IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G. B. M. KARIUKI, M'INOTI & MOHAMMED, JJ.A.

CIVIL APPEAL NO. 76 OF 2014

BETWEEN

DAVID SIRONGA OLE TUKAI…….....…….....…… APPELLANT

AND

FRANCIS ARAP MUGE…...…….....……..1ST RESPONDENT

SAMUEL KIPROTICH ARAP KIRUI…….....……2ND RESPONDENT

JOHANNAH KIPRONO ARAP MOSONIK…….....…….3RD RESPONDENT

(SUED AS CHAIRMAN, SECRETARY & TREASURER OF KAPKWEEN FARMERS CO-OPERATIVE LTD)

***(Appeal from the judgment and decree of the High Court of Kenya at Nakuru (Emukule, J.) dated 7th June 2013* in H.C.C.C. No 253 of 2005)**

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JUDGMENT OF THE COURT

The central issue for determination in this appeal is whether the learned trial judge ***(Emukule, J.)*** erred by declining to give effect to ***section 6(3) of the Land Control Act, cap 302 Laws of Kenya***, which declares any transaction involving a controlled transaction in land to be null and void if not sanctioned by the relevant ***land control board***. The appellant, ***David Sironga ole Tukai***, asserts that the learned judge erred by ignoring express provisions of a statute and by refusing to follow a consistent line of precedents on section 6(3) of the Land Control Act, some of which were binding on him. On the other hand, the respondents, ***Francis arap Muge, Samuel Kirotich arap Kirui*** and ***Johannah Kiprono arap Mosonik,*** who represent members of ***Kapkween Farmers Co-operative Society Ltd,*** contend that the trial judge was right to disregard the Land Control Act and in lieu thereof to uphold the equitable rights that had accrued to the respondents.

The primary facts in this appeal are rather straightforward and may be stated as follows. At all material

times, the appellant was the registered proprietor under the ***Registered Land Act, cap 300*** (now repealed), of the property known as ***NAROK/CIS MARA/OLOLUNGA/161 (the suit property),*** measuring in area approximately 150.5 hectares. On or about 13th October 1995 the appellant and the respondents, representing Kapkween Farmers Co-operative Society Ltd, entered into an agreement in which the appellant agreed to sell and the respondents agreed to purchase the suit property for ***Kshs 6,878,300.00***. The respondents agreed to pay the appellant the sum of ***Kshs 687,000.00*** upon the signing of the agreement and the balance of ***Kshs 6,191,300.00*** was to be paid upon the transfer and registration of the suit property in the name of the respondents.

The agreed completion date was ***31st January 1996***. Clause 12 of the agreement set out the conditions of sale, one of which was that in the event of failure to obtain the consent of the land control board sanctioning the transaction, the agreement would become void and the appellant was to refund to the purchaser all monies already paid. In addition clause 11 of the agreement provided that the respondents would take possession only upon payment of the full purchase price.

The transaction was not completed as contemplated or at all, and despite clause 11, the respondents took possession of the suit property, although they claim to have been in possession even on the date of the agreement. Be that as it may, the respondents continued to pay and the appellant continued to receive installments of the purchase price after the completion date had passed and by the time the suit giving rise to this appeal was filed, the respondents had paid to the appellant a total of Kshs. ***2,214,500.00***. It is however common ground that no consent of the land control board was obtained as required by section 6(3) of the Land Control Act or clause 12 (a) of the sale agreement.

On 12th October, 2005 the appellant filed ***Nakuru HCCC No. 253 of 2005*** in which he sought an order for the eviction of the respondents from the suit property and a permanent injunction to restrain them and members of Kapkween Framers Co-operative Society Ltd from trespassing into the suit property or otherwise interfering with his quiet possession and occupation of the same.

The respondents filed their defence and counterclaim on 16th April 2007. They denied that they were wrongfully in possession or occupation of the suit property and contended that they had declined to pay the balance of the purchase price because there was a dispute regarding the boundary between the suit property and another property known as ***NAROK/CIS-MARA/OLOLUNGA/130***. In their counterclaim the respondents prayed for an order to compel the appellant to transfer to them 115 acres from the suit property, being the land that was equivalent to the money already paid by them to the appellant.

On 8th May 2008 the appellant filed his reply to defence and defence to counterclaim in which he pleaded that the transaction between him and the respondents was rendered null and void by the operation of the law by reason of failure to obtain the consent of the land control board as required in mandatory terms by the Land Control Act.

Emukule, J. heard the suit. The appellant called one witness (himself) and the respondents called two witnesses (the 1st respondents and a surveyor). By a judgment dated 7th June 2013, the trial judge found that indeed there was no consent of the Land Control Board sanctioning the transaction as required by section 6(3) of the Land Control Act. However, the learned judge held that in a situation like the one before him, ***"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 tamper the harshness of the law such (as) section 6 of the Land Control Act."***

Ultimately the learned judge made the following orders:

1. ***The respondents' members do remain in their respective parcels of land;***

2. ***The appellant and the respondents do commission within 60 days a survey of the suit land by the District Surveyor, Narok;***

3. ***The respondents' members do surrender to the appellant by vacating 84.16 acres, for which the respondents have not paid and other areas of land which the survey may reveal as occupied by the respondents' members;***

4. ***The appellant to apply and obtain Land Control Board consent for the transfer of the said 115 acres;***

5. ***In consideration of the sum of Shs, 2,214,500/= the appellant to transfer the area of 115 acres to the respondent society which may then cause a subdivision thereof to its individual members. The process of transfer be done within 120 days of this judgment, with liberty to apply.***

The learned judge finally ordered each party to bear their own costs.

Aggrieved by the judgment, the appellant lodged the appeal now before us in which he has set out 13 grounds of appeal. The main issues raised in the grounds of appeal, without having to produce the same verbatim, are that the learned judge erred by:

1. ***disregarding the mandatory provisions of section 6(3) of the Land Control Act;***

2. ***ordering specific performance of an agreement, which by law, was declared to be null and void;***

3. ***ordering the appellant to apply and obtain consent from the Land Control Board while that issue was neither pleaded nor canvassed by the parties;***

4. ***making contradictory findings regarding the necessity of consent from the Land Control Board by finding, on the one hand that lack of consent could be ignored and on the other, directing the appellant to apply and obtain the consent of the Land Control Board;***

5. ***stating that the respondents were entitled to the suit property by adverse possession while the issue was neither pleaded nor canvassed by the parties;***

6. ***ignoring binding precedent without any cogent reason; and***

7. ***making conclusions of fact that were not supported by the evidence adduced in court.***

For the appellant, ***Mr. Karanja Mbugua***, learned counsel, submitted that the learned judge had committed fundamental and inexcusable errors that vitiated the judgment to the extent that it should not be allowed to stand. Counsel argued that notwithstanding reforms in the land sector in Kenya after 2010, the Land Control Act had not been repealed and was still in force. The agreement in dispute, counsel submitted, involved sale of agricultural land and no consent of the land control board had been obtained authorizing the transaction. In the absence of consent from the land control board, it was contended, the transaction became null and void for all purposes. It was counsel's further contention that the learned judge could not purport to rely on the doctrines of equity to void a clear statutory provision like section 6(3) of the Land Control Act.

Relying on the decisions of this Court in ***ELIZABETH CHEBOO V MARY CHEBOO GIMNYIKA, CA NO. 40 OF 1978, OMUSE ONYAPU V. LAWRENCE OPUKA KAPLA, CA NO. 149 OF 1992, JOSEPH NORO NGERA V. WANJIRU KAMAU KAIME & ANOTHER, CA NO. 32 OF 2005*** and ***DANIEL NG'ANG'A KIRATU V. SAMUEL MBURU KIRATU, CA NO 58 OF 2005*** Mr. Mbugua submitted that on the authority of those decisions, a transaction involving agricultural land is null and void so long as consent of the land control board has not been obtained.

Counsel also criticized the judgment of the High Court for failing to follow those authorities, which he submitted were binding on the learned judge and had been cited before him. We were urged to bear in mind the central role of precedent in our legal system and the fact that ignoring the above binding decisions, the learned judge had not assigned any reasons at all for departing from them.

Regarding the occupation of the suit property by the respondents, learned counsel submitted, such occupation constituted a criminal offence under ***section 22 of the Land Control Act*** so long as there was no consent from the land control board. It was submitted that the learned judge had erred by purporting to cloth with legality conduct that was declared to be a criminal offence by statute.

As regards the order by the learned judge that the appellant should apply for consent of the land control board, Mr. Mbugua submitted that the issue was not pleaded and none of the parties had prayed for the order that the learned judge had given. In addition, counsel complained, the parties had not addressed the learned judge on the issue and had thus been denied an opportunity to be heard on the issue.

It was the appellant's further contention that by directing the appellant to transfer 115 acres to the respondents, the learned judge had in effect ordered specific performance of a contract that by law was declared to be null and void. It was submitted on the authority of ***ELIZABETH CHEBOO V MARY CHEBOO GIMNYIKA*** ***(supra)*** and ***OMUSE ONYAPU V. LAWRENCE OPUKA KAPLA, (supra)*** that specific performance cannot be ordered in respect of a void agreement or contract.

The judgment of the High Court was also impugned on the ground that the learned judge had stated that the respondents had acquired prescriptive rights over the suit property, yet the claim before him was not for adverse possession and none of the parties had addressed the court on the issue.

Lastly Mr. Mbugua criticized the conclusion by the learned judge that the appellant would not be able to refund the money that had been paid to him by the respondents and that the respondents were not willing to vacate the suit property while those issues had not been raised or addressed by any of the parties. In counsel's view, the learned judge had reached conclusions that were not based on any evidence.

Accordingly the appellant urged us to allow the appeal, set aside the orders of the High Court and substitute therefore an order allowing the applicant's suit and ordering eviction of the respondents from the suit property.

Mr. B. N. Kiptoo, learned counsel for the respondents opposed the appeal and supported the judgment of the High Court. Counsel submitted that after the completion date, the respondents continued paying the purchase price which was received by the appellant, the last such payment being of Kshs 32,000.00 paid in September 2003, some seven years later. By accepting payment after the completion date, counsel argued, the appellant had disregarded the sale agreement and due to their occupation of the suit property, the respondents had acquired equitable rights over the same.

The judgment of this Court in ***MACHARIA MWANGI MAINA & 87 OTHERS V DAVIDSON MWANGI KAGIRI, CA NO. 26 & 27 OF 2011 (NYERI)*** was relied upon to make the argument that the respondents, as the persons in actual occupation of the suit property, had acquired equitable rights thereon. We were accordingly invited to find that there was a constructive trust in favour of the respondents, which was enforceable in law. To that extent, it was contended the judgment of the High Court was unimpeachable.

Mr. Kiptoo submitted that all the orders granted by the learned judge had been prayed for, in particular specific performance, which was sought in the counter claim. It was further argued that the decision of the learned judge to extend the period for applying for consent of the Land Control Board was an exercise of discretion, which this Court should not interfere with. The decisions of the predecessor of this Court in ***MBOGO V SHAH [1968] 93*** and ***PATEL V EAST AFRICA CARGO HANDLING SERVICES LTD [1974] EA 75*** were relied upon in support of the propositions that the discretion of the High Court is not limited and that this Court should be slow to interfere with the exercise of discretion by the learned judge.

Mr. Kiptoo concluded by submitting that the requirements of the Land Control Board pertaining to consent from the land control board are mere technicalities, which by dint of ***Article 159*** of the Constitution cannot stop this Court from administering justice. The decision in ***MACHARIA MWANGI MAINA & 87 OTHERS V DAVIDSON MWANGI KAGIRI*** ***(supra)*** was cited in support of that view.

We have anxiously considered the record, the judgment of the High Court, the submissions by learned counsel, the illuminating authorities cited on behalf of the respective parties and the law. Conscious of our duty as the first appellate Court in this matter, we have reconsidered the evidence, assessed it and made our own conclusions on the evidence, subject to the cardinal fact that we did not have the advantage singularly enjoyed by the trial judge, of seeing and hearing the witnesses as they testified. ***(See SEASCAPES LTD V. DEVELOPMENT FINANCE COMPANY OF KENYA LTD [2009] KLR, 384).*** We also remind ourselves 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 judge 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).***

The Land Control Act remains one of the most litigated statutes in Kenya. As a consequence, a consistent line of case law has emerged, both from this Court and the High Court on the interpretation and application of various provisions of that statute. Those authorities cover a span of 47 years from the date of enactment of the Act in 1967 to this day. From the outset, it is clear to us that the decision of the High Court that has precipitated this appeal together with the recent decision of this Court in ***MACHARIA MWANGI MAINA & 87 OTHERS V DAVIDSON MWANGI KAGIRI (supra)***, are a departure from the previous consistent decisions of our courts as we shall shortly demonstrate. The real question in this appeal is whether that departure is really based on sound legal foundation.

Granted the centrality of the provisions of the Land Control Act in this appeal, it is important at this point to set out *verbatim*, some of the important provisions of that legislation. For present purposes, these are sections 6, 7, 8 and 22, which provide 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).***

3. ***This section does not apply to –***

a. ***the transmission of land by virtue of the will or intestacy of a deceased person, unless that transmission would result in the division of the land into two or more parcels to be held under separate titles; or***

b. ***a transaction to which the Government or the Settlement Fund Trustees or (in respect of Trust land) a county council is a party.***

…

7. ***If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice***

to section 22.

8. ***(1) An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto:***

   Provided that the High Court may, notwithstanding that the period of six months may have expired, extend that period where it considers that there is sufficient reason so to do, upon such conditions, if any, as it may think fit.

   …

22. ***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 any 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 or of the intentions of the parties to 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.***

How are the above provisions of the Land Control Act to be interpreted? The learned authors of ***THE LAW OF CONTRACT*****, *Butterworths Common Law Series (General Editor, Prof Michael Furmston), 3rd ed. 2007, p. 1000*** state as follows regarding express statutory prohibitions, like those of the Land Control Act:

"Where contracts of a specific type are expressly declared to be illegal by a particular statute, the contract is rendered void and unenforceable from its very inception or formation. There is no need to embark on any inquiry into the legislative intent as such for the very simple reason that the legislative intent is evident from the express language of the statute itself. In other words, while the legislative intent remains crucial, the plain language on the face of the statute itself saves the court the time and trouble of inquiring into the intention of Parliament in so far as that particular statute (or material provision thereof) is concerned."

The following five fundamental conclusions, in our view, are self-evident and flow directly from the above 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.

The reason behind the above stringent provisions of the Act is to be found, in our view, in the rationale of the land control legislation. Before enactment in its present form, the Land Control Act had existed in one form or another in the colonial period. Writing on a previous version of the same law namely, the ***Land Control (Native Lands) Ordinance (No. 28 of 1959),*** the eminent Kenyan legal scholar, the late ***Prof. HWO Okoth Ogendo*** captured the purpose of the legislation thus:

> ***"The purpose of the Land Control (Native Lands) Ordinance was to protect uninitiated peasants from improvident use of their rights under the new tenure system. Even though individualization was seen as necessary precondition to the planned development of the African areas, it was also appreciated that it could lead to many other problems more difficult to solve than the ones it was intended to eliminate. The Royal Commission had warned, for example, that in many peasant communities individualization had led to 'the emergence of a chronic state of indebtedness, the continued fragmentation of holdings and the unproductive accumulation and holding of land by a few individuals in circumstances of little income-earning opportunity for those who have parted with the land' ". (See TENANTS OF THE CROWN, Acts Press (1991) page 74).***

What is beyond doubt, the paternalistic nuances of its colonial origins notwithstanding, is the fact that the enactment of the Land Control Act in 1967 was informed by noble and deliberate public policy considerations. The Act seeks to regulate transactions in agricultural land, to among other things avoid sub-division of land holdings into uneconomical units, thus undermining agricultural production; to mitigate the danger of landlessness inherent in unchecked sale and alienation of land; to control land holding by non Kenyans, etc. It is for these reasons that in considering whether to grant or refuse consent regarding dealings in agricultural land, the land control board is obliged under the Act to consider, among others, such factors as the economic development of the land in question, the possibility of maintenance or improvement of standards of good husbandry; the agricultural land already owned by the proposed transferee; the fairness or unfairness of the proposed consideration or purchase price; and whether subdivision of the land in question would reduce the productivity of the land.

It is not surprising therefore that in ***WAMUKOTA V DONATI [1987] KLR 280*** at page 291 ***Apaloo, JA*** (as he then was) found the public policy considerations behind the Land Control Act unquestionable in the following terms:

> ***"I believe that sound reasons of public policy motivated the Parliament of Kenya to seek to prevent the alienation of agricultural land to non Kenyans or to Kenyans without the interposition of the judgment of an independent board. Section 6 of the Act lays down the sanction for violation of the Act in absolute terms. An alienation made in transgression of the Act is ordained to be void for all purposes. Strong words indeed!"***

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 V 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 V 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.

Speaking for the Court in ***KARIUKI V KARIUKI [1983] KLR 225, at p. 227***, ***Law, JA*** affirmed that when a transaction is stated by the express terms of an Act of Parliament to be ***void for all purposes*** for want of necessary consent, a party to that transaction cannot be guilty of fraud if he relies on the statute to argue that the transaction is void. His Lordship also added that no general damages are recoverable in respect of a transaction which is void for all purposes for want of consent and that the only remedy open to a party to a transaction which has become void under the Act is recovery of any money or consideration paid in the course of the transaction under section 7 of the Act.

In ***SIMIYU V. WATAMBAMALA*** *[1985] KLR 852, Nyarangi, Ag. JA (as he then was)* echoed ***KARURI V. GITURA*** (supra) at P 856 when he stated:

> ***"Here, the appellants had to obtain consent for the controlled transaction. They did not and so the agreement was void for all purposes including attempting to set up estoppel."***

Justice Nyarangi repeated the same view in ***ONYANGO & ANOTHER V LUWAYI*** *[1986] KLR 513* at ***P. 516*** in the following terms:

> ***"The appellants admitted that no consent for the proposed transaction concerning agricultural land had been given by the divisional land control board. The transaction was therefore void for all purposes under section 6(1) of the Land Control Act, cap 302, because the transaction was not excluded by section 6(3). An application for consent in respect of the proposed sale of the material parcel of land had to be made to the appropriate land control board within six months of the making of agreement between Samson Luwayi and Javan Bulemi. No such application was made. That agreement therefore is of no effect and no question of specific performance can lawfully arise****."***

His Lordship concluded that once a transaction relating to agricultural land is held to be void, no complaints of any nature, such as trespass, remained to be resolved and that the words ***"void for all purposes"*** used in the statute must be interpreted to mean what they say.

Regarding the effect of section 22 of the Act, this Court in ***WAMUKOTA V DONATI*** *[1987] KLR 280* held that the sale of agricultural land is void for all purposes, unless the Land Control Board has given its consent to the sale and that under section 22 of the Land Control Act, any person who remains in possession of property in furtherance of an avoided transaction is in breach of the Act and is subject to a penalty. The Court also stated that no equitable claim could be sustained under the Act and that the remedy of a would-be purchaser is to recover money or valuable consideration paid in the course of the void transaction. It was emphasized that equity cannot be applied to contradict the express provisions of the law.

MUNYRORO V MURAGE *[1988] KLR 180,* a decision of this Court, decided that the consent of the Land Control Board had to be obtained within the prescribed time and that sale of agricultural land pursuant to consent purportedly obtained outside the prescribed time was void.

Platt, JA found the terms of the Land Control Act to be too clear to ignore, when he state thus:

> ***"Unfortunately I cannot twist the express terms of a statute under the rule of expediency that the end justifies the means. All that can be said is that the consent of the sub-division and sale not having been granted in time, the consent is void."***

In ***JOSEPH BORO NGERA V WANJIRU KAMAU KAIME & ANOTHER*** ***CA NO. 32 OF 2005 (NAKURU)*** the real issue was whether the High Court had properly exercised its jurisdiction under Section 8 of the Land Control Act when it declined to extend time for applying for consent of the Land Control Board. This Court held that the appellant, who had taken possession of agricultural land under a transaction, which he knew to be void for lack of consent of the Land Control Board, was not entitled to extension of time because such possession constituted a criminal offence under section 22 of the Land Control Act.

In ***MUCHERU V MUCHERU*** *[2000] 2 EA 455* this Court held that a declaration of trust in agricultural land is a dealing in the land requiring consent of the land control board and hence any such trust declared without the relevant consent is void for all purposes. That position was affirmed in ***DANIEL NG'ANG'A KIRATU V SAMUEL MBURU, CA NO. 58 OF 2005 (NAKURU)***, which involved application of section 6(2) of the Land Control Act. As noted above, that section provides that declaration of trusts of agricultural land in a land control area is a controlled transaction. This Court concluded that declaration of trust over agricultural land also requires consent of the land control board.

Similar consistent decisions of the High Court abound. Thus for example in ***HIRANI NGAITHE GITHIRE V WANJIKU MUNGE [1979] KLR 50, Chesoni, J.*** (as he then was), stated as follows at page 52:

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

Other such decisions of the High Court include, ***FRANCIS WAHIU THEURI V MONICA NJERI & 3 OTHERS, HCCC NO 2484 OF 1994 (NAIROBI), JOHN DIDI OMULO V SMALL ENTERPRISES FINANCE CO LTD & ANOTHER, HCCC NO 232 OF 1996 (KISUMU), GITANGA MWANIKI & ANOTHER V AUNCIATA WAITHIRA KIBUE, E&LCC NO. 541 OF 2009 (NAIROBI), ASHFORD GITONGA MUGAMBI V M'ANAMPIU M'ANGAINE & ANOTHER, HCCC NO 39 OF 2009 (MERU), BENSON MAINA KABAU V JOSEPH WANJOHI NJAU, HCCA NO 11 OF 2010 (EMBU), DISHON MUCHENE MWANGI V. HAFUSWA BAKARI, HCCC NO 28 OF 2011 (MALINDI), EZEKIEL KISORIO TANUI V JACINTA EKAI NASAK, HCCC NO 72 OF 2012 (KITALE), SILAS BARTONJO KIPTALA V JAMES KIPKEMBOI MUREI, E&LCC NO. 693 OF 2012 (ELDORET)*** and ***KATANA MRANJA ANGORE V EZELIEL K. MASHA, E&LCC NO 92 OF 2013 (MALINDI).***

That was the weight of precedent and authority that was before the trial judge when he determined the suit before him. In our opinion, the learned judge did not give any serious reasons for departing from such consistent decisions, many of which were directly binding on him. All that we see is the taking of refuge in unclearly articulated notions of inequality, injustice, equity and natural justice.

To begin with it is difficult to comprehend the legal basis of the view that the court has the power to ignore clear and express provisions of a statute under the guise of equity. We have already pointed out that in ***KARURI V GITURA (supra), SIMIYU V. WATAMBAMALA (supra)*** and ***WAMUKOTA V DONATI (supra)*** this Court held that the provisions of the Land Control Act were clear enough to leave no room for application of the principles of equity.

But perhaps the more compelling argument against the approach taken by the learned judge lies in the provisions of our ***Judicature Act, cap 8 Laws of Kenya,*** regarding the application of statutes and the doctrines of equity. Section 3(1) thereof embodies what has been called the ***hierarchy of norms*** and provides for how the jurisdiction of the courts in Kenya shall be exercised. The section creates a deliberate and hierarchical sequence of laws, starting with the Constitution, followed by Statutes and next the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August 1897. It does not require too much imagination to see that under section 3(1) the application of the substance of the common law and the doctrines of equity is subject first to the Constitution and the Statutes. Indeed to emphasize that the substance of common law and the doctrines of equity cannot override provisions of the statute, section 3(1) (c) makes it clear that ***the substance of common law and the doctrines of equity apply only in so far as the statute does not apply. (Emphasis added)***. In other words, the Judicature Act does not allow a court of law to ignore an express statutory provision under the guise of applying the doctrines of equity.

The application of the substance of common law, the doctrines of equity and statutes of general application in Kenya is further circumscribed by the requirement in the Judicature Act that they shall apply ***so far only as the circumstances of Kenya and its inhabitants permit and subject to such***

qualifications as those circumstances may render necessary. (Emphasis added). In our view, the import of this qualification is that once an issue has been expressly and comprehensively provided for by legislation, the courts cannot invoke the substance of common law, the doctrines of equity and statutes of general application to contradict the provisions of the Kenya statute.

Section 3(1) (c) of the Judicature Act is really, in our view, no more than a restatement in statutory form, of one of the key maxims of equity, ***"Aequitas sequitur legem"***, meaning that equity follows the law. Of that maxim, the late ***Sir Robert Edgar Megarry,*** a renown jurist and judge of the Chancery Division of no mean repute, quoting the 3rd edition of ***STORY ON EQUITY***, stated as follows:

"Where a rule, either of the common or statute law, is direct, and governs the case with all its circumstances, or the particular point, a court of equity is as much bound by it as a court of law, and can as little justify a departure from it." (See ***R.E. MEGARRY & P. V. BAKER, SNELL'S PRINCIPLES OF EQUITY, 25th Ed. Sweet & Maxwell, 1960, p. 26).***

The great American jurist, Benjamin Cardozo made the same point in his speech in ***GRAF V HOPE BUILDING CORPORATION, 254 N.Y 1 at p. 9 [1930],*** as follows:

Equity works as a supplement for law and does not supersede the prevailing law."

The approach that equity does not supplant express provisions of a statute is further demonstrated in ***PATEL V THAKOLE [1965] EA 629.*** In that appeal, the predecessor of this Court considered the relationship between undue influence under ***section 16 of the Indian Contract Act*** and under the equitable principles of English law. In upholding the statutory provision, the Court stated that section 16 which defined undue influence was exhaustive and that the doctrines of equity could not override the plain and clear provisions of the statute.

We are satisfied that the learned judge erred fundamentally by invoking the doctrines of equity as the basis for ignoring the express provisions of the Land Control Act. We are also unable to understand the context, in law, in which the learned judge invoked ***"natural justice",*** granted that we have always understood natural justice to refer to the rule against bias (***nemo judex in re sua)*** and the right to a fair hearing (***audi alteram partem***), which clearly were not issues in the case before the learned judge.

Before we leave the question of the application of the provisions of the Land Control Act, we would like to make some observations on the judgment in ***MACHARIA MWANGI MAINA & 87 OTHERS V DAVIDSON MWANGI KAGIRI (supra)***, which was heavily relied upon by the respondents. In that case the respondent sold parcels of agricultural land to the appellants who paid in full the agreed purchase price and took possession of the suit properties. Subsequently a dispute arose regarding payment of survey fees and other outgoings, prompting the respondent to file a suit in the High Court for eviction of the appellants and an injunction to prohibit them from encroaching on the suit properties. The appellants filed a counter claim for specific performance of the agreements for sale of the suit properties. It was common ground that no consent had been obtained from the land control board. The High Court held, consistent with the decisions we have cited above, that the failure to obtain consent from the land control board as required by section 6(1) of the Land Control Act rendered the transactions void and unenforceable against the respondent. The appellants appealed to this Court in Nyeri.

In reversing the High Court, the Court held *inter alia* that the appellants were in possession of the suit properties as *bona fide* purchasers; that they were put in possession by the respondent; that as persons in actual occupation, the appellants had acquired overriding interests under ***section 30 (g)*** of the repealed ***Registered Land Act, cap 300***; that the respondent had created an implied or constructive trust in favour of the appellants who had paid the purchase price; that the doctrine of proprietary estoppel applied in the case and stopped the respondent from reneging on the agreements for sale; and that the ***Constitution of Kenya 2010*** and the overriding objective principles in the ***Appellate Jurisdiction Act*** enjoined the Court to dispense substantive justice, which the Court defined to mean "the conscience of the whole humanity".

The conclusion that the respondent had created an implied or constructive trust in favour of the appellants

was based on the decisions of this Court in ***MWANGI & ANOTHER V MWANGI [1986] KLR 328, MUTSONGA V NYATI [1984] KLR 425*** and ***KANYI V MUTHIORA [1984] KLR 712***. Citing ***GATIMU KINGURU V MUYA GATHANGA (supra)***, the Court stated that the creation of a trust over agricultural land in a land control area is not a disposal or dealing with land for purposes of section 6(1) of the Land Control Act and therefore it did not require consent of the Land Control Board. The Court specifically stated:

> ***"Nothing in the Land Control Act prevents the claimants from relying upon the doctrine of constructive trust created by the facts of the case. The respondent all along acted on the basis and represented that the appellants were to obtain proprietary interest in the suit property. Constructive trust is an equitable concept which acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner by defeating the common intention."***

Although the Court referred to some of the authorities we have cited above on the proposition that without consent of the relevant land control board, a transaction involving agricultural land is void for all purposes, it did not follow them on the grounds that there was a constructive trust in the case before it and further because the overriding objectives of the Court demanded substantive rather than technical justice. On the latter issue, the Court expressed itself thus:

> ***"This Court is a court of law and a court of equity; Equity shall suffer no wrong without a remedy; no man shall benefit from his own wrong doing; and equity detests unjust enrichment. This Court is bound to deliver substantive rather than technical and procedural justice. The relief, orders and directions given in this judgment are aimed at delivery of substantive justice to all parties having legal and equitable interest in the suit property."***

The final conclusion was in these terms:

> ***"The totality of our re-evaluation of the facts and applicable law in this case leads us to conclude that the Honourable Judge erred in failing to consider that the appellants were in possession of the suit property, that the respondent had created a constructive trust in favour of all individuals who had paid the purchase price for respective plots and the trial court erred in failing to note that consent of the Land Control Board is not required where a trust is created over agricultural land. We do find that the possession and occupation by the appellants of the suit property is an overriding interest attached to the said property. Based on the reasons given, we find that this appeal has merit…"***

For several reasons, we are, with respect, unable to agree with the above reasoning. 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. Those previous judgments were not referred to in the judgment in ***MACHARIA MWANGI MAINA & 87 OTHERS V DAVIDSON MWANGI KAGIRI (supra)***.

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. Accordingly the decisions in ***MWANGI & ANOTHER V MWANGI (supra)*** and ***KANYI V MUTHIORA (supra)*** on overriding interests are not relevant because the occupation in those cases was not illegal like the occupation contemplated by section 22 of the Land Control Act.

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. In ***MAPIS INVESTMENT (K) LTD V KENYA RAILWAYS CORPORATION [2005] 2 KLR 410*** this Court cited with approval ***Lindley L.J*** in ***SCOTT V BROWN, DOERING, MCNAB & CO (3) [1892] 2 QB 724, at 728*** as follows:

> ***"Ex turpi causa non oritur action. This old and well known legal maxim is founded in good sense, and expresses a clear and well recognized legal principle, which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality . It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him." (Emphasis added).***

Earlier in ***PATEL V SINGH (No 2) [1987] KLR 585*** at ***588***, this Court, relying on the words of ***Devlin L.J*** (as he then was), in ***ARCHBOLDS (FREIGHTAGE) LTD V S. SPANGLETT LTD [1961] I QB 374*** at ***388*** reiterated:

> ***"The effect of illegality upon a contract may be threefold. If at the time of making the contract there is an intent to perform it in an unlawful way, the contract, although it remains alive, is unenforceable at the suit of the party having that intent; if the intent is held in common, it is not enforceable at all. Another effect of illegality is to prevent a plaintiff from recovering under a contract if in order to prove his rights under it he has to rely upon his own illegal act; he may not do that even though he can show that at the time of making the contract he had no intent to break the law and that as the time of performance he did not know what he was doing was illegal. The third effect of illegality is to avoid the contract ab initio and that arises if the making of the contract is expressly or impliedly prohibited by statute or is otherwise contrary to***

public policy." (Emphasis added).

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 ***LUCIA MWETHYA T/A KALEBRAN ENTERPRISES V NAIROBI BOTTLERS LTD & 3 OTHERS, HCCC NO. 10 OF 2012***, ***Odunga, J***. aptly captured the view as follows:

> ***"Whereas I agree that the provisions of Article 159(2)(d) of the Constitution should be invoked to aid in ensuring that substantive justice is attained, I do not accede to the argument that the said provision can be called in aid of an act that is declared to be criminal by Legislature. I do not subscribe to the submission that an act, which our statute expressly declares to be criminal, should be excused by invocation of the Common Law either. Common Law, it must be remembered, is subject to the statutes of the land."***

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.

What we have stated above effectively disposes of grounds Nos.1, 2 and 6 of the appeal. Grounds Nos. 3 and 6 can be conveniently considered together as they relate to extension of time within which to apply for consent of the land control board. In ground No 6 the appellant complains that if indeed consent of the land control board was not necessary as held by the learned trial judge, then what was the need of the learned judge, *suo motu*, directing the appellants to apply for consent of the land control board? Related to that is ground of appeal No. 3 in which the judgment of the High Court is impugned for granting a remedy that the applicants had not applied for and in respect of which the court did not hear the parties.

It is common ground that the appellants never applied for extension of time within which to apply for the consent of the land control board. We have already noted that the proviso to section 8(1) of the Land Control Act empowers the High Court to extend the period for applying for consent of the land control board beyond the prescribed six months from the date of the transaction in question. In our view, a party must move the High Court for extension of the time because under the proviso, the extension is not a matter of course. On the contrary, sufficient reason must be presented to the High Court why extension of time is justified.

It is well established in our jurisdiction that the court will not grant a remedy, which has not been applied for, and that it will not determine issues, which the parties have not pleaded. In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other's case is as pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense.

The court, on its part, is itself bound by the pleadings of the parties. The duty of the court is to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings. The court would be out of character were it to pronounce any claim or defence not made by the parties as that would be plunging into the realm of speculation and might aggrieve the parties or, at any rate, one of them. A decision given on a claim or defence not pleaded amounts to a determination made without hearing the parties and leads to denial of justice.

The proposition was expressed as follows by the former Court of Appeal for Eastern Africa in ***GANDY V CASPAR AIR CHARTERS LTD [1956] 23 EACA, 139:***

> ***"[T]he object of pleadings is, of course, to secure that both parties shall know what are the points in issue between them; so that each may have full information of the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent. As a rule relief not founded on the pleadings will not be given"***

Later in ***GALAXY PAINTS CO LTD V FALCON GUARDS LTD [2000] 2 EA 385***, this Court reiterated that the issues for determination in a suit generally flowed from the pleadings and that a trial court could only pronounce judgment on the issues arising from the pleadings or such issues as the parties framed for the courts determination. The Court added that unless pleadings were amended, parties were confined to their pleadings.

The exception to the rule arises where the parties, in the course of the hearing, raise an issue that was not pleaded and leave the same to the court to decide. Hence in ***ODD JOBS V MUBIA [1970] EA 476, Law, JA;*** speaking for the predecessor of this Court stated that:

"[A] court may allow evidence to be called, and may base its decision, on an unpleaded issue if it appears from the course followed at the trial that the unpleaded issue has in fact been left to the court for decision." (See also ***VYAS INDUSTRIES LTD V DIOCESS OF MERU [1982] KLR 114)***

In this appeal the appellants never applied for extension of time and the parties never addressed the issue at all; the same just popped up in the judgment. We are satisfied that the learned judge erred in granting extension of time when it had not been sought, when none of the parties had raised or addressed the issue, and when clearly no sufficient reason was placed before him as required by the proviso to section 8(1) of the Land Control Act.

From the foregoing, we do not deem it necessary to address the remaining two grounds, namely adverse possession and the conclusions of the learned judge that were said not to have been supported by evidence. Adverse possession was never pleaded and was nor an issue before the court. The fleeting reference to the same in the judgment is really of no moment, granted the final conclusions of the learned judge.

We have come to the conclusion that this appeal has considerable merit. We allow the same, set aside the judgment and decree of the High Court dated 7th June 2013 and substitute therefore an order allowing the appellant's suit with costs. The appellant will also have costs of this appeal. It is so ordered.

Dated and delivered at Nairobi this 18th day of December 2014.

G. B. M. KARIUKI

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

J. MOHAMMED

…….

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR