



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: VISRAM, KOOME & OTIENO - ODEK, JJ.A)**

**CIVIL APPEAL NO. 18 OF 2010**

**SATIMA PEAK FARMERS LIMITED .....APPELLANT**

**AND**

**ONESMUS WERU (DECEASED) ..... 1<sup>ST</sup> RESPONDENT**

**TRACISIUS NDERITU (DECEASED)..... 2<sup>ND</sup> RESPONDENT**

**WILLIAM GACHAI .....3<sup>RD</sup> RESPONDENT**

**JAMES GITONGA WERU .....4<sup>TH</sup> RESPONDENT**

**JOHN NDERITU & OTHERS ..... 5<sup>TH</sup> RESPONDENT**

*(An appeal against the Judgment of the High Court of Kenya at Nyeri  
(Makhandia, J.) delivered on 22<sup>nd</sup> July, 2009*

*in*

***H.C Civil Case No.62 of 1995 (O.S)***

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

- 1. The suit property is an agricultural land. Initially, the suit property was registered under the repealed Registration of Titles Act as IR 1410 - Land Reference No. 3381/ Mweiga and measures 983 acres. The suit property is currently known as Mwiyo/Labura Block II (Mukoi) having been subsequently registered under the repealed Registered Land Act (Cap 300 of the Laws of Kenya).**
- 2. On 24<sup>th</sup> November, 1962, the suit property was transferred to Mr. Onesmus Weru s/o Gichahi (the 1<sup>st</sup> respondent), Tracisius Nderitu s/o Ngatunyi (2<sup>nd</sup> respondent) and William Gachai (3<sup>rd</sup> respondent) as tenants in ommon in equal shares for Kshs. 120,000/=. The three proprietors did not have money to pay the purchase price, hence they secured a loan from the Land Development and Settlement Board (Settlement Fund Trustees) for Kshs. 108,000/= to finance the purchase. A charge in favour of the Settlement Fund Trustees (Chargee) was registered against the suit property on 24<sup>th</sup> November, 1962 for the said Kshs.**

108,000/=.

3. **In order to run the affairs of the suit property, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents, as registered proprietors in common executed a partnership deed dated 10<sup>th</sup> September, 1962 incorporating themselves as Wendiga Farm. A crucial part of the partnership deed stipulated that if the partners were unable to repay the loan and they invited other persons to repay the loan, such new parties would be entitled to a share of the land only.**
4. In January 1969, the Settlement Fund Trustees as Chargee to the suit property gave notice to auction the property for a sum of Kshs. 46,369/= which was then due and in arrears. The 1<sup>st</sup> and 2<sup>nd</sup> respondents approached a Mr. Kingori Muriu who paid the demanded loan arrears. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents and the said Mr. Kingori Muriu, formed a company known as Mukoe Farmers Limited on 28<sup>th</sup> June, 1969. The objective of the company was to carry wheat farming on the land to recover the monies paid to the Chargee by Mr. Kingori Muriu. Mukoe Farm Limited was allowed to farm 120 acres of the land; Subsequently, the said company abandoned the wheat farming in 1970. Mukoe Farm Company never participated in repaying the loan except for the initial Kshs. 46,369/= that was paid by Mr. Kingori Muriu. An attempt to transfer the land to Mukoe Farm Limited failed because the 3<sup>rd</sup> respondent herein protested.
5. **The attempt to transfer the suit property to Mukoe Farm Limited did not stop in 1972. Mukoe Farm Limited filed suit in the High Court being HCCC No. 1473 of 1973 against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondent and the company obtained judgment directing the suit property to be transferred to it. A vesting order in favour of Mukoe Farm Limited, over the suit property was issued on 28<sup>th</sup> March 1984. Using the above mentioned court order, Mukoe Farm Limited surrendered to the Government the original title issued under the Registration of Titles Act (repealed) in exchange for a new block title under the Registered Land Act (repealed). Upon surrender of the original title, the suit property changed its registration status and is now Mwiyo/Labura Block II (Mukoi).**
6. By 1972, the outstanding loan was Kshs. 135,000/= and the three proprietors in common were unable to service the same. In order to clear the loan, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents entered into a sale agreement dated 19<sup>th</sup> March, 1972 with Gathare Farm Company for sale of 500 acres at a cost of Kshs. 135,000/=. The 3<sup>rd</sup> respondent in his capacity as a common proprietor wrote to the Chargee disowning the said sale agreement. By then, Gathare Farm Company had already paid Kshs. 32,695/= directly to the Chargee. Unable to complete the payment of the purchase price, Gathare Farm Company, instituted a civil suit being H.C.C.C. No. 91 of 1974 at Nyeri seeking *inter alia* an order granting it a portion of the suit property which was equivalent to the amount it had paid. The said suit was subsequently dismissed.
7. Since the loan amount had not been cleared, the 1<sup>st</sup> and 2<sup>nd</sup> respondents agreed to sell 450 acres of the suit property for Kshs. 135,000/= to the appellant vide a sale agreement dated 8<sup>th</sup> June, 1973. Subsequently, the 1<sup>st</sup> and 2<sup>nd</sup> respondents vide a further sale agreement dated 25<sup>th</sup> June, 1973 sold an additional 27 acres of the suit property to the appellant for Kshs. 8,100/=. The appellant paid a total of Kshs 143,100/= for the 477 acres. Part of the consideration was paid directly to the Chargee and the charge over the suit property was discharged. After the said purchase, the appellant's members were allowed to take possession of the 477 acres and they have since developed the same. The appellant filed an application seeking the consent of the Nyeri/ Kiganjo Land Control Board for the transfer of the said portion of 477 acres to it. The said Land Control Board declined to give its consent mainly because the 3<sup>rd</sup> respondent had not executed the sale agreements and the form for application for transfer.
8. Unable to obtain title from the three registered proprietors, the appellant filed suit in the High Court at Nyeri being H.C.C.C. No. 62 of 1985 by way of Originating Summons. The appellant sought *inter alia* a declaration that it was the rightful owner of the 477 acres of the suit property which were in the possession of its members; and extension of time within which to obtain the consent of the Nyeri/ Kiganjo Land Control Board for the said portion to be transferred to it.
9. The 3<sup>rd</sup> respondent(3<sup>rd</sup> defendant in the suit) maintained that despite being a co-owner, he

- was never a party to the sale agreements which purportedly sold 477 acres to the appellant ;and that he never received any consideration for the suit property from the appellant. He further maintained the appellant had no valid claim over the suit property.
10. The 4<sup>th</sup> respondent was enjoined in the suit as the legal representative of the 1<sup>st</sup> respondent (deceased). It was his case that differences between the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents cropped up resulting in the loan amount being divided into three portions as per the partnership deed. According to the 4<sup>th</sup> respondent, the 3<sup>rd</sup> respondent was unable to pay his portion of the loan and he moved out of the suit premises in August 1968; the 3<sup>rd</sup> respondent stopped being a co-owner of the suit property since 1968; therefore, the 3<sup>rd</sup> respondent's signature was not required in the sale agreements between the appellant on one part and the 1<sup>st</sup> and 2<sup>nd</sup> respondents on the other part.
  11. The 4<sup>th</sup> respondent submitted that the 5<sup>th</sup> respondent represents Mukoe farm Limited. That the 5<sup>th</sup> respondent had been invited sometime in 1969 by the 1<sup>st</sup> and 2<sup>nd</sup> respondent to clear the outstanding loan over the suit property; instead the 5<sup>th</sup> respondent fraudulently took loans from Agricultural Finance Corporation (AFC) using the suit property as security and left without repaying the same. The 5<sup>th</sup> respondent only resurfaced once the appellant cleared the outstanding loan and the title over the suit property had been discharged.
  12. The 5<sup>th</sup> respondent contended that the Provincial Commissioner of the then Central Province due to the foregoing arbitrated over the dispute between the parties herein and had resolved that the appellant would get 227 acres of the suit property. According to the 5<sup>th</sup> respondent all parties, with the exception of the appellant were in agreement with the decision of the Provincial Commissioner. The 5<sup>th</sup> respondent contended that the appellant's suit was defective and ought to be dismissed. This is because the description of the suit property had changed to Mwiyo/Labura Block II (Mukoi) after the original title was surrendered to the Government. Therefore, L.R. No. 3381/ Mweiga as pleaded by the appellant did not exist and consequently, according to the 5<sup>th</sup> respondent, the court should not make an order in vain.
  13. The primary issue that was before the learned Judge (Makhandia, J.) (as he then was) was, whether there were valid and enforceable sale agreements between the appellant on one hand and the 1<sup>st</sup> and 2<sup>nd</sup> respondents on the other hand, despite the fact that the 3<sup>rd</sup> respondent who was a registered proprietor in common did not sign the two sale agreements.
  14. The learned Judge in his judgment dated 22<sup>nd</sup> June, 2009 cited Section 3 (3) of the Law of Contract Act which provides that:

*“..... No suit shall be brought upon a contract for the disposition of an interest in land unless (a) the contract upon which the suit is founded is (i) in writing (ii) is signed by all the parties thereto.....”*

From the foregoing, the learned Judge while dismissing the appellant's suit, pronounced himself as follows:

*“It is common ground that the two sale agreements were only executed by the 1<sup>st</sup> and 2<sup>nd</sup> defendants to the exclusion of the 3<sup>rd</sup> defendant as vendors. It would appear therefore that the purported sale agreements were in violation of Section 3 (3) of the Law of Contract Act. The 3<sup>rd</sup> defendant has categorically stated that he was not a party to the transaction, was never consulted nor his consent given to the transaction sought and obtained. Neither did he receive the consideration or a portion thereof. It would appear therefore that under the circumstances, no valid legal agreement for the sale of the suit premises or any part thereof could have been effected without the consent and signatures of all the three tenants in common. Indeed, one of the reasons for failure to obtain consent of the Land Control Board was because the 3<sup>rd</sup> defendant had failed to sign the application forms as the suit premises was registered in the joint names of the 3*

*defendants yet the 1<sup>st</sup> and 2<sup>nd</sup> defendants had signed.”*

Aggrieved by this decision, the appellant lodged the present appeal grounded on 8 grounds which can be compressed as follows:-

- i. *That the learned Judge erred in law and in fact by finding that Section 3 (3) of the Law of Contract Act applied to the transaction and that the failure by the 3<sup>rd</sup> respondent to sign the sale agreement rendered the agreements void while in actual fact the 3<sup>rd</sup> respondent's signature was irrelevant to the sale agreement.*
- ii. *That the learned Judge erred in law and in fact by holding that it was a legal requirement that the sale agreements should have been executed by all the three co-owners of the suit property.*
- iii. *That the learned Judge's comment “that no wonder that the Land Control Board declined to grant its consent to the transaction” was a conjecture devoid of any legal basis and the said reasoning was untenable in law.*
- iv. *The learned Judge erred in fact and in law in finding that the doctrine of part performance did not apply and his decision in dismissing the Originating Summons is totally devoid of any legal basis.*
- v. *That the learned Judge failed to understand the law altogether which resulted in total injustice to the rights of the appellant.*
- vi. *That the judgment did not give or perceive any rights on any party hence it was void of no effect.*
- vii. *That the judgment must be set aside and a proper trial must be held to determine the rights of all the parties including the appellant.*

The 4<sup>th</sup> respondent also filed a cross appeal against the said decision.

15. At the hearing of the appeal, learned counsel, Mr. R.K. Mahan, appeared for the appellants and learned counsel, Mr. K. Wachira appeared, for the 3<sup>rd</sup> respondent; learned counsel, Mr. V.E. M. Muriu, appeared for the 5<sup>th</sup> respondents; and the 4<sup>th</sup> respondent appeared in person.
16. Counsel for the appellant elaborated the grounds of appeal and faulted the Judge for relying on **Section 3 (3)** of the **Law of Contract Act** and ignoring the proviso in **Section 3 (7)** of the Act which made an exception for oral contracts for sale of land coupled with part performance. He submitted that the learned Judge ignored that **Section 3 (3)** of the **Law of Contract Act** came into effect in 1999 and that the same did not apply to oral contracts for sale of land concluded before **Section 3 (3)** of the Act came into force.
17. He maintained that if the Court was inclined to find that the two sale agreements signed in 1973 are ineffectual because they did not have the 3<sup>rd</sup> respondent's signature, then the said two agreements must be construed to be oral agreements for sale of land coupled with part performance and possession of land. Mr. Mahan submitted that although **Section 3 (3)** requires that sale or disposition of an interest in land must be evidenced in writing or some note or memorandum thereof signed by person or some person duly authorized by him to sign it; it is the proviso to the said section that governs the transaction between the appellant and the 1<sup>st</sup> and 2<sup>nd</sup> respondents. The proviso to the section states that:

*“Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser ... who has performed or is willing to perform his part of the contract:*

*i) has in part performance of the contract taken possession of the property or part thereof or*

*ii) already being in possession continues in possession in part performance of the contract and has done some other act in furtherance of the contract.”*

18. The appellant's counsel contend that the learned Judge erred by stating that the Land Control

Board consent was necessary to complete the transaction. He submitted that **Section 6** of the **Land Control Act** exempted transactions involving the Government or the Settlement Fund Trustees; that in the present case, the Settlement Fund Trustees was involved in the transaction and the sale agreement between the appellant and the 1<sup>st</sup> and 2<sup>nd</sup> respondents did not require consent from the Land Control Board.

19. In opposing the appeal, learned counsel, Mr. Wachira, who appeared for the 3<sup>rd</sup> respondent, reiterated that the suit property was registered in the name of 3 co-owners and no valid agreement for sale of part thereof could be effected without the consent and signature of all the co-owners. It was submitted that the 3<sup>rd</sup> respondent as a co-owner did not sign the two sale agreements relied upon by the appellant; that in the absence of consent and signature of the 3<sup>rd</sup> respondent, the two agreements are null and void and cannot create or pass any interest in land. On the issue lack of consent from the Land Control Board, counsel for the 3<sup>rd</sup> respondent submitted that the Settlement Fund Trustees were not a party to the sale agreement; that the registered owners of the land were the three proprietors in common and as such, any dealing, sale or transfer of the land required consent from the Land Control Board. Counsel supported the decision of the Land Control Board in refusing to give its consent because the 3<sup>rd</sup> respondent as a co-owner had not signed the form applying for consent. On the issue of there having been a partnership agreement between the three proprietors in common, counsel submitted that the suit property was registered in the individual names of the 3 co-owners and not in the partnership name; further, even if the three co-owners were partners, the partnership was never dissolved in accordance with the provisions of law and consequently the 3<sup>rd</sup> respondent remained a co-owner of the suit property.
20. The 4<sup>th</sup> respondent acting in person, supported the appeal and made his submissions on the cross-appeal. He cross appealed seeking inter alia orders setting aside the judgment of the High Court and a rehearing of the suit to enable determination of the rights of all parties over the suit property. He contended that the learned Judge erred in failing to take into account that the appellant and the 4<sup>th</sup> respondent are residing on the suit land. The 4<sup>th</sup> respondent further submitted that the 3<sup>rd</sup> respondent consented to the sale of the suit property by letter dated 28<sup>th</sup> September 1972 addressed to the Settlement Fund Trustees who was the Chargee to the property. The relevant part of the letter reads as follows:

***“I am one of the three partners on the above named farm. I am going to Britain for ten month’s course.... We were joined by new members (Mukoe Farm) who paid several thousands of pounds and when we were due to transfer the farm in the name of the new company, Mr. Weru refused to sign the transfer form. We had started very nicely and now the new partners have lost interest in the farm and none is ready to pay the outstanding amount of the loan. The new partners have decided to file a suit against the three of us but I would like to withdraw my name in this matter as I have not refused to straighten the matter. Messrs Weru and Nderitu are collecting money from societies who are being promised that the farm will be sold to them according to the money they pay.... In closing, I may point out that we are heading no where and should your ministry decide to auction the farm during my absence which is the only alternative, I shall be entirely with it but my only request is that no proceeds (sic) of the sale other than your part should be distributed to the partners until I returned sometime in July 1973...”***

21. The above letter dated 28<sup>th</sup> September 1972 was copied to the 1<sup>st</sup> and 2<sup>nd</sup> respondents. The 4<sup>th</sup> respondent and the appellant contend that the phrase ***“I shall be entirely with it”*** in the context of the outstanding loan was a consent and permission from the 3<sup>rd</sup> respondent that he had no objection to the suit property being sold; that it should not matter who purchased it and in this case, it was the appellant who by virtue of the two sale agreements took possession of the suit property and paid all the outstanding sums due to the Chargee and the suit property was discharged. It is the appellant's and 4<sup>th</sup> respondent's submission that the appellant acquired an interest in the suit property through the no objection letter and consent of the 3<sup>rd</sup> respondent
22. In opposing this appeal and cross appeal, the 5<sup>th</sup> respondent's counsel raised two pertinent points.

Firstly, that the suit property that was registered under the **Registration of Titles Act** no longer exists; the property is now registered under the **Registered Lands Act**; the property has been sub-divided and new titles issued; the nature and character of the suit property has fundamentally changed hence this Court should not allow the appeal. Secondly, that the law of contract is very clear, that the purported sale agreements of 1973 between the appellant and the 1<sup>st</sup> and 2<sup>nd</sup> respondents were null and void because they were not signed by all the three registered co-owners; Further, that whether the sale agreement was oral or written it still had to comply with the Land Control Act and consent of the Land Control Board was mandatory. Counsel submitted that the appellant's members were in possession of the suit property and if any overriding interest exists, the same can only extend to 227 acres that has been reserved for the appellant in the sub-division exercise following arbitration by the Provincial Commissioner of the then Central Province.

23. We have considered the evidence on record, oral submissions by learned counsel and the authorities cited. This is a first appeal and on the authority of *Selle v Associated Motor Boat Company Ltd. [1968] EA 12,3* this Court has the duty of re-evaluating the evidence, assess it and make its own conclusions without overlooking the conclusions of the trial court and also bearing in mind that unlike the trial court, we neither saw nor heard the witnesses.

24. Having evaluated and outlined the chronology of the dispute in this matter, it is our considered view that there are three issues pertinent to this appeal:

i) *Were the two sale agreements signed in 1973 between the appellant and the 1<sup>st</sup> and 2<sup>nd</sup> respondents valid and capable of transferring 447 acres of to the appellant?*

ii) *If not, did the learned Judge err in failing to ascertain and determine if the appellant had any interest in the suit property pursuant to Section 3 (7) of the Law of Contract Act or any other provision of law?*

iii) *Should the veil of incorporation be lifted in relation to the 5<sup>th</sup> respondents in the matter of Mukoe Farm Limited?*

iv) *What orders should this Court make in the interest of substantive justice and equity between all parties having an interest in the suit property?*

25. We will begin with the issue of to the validity of the two sale agreements in the absence of the signature of the 3<sup>rd</sup> respondents. A property of any description can only be transferred by the owner(s) thereof. In real property, it is the registered proprietor(s) who can enter into an agreement to sell or transfer the property. In the present case, the suit property was registered in the names of 3 proprietors in common. It is the consent and signature of all the three proprietors in common that could validly transfer and sell the suit property. **Section 3 (3)** of the **Law of Contract Act** requires any transaction for sale or disposition of an interest in land be evidenced in writing and signed by the parties thereto. The issue of writing and the question of signature were considered in the case of *Mawji – v- United States International University 7 Another (1976) KLR 185* where this Court considered the effect of **Section 3 (3)** of the **Law of Contract Act**. The court in the said case held that a document written in the handwriting of the person to be charged (or that of his duly authorized agent) may be construed as signed by him for purposes of **Section 3(3)** of the **Law of Contract Act** even though it is not actually signed. The court further noted that each case must turn on its own facts, but that on a *prima facie* basis, the court should accept the handwriting of the party to be charged until it is disputed by other evidence. In the instant case, the issue is whether the letter dated 28<sup>th</sup> September, 1972 from the 3<sup>rd</sup> respondent to the Settlement Fund Trustees can be construed as consent and signature by the 3<sup>rd</sup> respondent for the sale of the suit property. We think not. The letter had no legal consequences as it purported to give the chargee the power to sell the suit property in default of loan repayment. The letter could not give consent because the chargee did not require consent of any or all of the three registered proprietors to exercise its statutory power of sale; the power of sale existed and was exercisable by virtue of the charge instrument.

26. As regards the two sale agreements signed in 1973 between the appellant on one part and the 1<sup>st</sup>

and 2<sup>nd</sup> respondents on the other part, we pose the question, is a co-owner of real property an agent of the other?; Can his/her action bind the other owners?; What are the rights of a co-owner *inter se* and as against third parties who have notice of co-ownership? In ***Re Hilton {1090} 2 Ch. 548***, it was stated that where the legal estate is vested in all co-owners, they must act unanimously. One or two co-owners cannot act to sell the property to the exclusion of the other and none of the co-owners has the power to sell unless such power is exercised unanimously by all registered co-owners. The only thing that one co-owner has as against the others is unity of possession of the suit property and nothing more. In the present case, we hold that since the sale agreement was not signed by all the 3 co-owners, there was no valid agreement to effect sale and transfer of the suit property. A transfer can only be effected with the signature of the registered proprietor (s). Consequently, we find that the learned Judge did not err in finding that there was no valid sale agreement.

27. On the issue of whether the consent of the Land Control Board was required, we have examined the evidence on record and have noted that by letter dated 18<sup>th</sup> December, 1972, the Settlement Fund Trustees wrote to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents (operating as Wendiga Farm) stating that it had no objection in them selling the suit property subject to the consent of the local divisional Land Control Board and the District Agricultural Committee. It is our view that the interest of the Settlement Fund Trustees in the suit property was limited to the extent that it was a chargee; the moment the outstanding sums were paid, the Settlement Fund Trustees had no further interest in the suit property. Further, the practice and law is that, it is the registered proprietor and intended purchaser who apply for the consent of the Land Control Board. The Settlement Fund Trustees were neither the registered proprietors nor the intended purchasers. For purposes of Land Control Board consent, the Settlement Fund Trustees had no role to play. We find that the land being agricultural land, it required consent of the relevant Land Control Board. In the case of ***Denning -v- Edwards {1938} EA 638***, it was held that land dealings or agreements are inchoate until the necessary consents are obtained. Therefore, the learned Judge did not err in holding that consent of the Land Control Board was required.
28. We now turn to consider whether the suit property as originally registered under the **Registration of Titles Act** no longer exists as submitted by the 5<sup>th</sup> respondent's counsel. This issue is pertinent because this Court cannot make an order in vain when the subject matter or substratum of the suit is no longer in existence. The record reveals that the suit property was all along in existence and it was surrendered by the 5<sup>th</sup> respondents to the Government. At the time of surrender, the appellant's members were in occupation and possession of part of the suit property. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents all had actual knowledge of the occupation and possession of the suit property by the appellant's members. When the 5<sup>th</sup> respondents by themselves or acting as Mukoe Farm Company surrendered the title, they knew of the claim by the appellant (among other group of persons) to part of the suit property. If at all the character and nature of the suit property changed, it was changed by the 3<sup>rd</sup> and 5<sup>th</sup> respondents acting as Mukoe Farm Company. A party cannot change the nature and character of the suit property and then plead the change as a defence to an action in relation to the said property; this is more so when the party had actual knowledge of existing claims to the property. We hold that the surrender, change, sub-division and registration of the suit property under the **Registered Land Act** cannot be used to defeat any claims that existed prior to the surrender of the title. The doctrine of trace is an equitable remedy and equity shall trace the suit property for ends of justice to be served. The notion that the suit property no longer exists is not tenable. We find that the suit property exists and is presently registered as **Mwiyogo/Labura Block II (Mukoi)**. Any orders made by this Court or the High Court shall be in respect to the property previously known as **IR 1410, Land Reference No. 3381 measuring 983 acres and now known as Mwiyogo/Labura Block II (Mukoi)**. Accordingly, we find that the learned Judge erred in holding that the suit property no longer exists. This position is reinforced when one considers that it was brought to the attention of the learned Judge as stated in the judgment, that the subsequent title deeds were issued under questionable circumstances whose validity is a subject of investigations by the Chief Registrar of Titles. The learned Judge ought not to have ignored this item of evidence. Equity cannot aid a party to defeat claims of another.
29. The next issue for our consideration and determination is whether the learned judge erred in

failing to ascertain and determine if the appellant had any interest in the suit property. The property was originally registered under the **Registration of Titles Act** and subsequently under the now repealed **Registered Lands Act**. The appellant took possession of part of the suit property in 1973 and has since been in occupation and possession. **Section 30 of the Registered Lands Act** provides:

**30. Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same without them being noted on the registers:**

- a. ....;
- b. ....;
- c. ....;
- d. ....;
- e. **rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;**
- f. **the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such a person and the rights are not disclosed.**

30. One of the overriding interests under **Section 30 (f)** is the right of the person in possession or actual occupation of the registered property. An overriding interest binds the proprietor of registered land, even though he has no knowledge of the same and no reference to them is made in the register. A purchaser takes property subject to overriding interests subsisting at the date of registration and not the earlier date when the purchase money is handed over, (see **Bridges - v- Mees (1957) Ch. 475**). The registered proprietor must make inquiry of such persons who are in occupation to disclose their rights (See **Blacklocks – v- J.B. Development (Goldalming) Ltd. {1981} 3 All ER 392**); they must also be asked if they claim any proprietary interest.

31. The evidence in this case shows that the appellant entered the suit property in 1973 and has since been in occupation and possession of part of the suit property. The appellant's occupation and possession of part of the suit property is based on a claim of right. We find that when the original title was surrendered, the appellant was in occupation and possession of the property; and when the property was registered under the Registered Lands Act, the provisions of **Section 30 (f)** were fully applicable. We find that the appellant has an overriding interest in relation to the suit property and such overriding interest continues to exist. For avoidance of doubt, we reiterate that the overriding interest of the appellant in relation to the suit property started to run from 1973 and this overriding interest is in existence and was protected under **Section 30 of the Registered Land Act** when the original title was surrendered. We find that the learned Judge erred in failing to recognize the occupation and possession of part of the suit property by the appellants.

32. The interest of the appellant in the suit property is further reinforced by the fact that it is the appellant's company that paid the outstanding loan to the chargee to secure the discharge of charge. If the appellant had not paid and cleared the entire outstanding sum, none of the interested parties would have any property to dispute over. By the appellant clearing the outstanding sum, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents all have benefited from this payment. It is preposterous for the 3<sup>rd</sup> and 5<sup>th</sup> respondent to challenge the interest of the appellant in the suit property when they have benefited from the payment made by the appellant to discharge the suit property. It is unconscionable for a person to be unjustly enriched. The appellant paid the outstanding sum on the representation of the 1<sup>st</sup> and 2<sup>nd</sup> respondents and by extension the 4<sup>th</sup> respondent, we find that the doctrine of equitable estoppel is applicable and the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> respondents are estopped from denying the interest of the appellant in the suit property. As regards the 3<sup>rd</sup> and 5<sup>th</sup> respondent's the interest they are pursuing in the suit property exists by virtue of the fact that the appellant cleared all the outstanding sums due to the Chargee.

33. The evidence on record shows that there are various persons, groups and individuals who may have some interests in the suit property. Of significance to resolving the dispute in relation to the

suit property are the various partnerships, companies or entities created by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents to transfer the suit property or to sell part of the suit property to these entities. The motive for creating such entities is not relevant to this case but we hold that third parties who were invited by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents to repay the outstanding loans should not be short-changed through the use of such partnerships, companies or entities. In addition, such partnerships, companies or entities should not be used to unjustly enrich the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> respondent. The evidence on record reveals that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents are members of Mukoe Farm Company, Wendiga Farm Company and Gathare Farm Company. These companies contributed some money towards repayment of the loan due to the Settlement Fund Trustees. The extent of their contribution is not clear. However, it is not disputed that they did not pay off the entire loan and a substantial part of the outstanding loan was cleared by the appellant.

34. Having analyzed the facts and law pertaining to this matter, what orders, reliefs and directions should this Court issue? **Article 159 (2) (b)** of the **Constitution** requires that justice should not be delayed. This matter has been in the courts since 1974 and the courts have not resolved the dispute pertaining to the suit property. The persons or groups interested in the suit property are individuals of different status in the Kenyan society. **Article 159 (2) (a)** of the **Constitution** requires justice to be administered to all, irrespective of status; **Article 159 (2) (g)** of the **Constitution** stipulates that justice shall be administered without undue regard to procedural technicalities. 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 wrongdoing; and equity detests unjust enrichment. This Court is bound to deliver substantive rather than procedural justice and the relief, orders and directions given in this judgment are aimed at delivery of substantive justice to all parties having legal and equitable interests in the suit property.
35. The upshot of the analysis and findings of this Court is that the following orders and directions be and are hereby issued.
- i. *Judgment delivered by the learned Judge of the High Court on 22<sup>nd</sup> July, 2009 be and is hereby set aside.*
  - ii. *Despite the fact that the suit property is now registered under the Registered Land Act, the suit property is still available for all interested parties to claim and prove their respective interest.*
  - iii. *The appellant has an overriding interest in the suit property under Section 30 (g) of the Registered Land Act and this interest cannot be defeated by the respondents or any other interested party.*
  - iv. *The two sale agreements signed in 1973 between the appellant and 1<sup>st</sup> and 2<sup>nd</sup> respondents do not meet the requirement of Section 3 (3) of the Law of Contract Act because all the 3 registered co-owners did not sign the sale agreement.*
  - v. *The proviso to Section 3 (7) of the Law of Contract Act does not apply in relation to the two sale agreement between the appellant and the 1<sup>st</sup> and 2<sup>nd</sup> respondents because the agreements are incapable of transferring an interest in land.*
  - vi. *From the evidence on record, this Court notes that there are other parties such as Gathare Farm Company who are not party to this suit and who have either legal or equitable interest in the suit property; consequently, we decline to make orders determining the acreage of the appellant and respondents in relation to the suit property without all persons or groups who have an interest in the suit property being heard. For the foregoing reasons, we direct that a fresh trial should be held to determine the rights and acreage of land for all persons, groups and parties having an interest in the suit property. We direct that in determining the acreage for each interested party, the High Court should take into account inter alia the following factors:*
    - a. *The overriding interest of the appellant in the suit property.*
    - b. *The date of payment and the amount paid by the appellant to the Settlement Fund Trustees towards discharging the suit property.*
    - c. *The date of payment and amount paid by any interested party to the Settlement Fund Trustees towards the repayment of the loan and interest thereon.*
    - d. *The lifting of the veil in relation to Mukoe Farm Company Limited, Wendiga Farm Company*

- and Gathare Farm Company to determine the nature and extent of interest of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents to avoid unjust enrichment and double allocation of land.*
- e. *The interest of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents in the suit property shall be in the balance of the land and shall not rank in priority to the interest of any other person or group or party.*
  - f. *The interest of the 4<sup>th</sup> respondent in the suit property should be determined to ascertain if he has an independent interest or if his interest in the suit property is to be derived from the estate of the 1<sup>st</sup> respondent.*
  - g. *The High Court to determine the validity of the proceedings, decisions and sub-division of suit property by the Provincial Commissioner.*

39. In conclusion, we allow the appeal and allow the cross appeal. We reiterate that the judgment of the High Court delivered on 22<sup>nd</sup> June 2009 be and is hereby set aside. The evidence on record compels us to order that the 3<sup>rd</sup> and 5<sup>th</sup> respondents shall bear the costs of this appeal, costs of the cross appeal and costs in the High Court.

*Dated and delivered at Nyeri this 11<sup>th</sup> day of July, 2013.*

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**MARTHA KOOME**

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**JUDGE OF APPEAL**

**OTIENO-ODEK**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**