



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT KERICHO

CIVIL SUIT NO. 1 OF 2014

WESLEY RUTTO.....PLAINTIFF

VERSUS

JAMES TALAM DEFENDANT

JUDGMENT

(Suit by plaintiff to enforce an agreement for sale allegedly entered into in 1978 with the defendant; agreement disputed and defendant filing counterclaim for eviction; no corroborating evidence to support the agreement; sale of agricultural land; whether consent of the Land Control Board is necessary; whether a trust can be implied where consent of the Land Control Board is not granted; consent of the Land Control Board necessary in such transactions; trust cannot be implied; plaintiff having executed an award of the Land Disputes Tribunal which was set aside; plaintiff cannot therefore benefit from the same; plaintiff's case dismissed; counterclaim succeeds with costs)

This suit was commenced by way of a plaint that was filed **on 9th January 2014**. In the plaint, the plaintiff pleaded that on **13th February 1978**, he entered into an agreement with the defendant through which the defendant sold to the plaintiff 5 acres of land comprised in the **land parcel Kericho/Kapsuser/933** at the consideration of Kshs. 30,000/=. It is averred that the purchase price was fully paid and the instruments of transfer signed by both parties. It is pleaded that consent to transfer was obtained from the Land Control Board but the defendant refused to sign the mutation forms notwithstanding that the defendant handed over to the plaintiff the title deed. It is pleaded that the dispute was referred to the Land Disputes Tribunal who made a decision that 4.5 acres of the said land be transferred to the plaintiff. The award was however later quashed for lack of jurisdiction. It is pleaded that the plaintiff has been in actual possession of the suit land since 1978 and has developed it by planting 3 acres of tea and has built permanent structures. In the suit, the plaintiff has asked for the following orders :-

- a) A declaration that the 5 acres comprised in the **land parcel Kericho/Kapsuser/933** belong to the plaintiff.
- b) A permanent injunction to restrain the defendant from the 5 acre parcel of land comprised in **Kericho/Kapsuser/933**.
- c) Costs of the suit.

The defendant filed a Defence and counterclaim. In the Defence he denied selling to the plaintiff the land. He also denied receiving any money out of any sale. He further denied executing any sale agreement or an application for Land Board consent on account of subdivision and transfer. He pleaded that there was

an amount of Kshs. 27,000/= paid but the same was rent for use of the land. He pleaded that despite the award of the Land Disputes Tribunal being quashed, the plaintiff went ahead to subdivide the suit land into two portions namely **Kericho/Kapsuser/5156** and **Kericho/Kapsuser/5157**, and proceeded to transfer to himself the **land parcel Kericho/Kapsuser/5157**. It was further pleaded that if at all there was any sale agreement, the same was rendered void for offending the provisions of the **Land Control Act, Cap 302, Laws of Kenya**. In the counterclaim, the defendant asked for orders that the titles resulting from a subdivision of the **land parcel Kericho/Kapsuser/933**, that is **Kericho/Kapsuser/5156 and 5157**, be revoked and the original title be restored. He also asked for orders for the demolition of the plaintiff's structures on the suit land, eviction and a permanent injunction against the plaintiff.

In his evidence, the plaintiff inter alia testified that at the time of the sale in 1978, the two parties were both teachers. The defendant used to teach in the same school with the plaintiff's wife. He said that it is his (the plaintiff's) wife who discussed the sale with the defendant and one of his two wives. The whole land was 8 acres and it was agreed that he could purchase 5 acres. As they were processing the Land Control Board documents, he paid the defendant a first installment of Kshs. 18,000/=. After a short while, he added another Kshs. 10,000/=. They agreed that the balance of Kshs. 2,000/= would be used in transferring the land and processing of the necessary papers. Before the second installment of Kshs. 10,000/= was paid, he testified that they proceeded to the Land Control Board and consent was given. He produced the application for Land Control Board consent and an application for registration of a subdivision of the land. He stated that they also executed a transfer instrument before an advocate. A copy of the transfer document was produced as an exhibit.

He testified that the defendant then moved to Molo where he had another 40 acre farm. He complained to the District Officer, to ask the defendant to come and settle the matter, but the defendant never came to execute the mutation forms. In the meantime, the plaintiff settled on the suit land and planted tea and maize. He also put up a school in the **year 1994/1995**. He testified that in the **year 2001**, the defendant surfaced and asked the plaintiff to surrender a half an acre to him, on the complaint that his wife was squeezed in the remainder of the parcel of land, and on a further complaint that he had not been paid the balance of Kshs. 2,000/=. The plaintiff stated that he agreed to surrender the half acre and they went back to the Land Control Board. Surveyors were called and they carved out for the plaintiff a portion of 4 1/2 acres. However the defendant still refused to sign the mutation forms. The plaintiff then filed a case before the Land Disputes Tribunal. The Tribunal awarded him 4 1/2 acres. The award was adopted by the Magistrate's Court and the Executive Officer was ordered to sign the mutation forms and transfer to the plaintiff. The land was thereafter subdivided and a portion transferred to the plaintiff. However, the defendant complained about jurisdiction of the Tribunal which prompted the plaintiff to file this case. He asked this court to uphold the sale of 5 acres.

In cross-examination, the plaintiff affirmed that the **land parcel No. 5156**, a subdivision of the **land parcel No. 933** is now in his name. That land is 4 1/2 acres. The **parcel No. 5157** is in the name of the defendant. He stated that he now needs an extra half acre from the **land parcel No. 5157** to make 5 acres which he is entitled to. He stated that it is only at the time of the hearing of the matter that he became aware that the award of the Tribunal had been quashed.

On his part, the defendant in his evidence denied selling land to the plaintiff. He testified that he only borrowed the sum of Kshs. 30,000/=. He denied ever executing the agreement for sale produced by the plaintiff. He refuted the signatures therein. He testified that they went to the Land Control Board having received a letter to attend but he refused the transaction. He testified that he has never refunded the plaintiff the sum of Kshs. 30,000/= and cannot now refund him since the plaintiff has been utilizing his land for all those years. He stated that he wrote to the plaintiff to move out in the year 1981 but the plaintiff did not. He attended the Land Disputes Tribunal and declined the claim of the plaintiff. He is aware that he was ordered to give 4 1/2 acres but he moved to the High Court and the award was quashed. Despite this, the plaintiff proceeded to subdivide the land. He asked that the plaintiff be evicted from the land and his title be restored.

In cross-examination, the defendant stated that he borrowed the money from the plaintiff to enable him relocate to Molo as he had bought some land there. It is in Molo that he moved his second wife. He stated

that the plaintiff moved into his land in the year 1978 but he was not happy with this and their relationship soured. He stated that the issue about the land was never fully resolved. He testified that he borrowed the money from the plaintiff because their wives were friends. He said that he is ready to refund Kshs. 27,000/= as the plaintiff had earlier taken Kshs. 3,000/=.

Both counsels filed submissions which I have read and considered in reaching my decision. Mr. Kirui in his submissions inter alia submitted that the prayers as drawn in the plaint cannot be granted since the land parcel No. 933 no longer exists. He submitted that the plaintiff has come to court with unclean hands for failing to disclose that he himself proceeded to have this land subdivided. He also submitted that the plaintiff's suit is time barred. On his part, Mr. Mutai for the plaintiff submitted inter alia that the defendant has not explained how come his signatures appear in various documents. He was not of the view that the plaintiff's case is time barred. He wondered why the defendant has not bothered to sue 35 years after the plaintiff took possession of the land. He submitted that the plaintiff has made various developments and the defendant cannot turn around and deny the existence of the sale. He relied on several authorities and dicta, and I think he was pressing the point, that it would be inequitable to deny the plaintiff the relief sought given his long occupation over the land and the fact that he has substantively developed it. He relied heavily on the decision of *John Simiyu Ndalila vs Francis Soita (2014) eKLR* and *Macharia Mwangi Maina & 87 Others vs Davidson Mwangi Kagiri (2014) eKLR*.

I have considered the pleadings, evidence and submissions of counsel. From the pleadings, the plaintiff wants to be declared owner of 5 acres of the **land parcel No. 933**. This land of course no longer exists as **parcel No. 933**, for the plaintiff himself, proceeded to subdivide it into the **land parcels No. 5156 and 5157**. This is following the award of the Land Disputes Tribunal which held that the plaintiff is entitled to 4 1/2 acres of the original **land parcel No. 933**. The plaintiff executed the award to carve out the 4 1/2 acres awarded to him which is now comprised in the **land parcel No. 5156**. He does now hold the title to this land in his name. He continues to hold this title despite the fact that the award that gave him the same was quashed. I will come back to this aspect of the case a little later, as for now, I need to deal with the question whether the plaintiff deserves a declaration of entitlement to 5 acres as he has contended.

The plaintiff's case is hinged on a sale agreement which he states he entered into with the defendant in the **year 1978**. I have not really been shown a conventional sale agreement. What the plaintiff produced was a document (a photocopy) stating that the defendant has undertaken to transfer 5 acres of the **land parcel No. 933** to the plaintiff at the cost of Kshs. 30,000/=. There are some writings in that document showing payment of some sums of money and some signatures. It is this which the plaintiff asserts is the sale agreement. The defendant has of course categorically denied ever having signed such agreement. Given that denial, the plaintiff needed to support his oral evidence by calling additional witnesses to affirm that the defendant actually executed the document and that the same constituted the agreement between the parties. This is because it is a requirement of the law, contained in **Section 3 (3) of the Law of Contract Act**, that a contract for the sale of land, needs to be in writing for the same to be enforced. The said law is drawn as follows :-

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, nor shall anything in it affect the creation of a resulting, implied or constructive trust.

(4) Subsection (3) shall not apply to a contract made in the course of a public auction nor shall anything in that subsection affect the creation or operation of a resulting, implied or a constructive trust.

Agreements for sale of land are supposed to be in writing for them to be enforceable. The signatures of the parties signing also need to be attested by a witness as noted in Section 3 (3) (b) above. Given this position, and given that the defendant denied having signed the alleged agreement, then the provisions of **Sections 70, 71 and 72 of the Evidence Act, Cap 80, Laws of Kenya**, apply. They are drawn as follows:-

S. 70 (Proof of allegation that person signed or wrote a document)

If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting.

S. 71 Proof of execution of document required by law to be attested.

If a document is required by law to be attested it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there is an attesting witness alive and subject to the process of the court and capable of giving evidence :

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document which has been registered in accordance with the provisions of any written law, unless its execution by the person by whom it purports to have been executed is specifically denied.

S. 72 Proof where no attesting witness found.

Where evidence is required of a document which is required by law to be attested, and none of the attesting witnesses can be found, or where such witness is incapable of giving evidence or cannot be called as a witness without an amount of delay or expense which the court regards as unreasonable, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.

It was incumbent upon the plaintiff, given the denial by the defendant, to bring forth an attesting witness or otherwise comply with the provisions of the above sections of the law. The plaintiff did not, and therefore it is difficult to say that he has proved that he had any agreement for sale with the defendant or that he has proved the terms thereof. The same goes for the transfer instrument which also requires attestation. The same needed to be proved in accordance with the **Evidence Act**.

But let us assume that the parties actually had an agreement for sale of land and that the same has been proved. Can such sale be upheld by this court ?

The plaintiff testified that after the sale agreement, they executed the requisite Land Control Board documents seeking consent for their transaction. The plaintiff testified that they appeared before the Land Control Board and consent was given. The defendant of course denied signing any Land Control Board forms although he did not deny appearing before the Land Control Board. He however stated that he appeared so as to refute any alleged transaction between himself and the plaintiff.

I have looked at the Land Control Board documents produced by the plaintiff. What he has produced is the application for consent. The nature of the transaction indicated in the said application is a subdivision and an eventual sale of 2.02 hectares to the plaintiff in consideration of Kshs. 30,000/=. The plaintiff stated that consent was given, an issue again denied by the defendant. I have looked at the application for consent produced and there is a writing above in the following words, "*approved 2-3-78*". I am however not persuaded that the plaintiff has proved on a balance of probabilities that their application for consent, if any, was approved for the reasons that follow.

The Land Control Act does contain the Land Control Regulations which provide for the manner in which the application for consent is to be lodged and given. For our purposes Regulations 2 (2) (a) which deals with subdivisions and Regulation 3 which deals with the way in which consent is given are material and I will set them out. They are drawn as follows :-

2. (2) Every application for approval to a subdivision of land shall be accompanied by -

a) a suitable plan on durable material showing the manner of subdivision, the means of access to each subdivision and, very approximately, any existing permanent development;

3. *The consent of a land control board shall be given to the applicant, in duplicate, in Form 2 in the Schedule; the original consent shall be marked "Registration Copy" and shall accompany the document evidencing the controlled transaction when it is presented for registration.*

The plaintiff in this case did not provide any plan showing the manner of subdivision of the defendant's land. I am therefore at a loss as to what subdivision was presented to the Land Control Board. But most importantly, the plaintiff did not produce the consent, to demonstrate that the Land Control Board actually gave consent to the transaction. It will be seen that there is a special form, which is Form 2 of the Schedule, which is the form evidencing that consent was given. If the plaintiff did not have the form, then at the very least, he should have tabled the minutes of the Land Control Board, showing that the Board did actually sit and approve the transaction for the subdivision of the defendant's land and sale of one of the subdivided portions to the plaintiff. The plaintiff produced neither consent nor the minutes of the Land Control Board to demonstrate that consent was actually given approving any transaction that the plaintiff may have had with the defendant. I cannot accept the mere writing "approved" on top of the application for consent, as evidence enough that consent was given, especially given the denial by the defendant. Any person could simply write "approved" on top of an application for consent. That by itself, without additional evidence on how the writing "approved" came to be on the document, will be too risky to take as evidence enough that consent was given. This is especially so, where there is denial by the other party that consent was never issued. It is for these reasons that I find that the plaintiff has not proved that consent of the Land Control Board was issued.

I have already held that the plaintiff has not proved an agreement for sale with the defendant. I have also held that I have not been persuaded that consent of the Land Control Board was given. It was however argued by Mr. Mutai for the plaintiff, that equity should come to the aid of the plaintiff, even if it is found that consent of the Land Control Board was not given. I was referred to the Court of Appeal decision in the case of **Macharia Mwangi Maina & 87 Others vs Davidson Mwangi Kagiri, Court of Appeal at Nyeri, Civil Appeal No. 6 of 2011 consolidated with Civil Appeal No. 26 and 27 of 2011**. The brief facts of the case were that the respondent sold one acre plots of his expansive land (measuring 256 acres) to the appellants between the **years 1983 and 1990**. However, no consent of the Land Control Board was ever obtained. In the meantime the appellants moved into the portions sold to them and developed them. In the suit, they sought an order to compel the respondent to transfer the said portions to them. The High Court gave judgment for the respondent, inter alia finding that the transactions with the appellants, was subject to the **Land Control Act** and failure to have consent made the agreements void and unenforceable against the respondent. On appeal, the Court of Appeal (Koome, Mwilu & Odek JJAs) was of the view that since it is the respondent who put the appellants in possession, an overriding interest in favour of the appellants was created. The court further held that the respondent created an implied or constructive trust in favour of the persons who had paid the purchase price in respect of the plots sold. The court held that it is enjoined to dispense substantive justice to the parties and that the conscience of humanity would not allow an individual to receive a purchase price yet later plead that the agreement is void. The appeal was allowed.

Mr. Mutai also referred me to the decision of my sister, Honourable Justice A. Omollo, in the case of **John Simiyu Ndalila vs Francis Soita, Bungoma Environment and Land Case No. 26 of 2013**. In the said case, the plaintiff had entered into three agreements between the years 1998 and 2001, to purchase some land from the defendant. An issue arose as to whether the transaction was void for want of consent of the Land Control Board. The Court followed the Court of Appeal decision in **Macharia & 87 Others**

vs **Davidson Mwangi Kagiri** and found that the defendant was relying on the provisions of the **Land Control Act** to perpetuate a fraud. The learned judge entered judgment for the plaintiff.

I have done my own research on the aftermath of the decision in **Macharia & 87 Others**. That decision was a clear departure from a chain of authorities which firmly held that lack of consent of the **Land Control Act** rendered the transaction void. One of the most oft quoted cases in this subject and which exemplified this position is the case of **Wamukota vs Donati (1986) KLR 328**. The facts were that in the year 1976, the respondent/defendant purchased certain land but consent of the Land Control Board was not given. In **1982**, the same seller sold the same land to the plaintiff/appellant at about three times the price of the earlier sale. Consent was given for this latter transaction and the land transferred to the appellant. The appellant then sued the respondent for eviction. The High Court held that the sale to the appellant was a fraud on the respondent. On appeal, the Court of Appeal held that the first sale could not be upheld for want of consent of the Land Control Board. The issue of the **Land Control Act**, being used to perpetuate fraud was exhaustively discussed in the case. Gachuhi JA, dealing with the matter stated as follows :-

"The main question in this appeal is whether equity would apply in contrast to the express provisions of the law. The law as it stands, is that there is no way by which equity can be applied to assist a litigant who failed to obtain Land Control Board consent to a transaction dealing with agricultural land.

There is no apparent evidence of fraud on the part of the appellant. If the appellant and the owner colluded to deprive the respondent of what, at one time, appeared to be a dealing in land which he wished to buy and the appellant and the owner acted within the law in their dealing, there is nothing the court can do for the respondent. If the Act was applied by the appellant and the owner as a means of fraud as the learned trial judge put it, so long as the procedure that was followed is what is laid down in the law, however sympathetic the respondent's case is, there is no way, as the matter stands, the court can interfere. It is only the parliament that can amend any part of the Act that is applicable in this case which is causing injustice or which is causing inconvenience or hardship to the parties relating to a controlled transaction. Ignorance of the procedure is no defence."

The Court of Appeal was of alive to the injustice that may be caused to parties who may have purchased land but not obtained the consent of the Land Control Board where required. But it was of the view that the law must be applied unless amended by Parliament.

The soundness of the decision in **Macharia & 87 Others** has been put to question given the elaborate provisions of the law in the Land Control Act and it indeed became the subject of argument in the case of **David Sironga Ole Tukai vs Francis arap Muge & 2 Others, Nairobi Civil Appeal No. 76 of 2014 (2014) eKLR**. The issue herein was a sale over agricultural land entered into in the year **1995**. Some money was paid and possession given but no consent of the Land Control Board was issued. The appellant in the year **2005** then filed suit for eviction. The High Court (Emukule J) held that *"the cut and dry provisions of section 6 of the Land Control Act, would wreak inequality, injustice"* and concluded that the solution to the problem was to apply *"the principles of equity, of natural justice, to temper the harshness of the law such (as) section 6 of the Land Control Act."* Judgment was entered for the defendants for transfer of the land in issue. On appeal, the respondent relied on the case of **Macharia & 87 Others** to support the decision of the High Court. The Court of Appeal (bench of Kariuki, M'Inoti & Mohamed JJAs) considered whether the departure in decision in **Macharia & 87 Others** was based on a sound legal foundation. The Court was of the view that the decision of **Macharia & 87 Others** was wrong, and I think it is important and I hope that I will be forgiven, that I quote parts of the said decision in extensu. The learned judges stated as follows :-

"For several reasons, we are, with respect, unable to agree with the above reasoning (that of Macharia & 87 Others). First and foremost, we have already stated that in our opinion, granted the express, unequivocal and comprehensive provisions of the Land Control Act, there is no room for the courts to import doctrines of equity into the Act. This is the simple message of section 3 of the Judicature Act. Consequently, invocation of equitable doctrines of constructive trust and estoppel to

override the **provisions of the Land Control Act** has, in our view, no legal foundation. We have also noted that this Court had previously held in a line of consistent decisions and in very clear terms, that there was no room for application of the doctrines of equity in the **Land Control Act**...

Secondly, in holding that there was an implied or constructive trust which did not require the consent of the Land Control Board, the Court not only ignored previous decisions of itself on the point, but also completely ignored the express terms of **section 6(2)** of the **Land Control Act** which provides as follows:

“For the avoidance of doubt it is declared that the declaration of a trust of agricultural land situated within a land control area is a dealing in that land for the purposes of subsection (1).

As this Court explained in **DANIEL NG’ANG’A KIRATU V SAMUEL MBURU** (*supra*) **section 6(2)** of the **Land Control Act** was introduced on **24th December 1980** by **Act No 13 of 1980** to undo the judgment of the High Court in **GATIMU KINGURU V MUYA GATHANGI** (*supra*) where **Madan, J.**, as he then was, held that creation of a trust over agricultural land in a land control area did not constitute “other disposal of or dealing” for the purposes of **section (1)** of the **Land Control Act** and therefore did not require the consent of the Land Control Board. In **DANIEL NG’ANG’A KIRATU V SAMUEL MBURU** (*supra*) this Court, relying of **section 6(2)** of the **Land Control Act** reiterated that declaration of trust over agricultural land requires consent of the Land Control Board. By relying on **GATIMU KINGURU V MUYA GATHANGI** (*supra*) whose effect had been undone by the amendment, which brought in **section 6(2)**, the decision of this Court in **MACHARIA MWANGI MAINA & 87 OTHERS V DAVIDSON MWANGI KAGIRI** (*supra*), was clearly *per incurium*. On the same vein even the judgment of the High Court in **MWANGI & ANOTHER V MWANGI [1986] KLR 328** which was cited in **MACHARIA MWANGI MAINA & 87 OTHERS** was also *per incurium* because it was based on **GATIMU KINGURU** without realizing that the latter decision had been overridden by **Act No 13 of 1980**.

The decision of the High Court in **MUTSONGA V NYATI** (*supra*), which held that equitable doctrines of implied, constructive and resulting trusts are applicable to registered land, did not involve the **Land Control Act** and is therefore not relevant. In addition, that judgment cannot apply in cases involving the **Land Control Act** because of **section 6(2)** of the **Land Control Act**, which expressly requires consent of the land control board even in cases of declaration of trusts.

Thirdly, for actual possession of land to amount to an overriding interest within the meaning of **section 30(g)** of the **repealed Registered Land Act**, that occupation must be occupation, which in law, is not declared to be illegal. We have already noted that under **section 22** of the **Land Control Act**, occupation of agricultural land pursuant to a transaction, which has not obtained the consent of the relevant control board, is a criminal offence. To that extent, such occupation cannot, with respect, constitute an overriding interest...

To hold that occupation that is declared by statute to be illegal can constitute an overriding interest would, with respect, amount to the courts recognizing and enforcing conduct that is by law declared to be illegal. No court of law will enforce an illegal contract or one, which is contrary to public policy. Decisions of this Court abound on the point...

Fourthly, we are not convinced that there can be an estoppel against the provisions of a statute. The **Land Control Act** requires consent to be obtained from the relevant land control board if the transaction involves agricultural land and failure to do so renders the transaction void for all purposes and in addition any occupation of the land pursuant to such a void transaction is declared to be a criminal offence. We are firmly of the opinion that no estoppel can arise under the **Land Control Act** to render valid and lawful conduct, which is otherwise declared by the Act to be void for all purposes and also a criminal offence.

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**. We have already adverted to the history

and the policy considerations behind the **Land Control Act**, which firmly convinces us that the requirement for application for consent of the land control board before a transaction involving agricultural land can be legally recognized is far much more than a procedural requirement. We must never lose sight of the fact that the overriding objective is first and foremost a case management tool; it was never intended to sound the death knell for substantive requirements of the law...

In our humble view and with utmost respect, the law on the interpretation and application of the **Land Control Act** antedating **MACHARIA MWANGI MAINA & 87 OTHERS V DAVIDSON MWANGI KAGIRI** (*supra*) remains good law."

I stand guided by the above decision which I wholly agree with. I am of the opinion that the above dictum expounds the correct position of the law and with respect, decline to follow the decisions in the case of **Macharia Mwangi Maina & 87 Others vs Davidson Mwangi Kagiri**, and that of **John Simiyu Ndalila vs Francis Soita**. The **Land Control Act** is clear that consent of the Land Control Board is mandatory in respect of transactions over agricultural land. This is brought out in **Section 6** of the **Land Control Act** which provides as follows :-

6. (1) Each of the following transactions -

a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;

b) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 for the time being apply;

c) the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area,

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

(2) For the avoidance of doubt it is declared that the declaration of a trust of agricultural land situated within a land control area is a dealing in that land for the purposes of subsection (1).

The above law has not been amended and still remains to be the law of the land. It therefore requires of parties entering into transactions over agricultural land to ensure that they do obtain the requisite consent of the Land Control Board as mandated by statute. Want of consent makes any transaction to be null and void.

That is precisely the situation in our case. There was no consent of the Land Control Board. Any agreement entered between the plaintiff and defendant is therefore null and void and the only remedy of the plaintiff is that found in **Section 7 of the Land Control Act**, which is a refund of the purchase price. No damages are awardable as affirmed in the case of **Kariuki v Kariuki (1983) KLR 225**. In the said case, the Court of Appeal upheld the provisions of the **Land Control Act**, and asserted that a transaction that requires the consent of the Land Control Board is null and void if no consent is issued. The court further affirmed that the only remedy is a refund of any money paid under the transaction and that no general or special damages are recoverable.

It follows from the above that the plaintiff cannot succeed in his case. The plaintiff would probably have tried his chances in filing suit for adverse possession given his apparently long stay on the suit property. However, he chose to try to assert title through a sale that cannot be upheld. That was a chance he took but which must backfire. I cannot delve into whether or not the plaintiff has acquired title by way of adverse possession for that is not the case before me.

I do not see how the plaintiff can succeed, given the discourse above, and I have little choice but to dismiss his case with costs.

The defendant has a counterclaim seeking to have the titles to the **land parcels number 5156 and 5157** revoked so as to revert back to the **land parcel No. 933**. I cannot deny the defendant this prayer for it was already held in **Kericho High Court Judicial Review No. 44 of 2010**, that the award which led to the subdivision of the **land parcel No. 933** was null and void, and the same was quashed. The two titles, that is **numbers 5156 and 5157**, cannot therefore be upheld. I therefore nullify the said titles and do order the land to revert back to the original **land parcel No. 933**. The defendant also asked for an order of eviction and demolition of the structures put up by the plaintiff. Having not found for the plaintiff, I again cannot deny the defendant these orders. The same are hereby allowed. I also see no reason as to why I should deny the defendant costs of the suit. I award him the same.

I believe I have addressed all issues in this case. I now make the following final orders :-

i) The plaintiff's suit is hereby dismissed with costs.

ii) I enter judgment for the defendant in terms of the counterclaim with costs.

iii) I hereby order the revocation of the titles Kericho/Kapsuser/5156 and Kericho/Kapsuser/5157 and further order the restoration of the title Kericho/Kapsuser/933 in the name of the defendant James Talam.

iv) I order the plaintiff to demolish all structures and to vacate the land comprised in the land parcel Kericho/Kapsuser/933 and to do so no later than 30 days from the date hereof.

v) In the event that the plaintiff does not do so, the defendant is at liberty to apply for an order of eviction and is at liberty if he does so wish to demolish the structures put up by the plaintiff and the cost of all these will be shouldered by the plaintiff.

vi) After the period of 30 days above, the plaintiff and/or his servants/agents/assigns and/or anybody claiming under his title, are hereby barred by an order of permanent injunction from entering, being upon, or in any other way interfering with the possession of the land parcel Kericho/Kapsuser/933.

Judgment accordingly.

Dated, Signed and delivered on this 2nd day of September, 2016

MUNYAO SILA

JUDGE

ENVIRONMENT AND LAND COURT

PRESENT

Mr. Joshua Mutai for Plaintiff

Ms Kitur for the Defendant

Court Assistant; Mr. Kenei

