution of about Ksh. 200,000/=. That the pipelines of the five water kiosks passed through several parcels of land and that they had agreed to pay the owner of the suit land at the time a sum of ksh. 10,000/= as an appreciation token for allowing them use his land to lay the pipe line since he could not sell the land to them as it was on a river bed.

46. That subsequently, the owner of the suit land, one Fredrick, sold the land to the Appellant herein for a consideration of Ksh. 65,000/= but the water intake had not been part of the property sold by Fredrick to the Appellant.

47. That vide their agreement of 2006, they had purchased the 50 x 100 piece of land for a consideration of Ksh. 80,000/= from the Appellant for the purpose of the intake, wherein they had given him a down payment of Ksh. 59,000/=.

48. The Respondent conceded to having entered into a subsequent contract with the Appellant to buy the same parcel of land wherein the Appellant had hiked the purchase price to Ksh. 132,900/=. That pursuant to the new contract, they had given the Appellant a down payment of Ksh.50,000/= in effect thereof they had no balance owing to him.

49. That they never got a consent after processing the agreement but instead they were served with a letter from the Appellant demanding for a further Ksh. 385,000/=.

50. The Respondent had been categorical that the water intake was along Mutara River. That he was not sure whether the Land Control board had declined to approve the subdivision of the suit land. All he knew was that they had bought the land and had developed it.

51. The Respondent's counter claim to the plaint was that Title No Mutara/Mutara Block 2/1235(Uruku) measuring over 6 acres was subject to an overriding interest comprised in the constructed and completed permanent water intake along the Muara River and five water kiosks served by the same and enjoyed by the its members.

52. They also sought the agreement dated the 28th June 2006 be declared valid and the Appellant be compelled to comply with the same fully.

53. They further sought for orders compelling the Appellant to refund them a sum of Ksh. 76,100/= with cost, which sum was over and above the initial consideration of the suit plot.

54. *Considering the evidence adduced in the trial court* the issues raised herein are;

i. Whether the sale agreements entered into by the parties herein were valid.

ii. whether the consent of the Land Control Board was essential for the sale transaction between the parties.

iii. Whether there was any overriding interest over land parcel No. No. Laikipia Mutara Block 2/1235(Uruku).

Analysis and determination:

55. *On the first issue, as to* whether the sale agreements entered into by the parties herein were valid, the law of contract is application in the instant case where Section 3(3) of the Act is clear to the effect 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:

56. A study of the contract that was entered into by the parties on the 28th June 2006, reveals that the Appellant herein did sell to the Respondents a portion of land measuring 50 x 100 out of LR No. Laikipia Mutara Block 2/1235(Uruku) for a consideration of Ksh. 80,000/= a deposit of Ksh. 59,000/= which was paid and received by the Appellant on the execution of the agreement. Parties agreed that the balance of Ksh 21,000/= was to be paid on or before 15th August 2006.

57. Paragraph 3 of the agreement was that the transaction was subject to the Appellant obtaining consent, within 6 months from the Land Control Board, to subdivide, sale and transfer the suit land in favour of the Respondent. At para 6, the transfer was to be effected on or before the 30th September 2006.

58. At paragraph 7, parties agreed that the fee for survey, mutation registration, stamp duty, registration and title processing fee was to be paid by the Respondent wherein the legal fee in preparation of the agreement would be paid by the parties.

59. Paragraph 8 and 9 carried the penalty in case of default and/or breach of the agreement.

60. Evidence on record is that the Respondent was already in possession of the suit land and had partially constructed a permanent water intake as at the time they entered into the agreement.

61. According to the evidence adduced, what followed after the execution of this agreement, which was clear in its terms, was that the Respondent herein breached the same, wherein in conformity with Paragraph 9 of their agreement, the Appellant demanded from them a sum of Kenya shillings 47,100/= broken down as follows; Ksh. 21,000/= being the payment of the balance, Ksh 24,000/= as the liquidated damages for breach and Ksh 2,100/= as further costs, monies which had not been paid as per the time of filing the suit.

62. I find that the 1st contract made in the year 2006 was a valid contract in the terms of Section 3(3) of the Law of Contract Act. The same however had become null and void wherein pursuant to clause Paragraph 9 of the said agreement, the Appellant herein sought for remedy for the breach.

63. The parties had executed the agreement willingly and were therefore bound by the terms thereon. The parties had then entered into a second agreement wherein there was no mention of the first agreement. Like the finding of the trial magistrate, the first contract was thus automatically vitiated by the subsequent contract. That ends there.

64. I shall thus concern myself with the subsequent contract which was entered into by the parties on the 16th October 2009 after the Appellant hiked the purchase price of the same suit land to Ksh. 132,000/=.Again like the first agreement, the Respondents made a down payment of Ksh. 82,900/= with the balance of ksh 50,000/= to be paid after a period of 18 months.

65. At paragraph 3 of the agreement hereto, the parties had agreed that the transaction was subject to the Appellant obtaining consent, within 6 months from the Land Control Board, to subdivide, sale and transfer the suit land in favour of the Respondent.

66. That the Appellant was to transfer the land to the Respondent upon completion of the payment of the last installment and further that the fee for survey, mutation registration, stamp duty, registration and title processing fee was to be paid by the Respondent wherein the legal fee in preparation of the agreement would be paid equally by the parties.

67. Paragraph 9 of the agreement carried the penalty in case of default and/or breach of the agreement.

68. Again on this issue I do find that there was a valid contract between the parties pursuant to the provisions of Section 3(3) of the law of Contract Act.

69. That pursuant to the signing of the said agreement and part payment of Ksh 82,900/= the said contract however did not fall through because the Appellant failed to secure the consent from the Land Control Board for reason that the excised portion did not have a road for access. It is worth noting that one of the conditions stipulated in paragraph 3 of the agreement was that the Appellant was to obtain the consent from the Rimuruti Land Control Board within 6 months of the agreement. The agreement thus become null and void on the 16th April 2010.

70. The next issue for consideration is whether the consent of the Land Control Board was essential for the sale transaction between the parties. It was the Appellant's case that since the suit land No. LR No. Laikipia Mutara Block 2/1235(Uruku) was registered under the *Registered Lands Act (Cap 300 of the Laws of Kenya),* any dealing with the land thereof required consent of the Land Control Board and the failure to procure the said consent rendered the agreement void.

71. The Respondents on the other hand were categorical that the Appellant had not made any application for consent to the Land Control Board regarding the agreement entered into in the year 2009. That the Appellant had filed the suit and Appeal not to vindicate justice but to try and make a kill and unjustly enrich himself.

72. The sale agreement between the parties hereto was entered into on the 16th October 2009 by which time the Defendant/Respondents were already in possession of the portion of the suit land having been in possession between the years 2001 and 2002 at the time the Government of Kenya was the registered proprietor of the suit land and one Frederick Ndiangui Mwaniki was the allottee. This was prior to the registration of the Appellant as the proprietor of the suit land.

73. The Respondents' contention was that the registration and issuance of title to the Appellant on the 20th January 2004 was subject to the overriding interest in the nature of an easement of a water intake and 5 water kiosks or points attaching the suit land under Section 30(a) and (g) of the Registered Land Act (now repealed) but applicable under the Transitional clause of the Land Registration Act.

74. I find that the terms of the Agreement to sale are clear to the effect that **there was common intention between the Appellant and the Respondent in relation to suit property. The Respondent** had acquired rights over the suit land under the agreement as t**he transaction had created a constructive trust in favor of the Respondent herein when they paid the** down payment of Ksh. 82,900/= **of the purchase price as per their agreement. This trust was enforceable.**

75. At paragraph 2 of the agreement, the balance of ksh 50,000/= was to be paid at the expiry of 18 months from the date of the agreement.

76. At clause paragraph 3 of the agreement, the Appellant guaranteed the Respondent that he shall seek for and obtain the consent for sub-division of the portion of land within 6 months from the date of the agreement.

77. Paragraph 4 of the agreement acknowledged that the Respondent was already in possession of the portion of land.

78. In essence thereof and from the wording of the parties' agreement, the Appellant was to procure the consent from the Land Control Board within 6 months of the agreement while the Respondents were to pay him the balance of Ksh. 50,000/= after 18 months of execution of the agreement.

79. There is therefore no doubt that the Respondents herein expected the Appellant to perform his part of the agreement, which was to secure the consent from the Land Control Board and thereafter transfer the land to them upon completion of the payment of the whole purchase price. This was not the case as the Appellant had turned around stating that he had been denied the relevant consent for sale and transfer of the portion of land for reason that there was no access road to the portion of the suit land.

80. Paragraph 8 of the agreement was to the effect that ;

> *If this this transaction shall fail for no fault of the purchaser, the vendor shall refund to the purchaser the amount of the money (that is the full purchase price) paid to him under this agreement.*

81. Paragraph 9 of the agreement stipulated as follows;

> *It is expressly agreed that any party in breach of this agreement shall, upon being given 14 days' notice to remedy the breach and failing to remedy the breach within the notice period, pay the party not in breach (that is the innocent party party) the agreed liquidated damages of thirty percent (30%) of the purchase price.*

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

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

> "*The parties executed the same willingly and they are therefore bound by it."*

84. In **Aiman vs Muchoki (1984) KLR. 353** the Court of Appeal held;

> "*In the field of the civil law, it is of utmost importance that the courts uphold the rights of parties to commercial transaction. It is*

the firm tradition of common law court to do so and if the tradition is departed from the nation will suffer".

85. A look at the terms of the party's agreement, the same is clear that the land in issue related to a controlled transaction in agricultural land which transaction is governed under Section 6(1) of the Land Control Act and which stipulates that such a transaction:

> *"is void for all purposes unless the Land Control Board for the land control board area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act."*

86. Section 6 (2) of the Land Control Act provides:

> *"For avoidance of doubt, it is declared that the declaration of trust of agricultural land situated within a Land Control Board area is a dealing in land for purposes of subsection (1)".*

87. Under Section 7 of the Land Control Act, consideration paid for a transaction which becomes void is recoverable as a debt subject to Section 22 which provides:

> *Where a controlled transaction; or an agreement to be a party to a controlled transaction, is avoided by Section 6 and any person –*
>
> *(a) pays or receives any money; or*
>
> *(b) enters into or remains in possession of the land,*
>
> *in such circumstances as to give rise to a reasonable presumption that the person pays or receives the money or enters into or remains in possession in furtherance of the avoided transaction or agreement, that person shall be guilty of an offence and liable to a fine not exceeding three thousand shillings or to imprisonment for a term not exceeding three months or to both such fine and imprisonment."*

88. Section 8 (1) requires that an application for consent should be made in the prescribed form within six months of the making of the agreement but the proviso thereto gives the High Court power to extend the period if it considers that there are sufficient reasons to do so upon such conditions, if any, as it may think fit.

89. Section 9 (2) stipulates that;

> *Where an application for the consent of a land control board has been refused, then the agreement for a controlled transaction shall become void—*
>
> *(a) on the expiry of the time limited for appeal under section 11; or*
>
> *(b) where an appeal is entered under section 11 and dismissed, on the expiry of the time limited for appeal under section 13; or*
>
> *(c) where a further appeal is entered under section 13 and dismissed, on that dismissal.*

90. Looking at the provisions of Section 9(2) of the Land Control Act, it is not the failure to secure the consent from the Land Control Board that makes an agreement null and void, but rather it is the where an application for the consent of the Land Control Board has been refused, that makes an agreement for a controlled transaction void.

91. A look at the proceedings in the trial court as well as the exhibits produced therein, I find that there was no evidence adduced to confirm that indeed the Appellant had applied for consent to the Land Control Board pursuant to the terms of their agreement, whereby the application had been rejected. It cannot therefor be said that this agreement became void by virtue of there having been no consent obtained, when it is clear that the Appellant never applied for the same.

92. The latest decision of the Court of Appeal on the import of failure to obtain the consent was stated recently in the case of **Willy Kimutai Kitilit v Michael Kibet [2018] eKLR** as follows:

> *A contract for the sale of land to which the Land Control Act applies is not void from inception nor is it an illegal contract. It becomes void when no application for consent of the Land Control Board is made or if made, it is refused and the appeal from the refusal, if any, has been dismissed (see Section 9 (2)). The Land Control Act prescribes the time within which the application for consent should be made to the Land Control Board but does not prescribe the time within which the Land Control Board should reach a decision or the time within which any appeal should be determined. The process from the time of the making the application to the time of the determination of the appeal, if any, may obviously take time. However, the requirement that an application for the consent should be made within six months of the making of the agreement and the provisions of Section 7 of the Land Control Act for recovery of the consideration is an indication that Parliament intended that controlled land transactions should be concluded within a reasonable time.*
>
> *The Land Control Act does not, unlike* ***Section 3 (3)*** *of the Law of Contract Act and* ***Section 38 (2)*** *of the Land Act save the operation of the doctrines of constructive trust or proprietary estoppel nor expressly provide that they are not applicable to controlled land transactions. Although the purpose of the two statutes are apparently different, they both limit the freedom of*

contract by making the contract void and enforceable. Since the doctrines of constructive trust and proprietary estoppel apply to oral contracts which are void and enforceable, in our view, and by analogy, they equally apply to contracts which are void and enforceable for lack of consent of the Land Control Board especially where the parties in breach of the Land Control Act have unreasonably delayed in performing the contract. However, whether the court will apply the doctrines of constructive and proprietary estoppel to a contract rendered void by lack of the consent of Land Control Board will largely depend on the circumstances of each particular case.

There is another stronger reason for applying the doctrines of constructive trust and proprietary estoppel to the Land Control Act. By ***Article 10(2) (b)*** *of the Constitution of Kenya,* ***equity*** *is one of the national values* ***(emphasis supplied)*** *which binds the courts in interpreting any law* (Article 10(1) (b)).*Further, by* ***Article 159(2) (e)****, the courts in exercising judicial authority are required to protect and promote the purpose and principles of the Constitution. Moreover, as stated before, by virtue of* ***clause 7*** *of the Transitional and Consequential Provisions in the Sixth Schedule to the Constitution, the Land Control Act should be construed with the alterations, adaptations, and exceptions necessary to bring it into conformity with the Constitution.……*

……..Thus, since the current Constitution has by virtue of ***Article 10(2) (b)*** *elevated equity as a principle of justice to a constitutional principle and requires the courts in exercising judicial authority to protect and promote that principle, amongst others, it follows that the equitable doctrines of constructive trust and proprietary estoppel are applicable to and supersede the Land Control Act where a transaction relating to an interest in land is void and enforceable for lack of consent of the Land Control Board.*

93. I find and hold that the transaction between the Appellant and the Respondent was not voided for want of consent of the land control board as the same was not sought for and denied

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

95. On the third issue as to whether the Respondents had an overriding interest over land parcel No. Laikipia Mutara Block 2/1235(Uruku), the evidence on record was to the effect that the Respondents herein constructed the water in-take and five (5) water kiosks or points between the year 2001 and 2002 at the time when Fredrick Ndiangui Njuguna was an allotte of the same and the Government of Kenya was the registered proprietor of the suit land.

96. That the said Fredrick Ndiangui Njuguna had allowed them entry onto the said land to construct a water in-take and five (5) water kiosks or points to be used by the society.

97. I find that by Fredrick Ndiangui Njuguna allowing the Respondents to construct the said facilities on the suit land, there had been an easement created such that by the time the Appellant was registered as the proprietor of the suit land on the 20th January 2004 and their subsequent sale agreement, the Respondents were already in possession and actual occupation of the suit land wherein they had constructed the water intake and 5 water kiosks with the knowledge of the Appellant who made no inquiry although the same would have been of no benefit as he already knew of their existence thereon.

98. The provisions of Section 30(g) of the Registered Land Act (now repealed) upon which the Respondents had relied on to lay their claim for overriding interest stipulates as follows.

Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register – (g) the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed;

99. In the case of **Joseph Githinji Gathiba v Charles Kingori Gathiba [2001] eKLR J.M. KHAMONI Judge had this to say;**

"Overriding interests" be taken from the context of the Registered Land Act, Cap 300 Laws of Kenya. It should not be taken in the same way as the meaning of the words "overriding trust" which means "a trust which takes precedence of other trusts previously declared

Using the definition from A Concise Law Dictionary by P G Osborn, who relied on the English Land Registration Act 1925, I would say that overriding interests as found in the Registered Land Act sections 28(b) and 30, are simply

"the encumbrances, interests, rights and powers not entered on the register, but subject to which registered dispositions take effect."…… The person entitled under section 30 (g) on the other hand will be "entitled in right only of such possession or occupation." Nothing more.

100. The Supreme Court in the case of **Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another [2018] eKLR** declared as follows:

We also declare that, rights of a person in possession or actual occupation under Section 30(g) of the Registered Land Act, are customary rights. This statement of legal principle, therefore reverses the age old pronouncements to the contrary in ***Obiero v. Opiyo*** *and* ***Esiroyo v. Esiroyo.*** *Once it is concluded, that such rights subsist, a court need not fall back upon a customary trust to*

accord them legal sanctity, since they are already recognized by statute as overriding interests.

101. That having been said, I find in favour of the Respondents and proceed to dismiss this Appeal with the following orders:

i. It is declared that the Plaintiff's registration as proprietor over Title No Mutara/Mutara Block 2/1235(Uruku) measuring over 6 acres is subject of overriding interest comprised in the constructed and completed permanent water intake along the Mutara River and five water kiosks served by the same and enjoyed by the Respondent members.

ii. The agreement dated 16th October 2009 is declared valid and the Appellant comply with the same fully.

iii. Time within which to apply for the consent of the Land Control Board in respect of the transaction comprised in the Agreement for Sale dated 16th October 2009 is hereby extended by a period of 6 (six) months. The extended period to run from the date of delivery of this judgment.

iv. The Appellant is hereby compelled to execute all the necessary documents and take all necessary steps to ensure completion of the transaction comprised in the Agreement for Sale dated 16th October 2009. Such execution and such steps to be done within 30 (thirty) days from the date of delivery of this judgment. In default, the Deputy Registrar of this court to execute such documents and take such steps in the place of the Appellant.

v. Upon certificate of title in respect of the portion of land measuring 50 x 100 out of LR No. Laikipia Mutara Block 2/1235(Uruku) being issued to the Respondent, the Respondents to immediately pay to the appellant Ksh 50,000/= being the balance of the purchase price.

vi. I award the Respondents costs of the Appeal.

Dated and delivered at Nyahururu this 22nd day of November 2018.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE