



Strathmore University

Law School

**The Legal Consequences of Failure to Obtain Consent of the Land Control Board in
Agricultural Land in Kenya**

**Submitted in partial fulfillment of the requirements of the Bachelor of Laws
Degree, Strathmore University Law School**

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089315

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January 2019

Word Count: 18,411

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DEDICATION


To God Almighty for His grace, to my family for their support, sacrifice and prayers and to my friends for their encouragement and relentless support.

ACKNOWLEDGMENTS

I am grateful to God for His sufficient grace throughout this process. I am greatly indebted to my supervisor Mr. Desmond Tutu for his encouragement, insight and guidance. I am greatly indebted to my father for his support and guidance throughout this study. Finally, I offer my sincere gratitude to my family for their support.

DECLARATION

I, **SIFUNA STEPHANIE NAMALELO**, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: 

Date: 22.03.2019

This dissertation has been submitted for examination with my approval as University Supervisor.

Supervisor: Mr. Desmond Tutu

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Date:

ABSTRACT

The courts in Kenya have had a myriad of opportunities to interpret salient legal issues arising from the application of the Land Control Act (Cap 302 of the Laws of Kenya) and in particular section 6(1). It has been the subject of many legal disputes owing to the fact that many dealing in agricultural land have negligently, ignorantly or otherwise failed to seek the consent of the Land Control Board and, therefore, rendered their transaction void for all purposes.¹ When such disputes are brought to court some Judges have tried to circumvent the provisions of the Act whereas others have helplessly refrained from any bold attempts to bypass the provisions of this Act.² This study investigated the adequacy of the laws that address the legal consequences of failure to obtain consent and analyzed different approaches taken by the courts in reaching a decision regarding section 6 (1) of the Act. The study took a legal approach in examining the theoretical framework on the freedom to contract and the requirement of consent of transactions in agricultural lands. Through the review of court decisions, the study was able to bring out the inconsistency and ambiguity in the approaches taken by the courts in interpreting section 6(1). The study recommends that: consent should be amended by deleting the word void and replacing it with the word voidable and compensation for improvements on the land should be available. In the end, the study makes the finding that the law does not adequately address the consequences of failure to obtain consent of the Land Control Board.

¹ Ojienda T. *Conveyancing principles and practice*, Revised edition, Law Africa publishing, Nairobi, 2010, 221.

² Mohammed K, 'The Land Control Act, 1967, as amended with particular reference to the question of compensation for improvements', published LL. B dissertation, University of Nairobi, 1982, 36.

LIST OF CASES

- Chase International Investment Corporation & another v Laxman Keshra & others* [1978] KLR 143 [1976-80] 1 KLR 891.
- Chemelil Sisal Estate Ltd v Makongi Ltd* [1967] EA 166.
- David Sironga Ole Tukai v. Francis Arap Muge & 2 Others*, (2014) eKLR.
- Gabriel Makokha Wamukota v Sylvester Nyongesa Donati* [1987] eKLR.
- Gatere Njamunyu v Joseck Njue Nyaga* [1983] eKLR.
- Graf v Hope Building Corporation*, 254 N.Y 1.
- Hirani Ngaithe Githire v Wanjiku Munge* [1979] eKLR.
- Hussey v Palmer* (1976) AC 536, 540.
- Isaac Ngatia Kihagi v Paul Kaiga Githui* [2017] eKLR.
- Jacob Minjire Gichuki V Agricultural Finance Corporation*.
- John Onyango & another v Samson Luwayi* [1986] eKLR
- Joseph Mathenge Kamutu v Joseph Wainaina Karanja & another* [2015] eKLR.
- Lucia Mwethya T/A Kale Bran Enterprises v Nairobi Bottlers Limited & 3 others*, HCCC No. 10 of 2012.
- Macharia Mwangi Maina & 87 others v Davidson Mwingi Kagiri* [2014] eKLR.
- Mapis Investment (K) LTD V Kenya Railways Corporation* [2005] 2 KLR 410.
- Mobi Goki V. Chege Kibaki*, K.H.C.D. 1972 Case No. 6.
- Onyango and another v Luwayi*, [1986] KLR.
- Patrick Musimba v National Land Commission & 4 others* [2016] eKLR.
- Rosebella Iranmwenya Mirieh v Mwangi Ngugi*, [2017] eKLR.
- Scott v Brown, Duering & Company* (3) (1892) 2 QB 724, 728.
- The Owner of Motor Vessel "Lillian S" v Caltex Oil Kenya Limited* [1989] KLR 1.

CHAPTER ONE

INTRODUCTION

1.1 Background

In Kenya, land has been at the centerpiece of the social, economic and political development of the country since the pre-colonial era.³ It is not just a commodity that can be traded in the market but perhaps the most fundamental natural resource and the resource base that supports most life forms and provides the physical stratum that sustains political, socio-cultural, economic as well as natural systems.⁴ It is a finite resource and most of the landmass in Kenya is not suitable for productive farming thus requiring the land available to be utilized sustainably, efficiently, equitably and productively.⁵ This is done through land control. In Kenya the government superintends transactions in land which require the consent of statutorily designated bodies through land control so as to gain legitimacy under the law and in particular agricultural land.⁶ Controlled transactions refer to the sale, transfer, lease, exchange, partition or other disposal of or dealing with any agricultural land.⁷

Consent is defined in the Black's Law Dictionary as the agreement, approval, or permission as to some act or purpose especially given voluntarily by a competent person.⁸ It plays an important role in any transaction affecting agricultural land in Kenya. In the realm of conveyancing and other land transactions, it is a general requirement that the consent of the Land Control Board must be obtained.⁹ It is clear that the land control system established by the Act is designed to promote agricultural development.¹⁰ Agricultural land means: land that is not within a municipality or township; a market and; land in the Nairobi Area or in any municipality, township or urban centre that is declared by the Minister, by notice in the

³ Karuiki F, Ouma S. and Ng'etich R, '*Property law*' Strathmore university press, Nairobi, 2016, 153.

⁴ N. Sifuna, 'Using Eminent Domain Powers to Acquire Private Lands for Protected Area Wildlife Conservation: A Survey Under Kenya Law', 2/1 *Law, Environment and Development Journal* (2006) 86, 90.

⁵ Karuiki F *et al.*, '*Property law*', 154.

⁶ Ojienda T. *Conveyancing principles and practice*, Revised edition, Law Africa publishing, Nairobi, 2010, 215.

⁷ Section 6(1) (a), *Land Control Act* (1967).

⁸ Kamau w., *Legal treatment of consent in sexual offences in Kenya*, University of Nairobi, 2013, 4.

⁹ Stanley Kinyanjui, 'Consents and Certificates to Obtain Before the Registration of a Conveyance', Academia.edu, 1.

¹⁰ Coldham S., *Land control in Kenya*, vol. 22. No. 1, *journal of African law*, 1978, 72.

Gazette, to be agricultural land.¹¹ The control of dealings in agricultural land is effected primarily through the Land Control Act (Cap 302).¹² The control device employed by the Land Control Act is that of 'consent'.¹³ Any transaction affecting agricultural land is void for all purposes unless the Land Control Board has given its consent.¹⁴ If this consent is not obtained, it results into two legal consequences: first the transaction automatically becomes void for all purposes and secondly only the money paid can be recovered as a debt.¹⁵ 'Void for all purposes' was interpreted in *Onyango and another v Luwayi*¹⁶ in which the Court of Appeal stated that if a transaction is rendered void for all purposes, nothing of it is left that could constitute a case of a civil nature and no complaints of any nature remain to be resolved after a transaction related to a transaction related to agricultural land is held to be void.¹⁷ The application for consent must be made within six months of the making of the agreement¹⁸ which may grant or refuse consent to the controlled transaction¹⁹.

In deciding whether to grant or refuse consent, the board is obliged to adhere to the various factors set out under section 9 of the Act.²⁰ In this regard, the Land Control Board shall: have regard to the effect which the grant or refusal is likely to have on the economic development of the land concerned or on the maintenance or improvement of standards of good husbandry within the land control area;²¹ act on the principle that consent ought to be refused where the person to whom land is to be disposed of is unlikely to farm and develop the land well, the terms and conditions of the transaction are markedly unfair and the division would reduce the productivity of the land²². This Act also establishes Appeal Boards to which an applicant whose transaction has been denied consent by a Land Control Board may lodge an appeal.²³ Any appeal should be made to the provincial board for the province in which the land in

¹¹ Section 2, *Land Control Act* (1967)

¹² Ojienda T. *Conveyancing principles and practice*, 265.

¹³ Mohammed K, 'The Land Control Act, 1967, as amended with particular reference to the question of compensation for improvements', published LL. B dissertation, University of Nairobi, 1982, 33.

¹⁴ Section 6, *Land Control Act* (1967)

¹⁵ Section 7, *Land Control Act* (1967)

¹⁶ [1986] KLR 513-516

¹⁷ *Onyango and another v Luwayi*, [1986] KLR 513-516.

¹⁸ Section 8 (1), *Land Control Act* (1967)

¹⁹ Section 8 (2), *Land Control Act* (1967)

²⁰ Ojienda T. *Conveyancing principles and practice*, 219.

²¹ Section 9 (1), *Land Control Act* (1967)

²² Section 9 (2), *Land Control Act* (1967)

²³ Ojienda T. *Conveyancing principles and practice*, 219.

question is situated and should be within thirty days of the copy of the board's decision being delivered or posted.²⁴ This board has absolute discretion to hear and determine all appeals made to it under the necessary provisions and subject to the right to appeal to the Central Appeals Board.²⁵

The Land Control Act Cap 302 owes its origin to the Land Control Ordinance of 1944. There were various objectives that this Act was designed to achieve which can conveniently, if somewhat crudely, be classified as economic or social.²⁶ The economic objectives included the prevention of fragmentation, uneconomic parcellation and the unproductive accumulation of land for speculative or prestige purposes.²⁷ The social objectives, on the other hand, would include the prevention of indebtedness, landlessness and land accumulation, whether greater productivity results or not and the control system would be obliged to investigate the financial and family circumstances of the applicants and the terms of every transaction.²⁸ These social factors were in one particular instance in which a divisional board had refused its consent to the sale of a plot of registered land on the grounds that the vendor's deceased brother's widow and her five children were living there and had developed it.²⁹ The vendor and the purchaser (who had paid the purchase price and lodged a caution) appealed arguing that the grounds for refusal relied upon a contrary to the Registered Land Act and that the people referred to are staying on my land without my consent.³⁰ The Appeal was dismissed on the grounds that the children who lived in the parcel will become destitute if consent to the sell is given.³¹

The Land Control Ordinance put an end to the exclusive European dealing in land as was earlier envisaged by the Crown Land Ordinances of 1902 and 1915 ensuring that only those who were capable of developing land could own it.³² This was perhaps necessitated by the fact that the Second World War had caused dwindling farm production as farms were neglected.³³ It was therefore necessary to ensure that the land would be used for the benefit of

²⁴ Section 11 (1), *Land Control Act (1967)*

²⁵ Ojienda T, *Conveyancing principles and practice*, 220.

²⁶ Coldham S., Land control in Kenya, *vol. 22. No. 1, journal of African law*, 1978, 69.

²⁷ Coldham S., Land control in Kenya, *vol. 22. No. 1, journal of African law*, 1978, 70.

²⁸ Coldham S., Land control in Kenya, *vol. 22. No. 1, journal of African law*, 1978, 70.

²⁹ Central Provincial Land Appeals Board minutes (27/1/74), Land Registry, Nairobi.

³⁰ Central Provincial Land Appeals Board minutes (27/1/74), Land Registry, Nairobi.

³¹ Central Provincial Land Appeals Board minutes (27/1/74), Land Registry, Nairobi.

³² Ojienda T, *Conveyancing principles and practice*, 23.

³³ Ojienda T, *Conveyancing principles and practice*, 24.

the country.³⁴ As land adjudication and consolidation programme made progress in the middle of the nineteen- fifties, it became clear that the traditional system of land tenure would have to be replaced by a system based on the registration of individual titles. Customary law was seen as an obstacle to agricultural development as an individual farmer had little incentive to develop his holding under customary arrangements.³⁵ The Swynnerton Plan proposed that the African farmer be provided with such security of tenure through an indefeasible title as this would encourage him to invest his labour and profits into the development of his farm and would enable him to offer it as credit against financial credits.³⁶ That the farmers owning unviable plots or unworkable fragments to sell them off to neighbours who would be in a position to develop them more effectively.³⁷

However, others viewed this possibility with less equanimity.³⁸ The East African Royal Commission, while recommending the adjudication and registration of individual titles in suitable areas of Kenya, recognized the need for some sort of control over the power of the registered proprietor to deal with his land as he liked.³⁹ The Commission failed to give concrete reasons to support their proposal and thus it was left to the Working Party on African Land Tenure to make recommendations in that regard.⁴⁰ It reported in the summer of 1958 and the two Bills it proposed became law in 1959, as Native Land Registration Ordinance and the Land Control (Native Lands) Ordinance.⁴¹ The aim was to prevent the Africans after registration from sub-dividing, selling and living on the land without adequately developing it.⁴² It further provided for establishment of Divisional and Provincial Land Control Boards without whose consent dealings in land would be void.⁴³ Under the Land Control (Native Lands) Ordinance, all transactions in land were to be controlled except three types of transactions: transmissions of land unless it is involved sub-division; foreclosures; and transactions made in favour of the Government or Trust Board.⁴⁴ Consent would not be

³⁴ Ojienda T, *Conveyancing principles and practice*, 24.

³⁵ Coldham S., Land control in Kenya, vol. 22. No. 1, *journal of African law*, 1978, 63.

³⁶ Swynnerton, R.J.M., *A plan to intensify the development of African agriculture in Kenya*, 1954, s. 13.

³⁷ Swynnerton, R.J.M., *A plan to intensify the development of African agriculture in Kenya*, s. 13.

³⁸ Coldham S., Land control in Kenya, 63.

³⁹ Coldham S., Land control in Kenya, 64.

⁴⁰ Coldham S., Land control in Kenya, 64.

⁴¹ Coldham S., Land control in Kenya, 64.

⁴² Ojienda T, *Conveyancing Principles and practice*, 25.

⁴³ Ojienda T, *Conveyancing Principles and practice*, 25.

⁴⁴ Ojienda T, *Conveyancing Principles and practice*, 26.

granted to any transaction which would cause the creation of smaller pieces of land and reduce productivity.⁴⁵

The Land Control (Native Lands) Ordinance was later renamed the Land Control (Special Areas) Ordinance and it empowered the Provincial Boards not to give its consent to any transaction whereby any separate parcel of land would be created which fell below the minimum area laid down for that division.⁴⁶ The Land Control (Special Areas) Regulations, 1961 repealed and replaced the Land Control (Special Areas) Ordinance, 1959, and were themselves repealed and replaced by the Kenya (Land Control) (Transitional Provisions) Regulations, 1963 which together with the Constitution, formed the system of land control until 1967.⁴⁷ The Divisional Boards under these regulations again were empowered to give or refuse consent to controlled transactions in their absolute discretion.⁴⁸ When the 1963 Regulations were repealed in 1967, they were replaced by the Land Control Act, 1967, the effect of which was to introduce a uniform and more policy-oriented system of land control.²³ It is this Act that is in use to date.

There are various challenges posed by the Act. Section 6 (1) has been the subject of many legal disputes owing to the fact that many a people dealing in agricultural land have negligently, ignorantly or otherwise failed to seek the consent of the Land Control Board and, therefore, rendered their transactions void for all purposes under the Act.⁴⁹ It is silent on the question of improvements and thus does not address the issue of compensation for improvements on the land after a transaction has been rendered void. Section 7 only provides for recovery of the money or valuable consideration paid. This results to a problem because more often than not the buyer goes to court to recover compensation. Usually, the buyer has been in possession for quite a number of years during which he has erected buildings on the land and transformed an otherwise neglected piece of land into a fertile, cultivated land.⁵⁰ To ask him to leave, with no compensation at all for all his efforts and expenses is morally

⁴⁵ Ojienda T, *Conveyancing Principles and practice*, 26.

⁴⁶ Coldham S., *Land control in Kenya*, 65.

⁴⁷ Coldham S., *Land control in Kenya*, 66.

⁴⁸ Constitution of Kenya, 1963, s. 219

²³ Coldham S, *Land control in Kenya*,

66.

⁴⁹ Ojienda T. *Conveyancing principles and practice*, 221.

⁵⁰ Mohammed K, 'The Land Control Act, 1967, as amended with particular reference to the question of compensation for improvements', published LL. B dissertation, University of Nairobi, 1982, 30.

unjustifiable.⁵¹ He may be a trespasser in the eyes of the law, but he was there with the consent of the owner and under an agreement albeit void and had no intention to trespass.⁵² Drawing from many cases, compensation for improvements is necessary. In *Chemelil Ltd. V Makoingi Limited*⁵³ it was unanimously held that the object of section 7 is restitution, i.e. to restore the parties back to their original position. Shouldn't compensation therefore be paid to the buyer in order to put him in the position he was before the agreement?⁵⁴ Secondly, and in the same case, it was held that either party could offset against the money to be refunded, any valuable consideration given for it, and which did not arise under an agreement made void.⁵⁵ Clearly a claim for compensation does not at all arise under the agreement made void but rather, such a claim arises independently and not because of the void agreement. So that if the vendor can obtain mesne profits why shouldn't the buyer offset against this compensation for improvements?⁵⁶ It will thus be significant to look into whether this law adequately addresses the consequences of failure to obtain consent of the Land Control Board.

1.2 Statement of the Problem

The Land Control Act⁵⁷ requires that a person obtains consent of the Land Control Board for any controlled transaction in agricultural land failure of which it is rendered void. Once a transaction has been rendered void, only money or valuable consideration that was paid is recoverable as a debt by the buyer. This has been the subject of many legal disputes owing to the fact that many a people dealing in agricultural land have negligently, ignorantly or otherwise failed to seek the consent of the Land Control Board and, therefore, rendered their transactions void for all purposes under the Act.⁵⁸ It is not rare that a vendor who initially, sincerely and in good faith sold his land to an innocent buyer, and went in search of brighter prospects in the urban areas realizes that there is this magic word in the form of section 6(1)

⁵¹ Mohammed K, 'The Land Control Act, 1967, as amended with particular reference to the question of compensation for improvements', published LL. B dissertation, University of Nairobi, 1982, 30.

⁵² Mohammed K, 'The Land Control Act, 1967, as amended with particular reference to the question of compensation for improvements', published LL. B dissertation, University of Nairobi, 1982, 31.

⁵³ (1967) E.A. 166

⁵⁴ *Chemelil Ltd. V Makoingi Limited*, (1967) E.A. 166.

⁵⁵ *Chemelil Ltd. V Makoingi Limited*, (1967) E.A. 166.

⁵⁶ *Chemelil Ltd. V Makoingi Limited*, (1967) E.A. 166.

⁵⁷ Cap 302 Law of Kenya, 1967.

⁵⁸ Ojienda T. *Conveyancing principles and practice*, 221.

which can be pleaded with the result that the land he sold, say, five or six years ago, and which by this time has shot up in value, will be restored to him.⁵⁹ Not only is the land reverted to the vendor but he is also unjustly enriched through the improvement thereon. The buyer on the other hand can only recover the money or valuable consideration he had paid and is barred by the void transaction from bringing an action for compensation for improvements.

1.3 Justification of the Study

It is not surprising that when such disputes are brought to court some have tried to circumvent the provisions of the Act whereas others have helplessly refrained from any bold attempts to bypass the provisions of this Act.⁶⁰ Most Judges in their decisions have admitted that this provision of the Act causes an injustice but their hands are tied.⁶¹ There is an ambiguity in this law in the interests in land and especially because of the requirement of consent in controlled transactions affecting agricultural land. Thus this study appraises the legal consequences of failure to obtain consent in controlled transactions affecting agricultural land as interpreted by different courts. Unfortunately, these problems are unlikely to decrease in the near future unless critical measures are taken by the courts in general and Parliament in particular to address the problem. This Act was repealed on 26th April 2012 pursuant to Section 109 of the Land Registration Act together with other land laws.⁶² It was however omitted from the list of repealed laws.⁶³ The present study therefore attempts to examine the legal consequences of failure to obtain consent with special reference to the injustices caused.

1.4 Research Objectives

The objectives that this study will seek to address are as follows:

⁵⁹ Mohammed K, 'The Land Control Act, 1967, as amended with particular reference to the question of compensation for improvements', published LL. B dissertation, University of Nairobi, 1982, 35.

⁶⁰ Mohammed K, 'The Land Control Act, 1967, as amended with particular reference to the question of compensation for improvements', published LL. B dissertation, University of Nairobi, 1982, 36.

⁶¹ Judge Kwach JA in *Jacob Minjire Gichuki V Agricultural Finance Corporation* stated that 'whether the Act is being used by unscrupulous people to defraud innocent citizens is a matter of Parliament, their duty as judges is to interpret the law and apply it as it stands. They are not concerned with the consequences.'

⁶² Gichuhi Allen Waiyaki, 'A Litigator's Guide to Topical Land Issues under The Land Acts', 2.

⁶³ Gichuhi Allen Waiyaki, 'A Litigator's Guide to Topical Land Issues under The Land Acts', 3.

1. To assess the adequacy of the law that addresses the consequences of failure to obtain consent of the Land Control Board in controlled transactions affecting agricultural land.
2. To examine the legal consequences of failure to obtain consent of the Land Control Board in controlled transactions affecting agricultural land.
3. To analyze the approaches taken by the Courts in reaching decisions concerning the consequences of failure to obtain consent of the Land Control Board in controlled transactions affecting agricultural land.

1.5 Research Questions

This study seeks to conduct the following research questions:

1. Whether the law adequately addresses the consequences of failure to obtain consent of the Land Control Board in controlled transactions affecting agricultural land?
2. What are the legal consequences of failure to obtain consent of the Land Control Board in controlled transactions affecting agricultural land?
3. What are the approaches taken by the courts in reaching decisions concerning the consequences of failure to obtain consent of the Land Control Board in controlled transactions affecting agricultural land?

1.6 Hypothesis

The law does not adequately address the consequences of failure to obtain consent of the Land Control Board in controlled transactions affecting agricultural land and as a result it has occasioned so many injustices to buyers. Moreover, this law is ambiguous in nature and as a result courts have taken different approaches in addressing the disputes that arise.

1.7 Literature Review

Mohammed Khan through analysis of the operation of the Land Control Act stated that it is not disputed, and is accepted by nearly all the Judges that the Land Control Act can and in some cases has caused a lot of injustice.⁶⁴ It is not rare that a seller who initially, sincerely and

⁶⁴ Mohammed K, 'The Land Control Act, 1967, as amended with particular reference to the question of compensation for improvements', published LL. B dissertation, University of Nairobi, 1982, 35.

in good faith sold his land to an innocent buyer, and went in search of brighter prospects in the urban areas realizes that there is this magic word in the form of section 6(1) of the Act which can be pleaded with the result that the land he sold, say, five or six years ago, and which by this time has shot up in value, will be restored to him.⁶⁵ He however, has not analyzed how the issue of compensation of improvements causes an injustice to the purchaser. This paper acknowledges this issue and discusses on how it causes an injustice to the purchaser.

Professor Tom Ojienda states that section 6 (1) of the Act has been the subject of many legal disputes owing to the fact that many a people dealing in agricultural land have negligently, ignorantly or otherwise failed to seek consent of the Board and, therefore, rendered their transaction void for all purposes.⁶⁶ He further identifies some of the issues emanating from this provision which include the inability to: recover damages for breach of contract and for improvements subsequently undertaken on the property.⁶⁷ He does not discuss these issues in depth. Both the vendor's and the purchaser's advocates have fundamental responsibilities in various transactions in land and most of them fail to inform their clients of their failure to discharge certain responsibilities such as obtaining consent of the Board. Professor Ojienda has not discussed the same in his treatise. They play a vital role and should face the repercussions of such omissions. This study will discuss this issues and show the various ways in which it causes an injustice to the Purchaser.

Emily Osiemo analyses section 6 (1) of the Land Control Act which provides that any transactions in agricultural land is void for all purposes unless the Land Control Board for the land control area in which the land is situated has given its consent.⁶⁸ She states that it leads to loss of time and money in most instances where it is not clear where the land is agricultural or not.⁶⁹ The necessity of the consent from the Land Control Board should be revised to only make lack of consent voidable as opposed to void because this will not only minimize cases of fraudulent dealings but also save the public a lot of money in litigation and time in

⁶⁵ Mohammed K, 'The Land Control Act, 1967, as amended with particular reference to the question of compensation for improvements', published LL. B dissertation, University of Nairobi, 1982, 35.

⁶⁶ Ojienda T. *Conveyancing principles and practice*, 221.

⁶⁷ Ojienda T. *Conveyancing principles and practice*, 224.

⁶⁸ Section 6 (1), *Land Control Act* (1967)

⁶⁹ Osiemo E, 'The role of the Kenya Land Control Boards: should they be disbanded?' Academia.edu, 17.

transactions.⁷⁰ Her opinion is that this section indirectly results to injustices. She however, does not analyze some of these injustices caused which this paper will do in depth.

From the aforementioned literature, the legal consequences of failure to obtain consent have not been discussed to a large extent. The literature available mostly discusses the section 6(1) of the Act. Furthermore, the literature available is based on the old Constitution by referring to provincial boards which ceased to exist when the New Constitution of Kenya was promulgated.

1.8 Research Methodology

This study approaches the subject matter through literature review on interests in land and especially because of the requirement of obtaining consent of the Board in transactions concerning agricultural land. To achieve this, primary and secondary sources are used in the study. The primary sources include: The Constitution of Kenya 2010, Acts of Parliament of Kenya, policies, International Instruments and case law. Secondary sources used include: Books, Journal Articles, conference papers and online journals.

1.9 Limitations

This study was limited by time constraints. This study has been carried out submitted within the stipulated timeframe. As a result, the study was limited to desk research.

1.10 Chapter Breakdown

The research study is divided into 5 chapters:

a) Chapter One- Introduction to the Study

This chapter provides an introduction to the study, background, statement of the problem, objectives, significance of the study, literature review and theoretical framework.

b) Chapter Two- Theoretical Framework

This chapter provides an in-depth review of the theoretical framework on the justification on the freedom to contract in relation to the requirement to obtain consent

⁷⁰ Osiemo E, 'The role of the Kenya Land Control Boards: should they be disbanded?' Academia.edu, 17.

of the Land Control Board in controlled transactions involving agricultural land. It will expound on the theories of John Locke and Jeremy Bentham.

c) Chapter Three- A Legal Appraisal of the Requirement to Obtain Consent of the Land Control Board

This chapter reviews the legislative framework that pertains to the interest in and disposition of land.

d) Chapter Four- A Review of Court Decisions

This Chapter reviews different courts' decisions on the interpretation of section 6(1) of the Act to show the injustices caused.

e) Chapter Five- Summary of Findings, Conclusions and Recommendations

This chapter provides a summary of the study, findings, conclusions and makes recommendations on measures to curb the injustices caused as a result of section 6 (1) of the Act. It draws from the findings of chapter three and four.

CHAPTER TWO

THEORETICAL FRAMEWORK

2.1 Introduction

This chapter proffers an analysis of the legal consequences of failure to obtain consent of the Board in controlled transactions affecting agricultural land while pointing out to various theories. This research will rely on the following theories: the labour theory and the utilitarian theory. However, the labour theory will inform this research more. These theories will thus anchor the vendor's and buyer's freedom to contract and depict how the legal consequences of failure to obtain consent of the Board in controlled transactions affecting agricultural land curtail this freedom. The requirement to obtain consent of the Board exemplifies a myriad of issues that affect the parties necessitating legal address.

The hypothesis of this dissertation is that the law does not adequately address the consequences of failure to obtain consent of the Board in controlled transactions affecting agricultural land and as a result it has occasioned so many injustices to the buyer. The questions then that arise are: why should the failure to obtain consent in controlled transactions affecting agricultural land render the transaction void and not voidable? Why should one be entitled only to the money or valuable consideration paid and not compensation to any improvements made on the land? What are the theoretical underpinnings of the legal consequences of failure to obtain consent of the board in controlled transactions affecting agricultural land? This chapter thus seeks to answer these questions. In this regard, the chapter looks at the legal consequences of failure to obtain consent. Property rights are rights in things.

According to the labour theory, property is a natural right and people enter into society to preserve property.⁷¹ As developed by its foremost exponent, the seventeenth-century philosopher John Locke, the labour theory assumes a world in a state of nature, without private property ownership.⁷² It seeks to explain how unowned natural resources are transformed into private property owned by one person through four basic steps: every person

⁷¹ Kariuki F *et al*, *Property law*, 33.

⁷² Waltoz, Hamilton, *Property- according to Locke*, 41.

owns his body; thus, each person owns the labour that his body performs; so, when a person labours to change something in nature for his benefit, he 'mixes' his labour with this thing; and by this mixing process, he thereby acquires rights in the thing.⁷³ He argued that God gave the world to men in common and reason to use it to the best advantage of life and convenience.⁷⁴ Man has a property in his own person; this is something that nobody else has any right to and thus the labour of his body and the work of his hands, are strictly his.⁷⁵

Critics of this theory observe that it leaves some questions unanswered such as: how much private property can an individual acquire under this theory? How much labour need one expend before he or she becomes entitled to the thing and does labour have to reflect the value added to the resource in question?⁷⁶ Locke only addresses the first question in his theory by stating that, if the user does not use the resources then the resources become common again despite his labour.⁷⁷ Regarding the second question, it is suggested that the theory should only permit a person to receive the value of his or her labour adds to a thing, and not the thing itself.⁷⁸ 'Moreover, the theory assumes abundant supply of land and other natural resources that are unowned. This is not true as these resources are anything but infinite and very few resources are unowned today.⁷⁹ The Vendor has property rights to his land because of the labour he mixes it with thus the right to transfer his property rights to others, either during his lifetime or by operation of the law.⁸⁰ The law that renders the transaction void for failure to obtain consent infringes on the vendor's right to transfer his property. The law can only limit this right but cannot curtail it. Thus the transaction should be rendered voidable instead of voidable. By the transaction being rendered void it is assumed that the transaction never existed at all- *a nullity from the beginning*.⁸¹ This should not be the case because the contract was entered into by the vendor who had the right to transfer his property to the buyer. Instead

⁷³ Sprankling J, *Understanding property law*, 15.

⁷⁴ Locke John, *Second treatise of government*, Bennet J (eds) 2010, para 124.

⁷⁵ Locke, *Second treatise of government*, para 126.

⁷⁶ Panesar, *Theories of private property in modern property law*, 125.

⁷⁷ Panesar, *Theories of private property in modern property law*, 125.

⁷⁸ Kariuki F *et al*, *Property law*, 35.

⁷⁹ Kariuki F *et al*, *Property Law*, 9.

⁸⁰ Kariuki F *et al*, *Property Law*, 9.

⁸¹ Guest, A. G, *Anson's Law of Contract*, 26th ed. (Oxford University Press, 1986), 17.

it should be rendered voidable. "Voidable" is used in the broad sense of the right (power) to bring a contract to an end.⁸²

Based on this theory the buyer is not only entitled to the money or valuable consideration he paid but also to compensation for improvements he made on the land. This is because he has expended his labour on the land thus he has private rights over it. Locke concluded that as much as a man tills, plants, improves, cultivates and can use the product of, so much is his property. He by his labour does, as it were, enclose it from the common.⁸³ The buyer acquires property rights to the improvements he makes on the land. Therefore, the labour theory justifies that the legal consequences of failure to obtain consent are unjust to both the Vendor and the Buyer. Because the Vendor has the right to transfer which should not be infringed upon whereas the Buyer is entitled to compensation for the improvements he made on the land which is his property because he mixed his labour with it.

In this study, the requirement that the Vendor must obtain consent for any transaction in agricultural land infringes on his property rights. He possesses the rights to use, exclude and transfer his property. The right to transfer gives rise to the freedom to contract. The vendor should be able to transfer his property without any interference or limitations from the government. According to the social contract theory, the Vendor did not surrender all his rights to the government but only the right to preserve and maintain order. He thus retained the right to his property which is an inalienable right. The duty of the government is only to uphold and protect his property rights. Therefore, rendering the transaction void infringes on the Vendor's property rights. This is because he is free to dispose his property as he likes without anyone's permission. The authority in this case which is the law has a duty to uphold and protect this right and not to curtail it.

The modern father of utilitarianism was Jeremy Bentham, an eighteenth century English philosopher who argued that property and law are born together and die together, and that without law there can be no property.⁸⁴ Property and law are born together and die together, and that without law there can be no property. That property rights are recognized by law and limited by law to serve human values.⁸⁵ For Bentham, the role of the legislator drafting a

⁸² Holmes O.W, *The common law*, (1881), 315.

⁸³ Tully J, *A discourse on property*, 119.

⁸⁴ Sprankling J, *Understanding property law*, 17.

⁸⁵ Bentham J, *The theory of legislation*, Oceana Publications, 69.

property law framework is to do what is essential to the happiness of society; when he disturbs it, he always produces a proportionate sum of evil.⁸⁶ Accordingly, property rights are allocated and defined in the manner that best promotes the general welfare of the society.⁸⁷ Criticisms against utilitarian theory are premised on its assertion that property is a means to an end, happiness.⁸⁸ We can predict only some of the consequences of our actions and have no way of measuring happiness which makes the weighing of consequences seems more often a matter of vague intuition than of scientific calculation.⁸⁹ Bentham said that happiness is pleasure and the absence of pain which lead us to ask the question is cheerful hedonism really the only way of life that is valuable in itself?⁹⁰ Others object that the largest total of happiness might be compatible with unjust inequalities in its distribution, or with policies that trample on people's rights.⁹¹

Property laws can bring injustice to some groups while bringing more wealth to others and therefore, a utilitarian defense of private property is in trouble unless it can show that everyone is better off, or at least that no one is worse off.⁹² The function of the law is to recognize and limit property rights of a property owner to serve human values. The law on the requirement to obtain consent does not serve human value because not only does it infringe on the vendor's right to property but also causes an injustice to the buyer by rendering the transaction void. Property laws should be formed in light of the happiness of the society but this law in turn produces a proportionate evil. Some vendor's fail to obtain the consent of the land and after the expiry of the period in which consent should be sought to go to court and have the land restored back to them. On the other hand, the buyer is only entitled to the money that he paid and not entitled to any compensation for the improvements he made on the land. This does not cause any happiness at all as the buyer is deprived what is his. Therefore, this does not promote the general welfare of the society as the Vendor is unjustly enriched at the expense of the buyer because the transaction is rendered void for all purposes. Agricultural land is vital because it produces most of the food that is consumed, by the law

⁸⁶ Bentham J, *The theory of legislation*, 69.

⁸⁷ Sprankling J, *Understanding property law*, 17.

⁸⁸ Kariuki F, *Property law*, 40.

⁸⁹ Edwards P, *Utilitarianism and its critics*, Macmillan publishing company, New York, 1990, 3.

⁹⁰ Edwards P, *Utilitarianism and its critics*, 5.

⁹¹ Edwards P, *Utilitarianism and its critics*, 5.

⁹² Waldron J, *The right to private property*, Clarendon Press, Oxford, 1988, 18.

limiting the vendor's right to transfer his property to a person who is more likely to make better use of it for the benefit of the public.

2.2 Conclusion

The freedom to contract is justified on the basis of the labour and utilitarian theories. This chapter has argued that a property owner has property rights to his property which includes the right to use, exclude and transfer his property. This is based on the labour theory in that, when an individual mixes his labour with the property and as a result he gains rights to it. This right should not be curtailed by the law or the authority based on the social contract theory but should instead should be upheld and protected. Further according to the utilitarian theory, property and the law are born together and thus the law should be drafted and enacted in such a manner that it promotes happiness to the society. Having illustrated the justifications for the requirement to obtain consent of the Board infringing on an individual's property rights and freedom to contract, it is now important to examine the law that requires this. Chapter three will therefore examine the law that requires one to obtain the consent of the Land Control Board.

CHAPTER THREE

A LEGAL APPRAISAL OF THE CONSEQUENCES OF FAILURE TO OBTAIN CONSENT

3.1 Introduction

This chapter is devoted to appraising the legal and institutional frameworks that govern various forms of interests in land and in particular those transactions that require consent to be obtained. It will grapple with fundamental provisions of various applicable laws, highlighting challenges in various laws to obtaining consents in different land transactions.

3.2 The Constitution and Policies

3.2.1 The National Land Policy, Sessional paper No. 3 of 2009

This National Land policy is also referred to as Sessional Paper No. 3. This paper discusses the land question which resulted in environmental, social, economic and political problems including deterioration in land quality, squatting and landlessness, disinheritance of some groups and individuals, urban squatter, under-utilization and abandonment of agricultural land, tenure insecurity and conflict.⁹³ This Sessional Paper was thus formulated to provide an overall framework and define the key measures required to address the critical issues of land administration, access to land, land use planning, restitution of historical injustices, environmental degradation, conflicts, unplanned proliferation of informal urban settlements, outdated legal framework, institutional framework and information management.⁹⁴

3.2.2 The Constitution of Kenya, 2010

The Constitution of Kenya was promulgated on the 27th of August 2010 it is one of the most significant pieces of legislation since independence. Article 40 provides for the protection of right to property.⁹⁵ It acknowledges every person's right, either individually or in association

⁹³ *Sessional Paper No 3 of 2009 on National Land Policy*, 1.

⁹⁴ *Sessional Paper No 3 of 2009 on National Land Policy*, 2.

⁹⁵ <http://www.ikm.co.ke/export/sites/ikm/news/articles/2012/downloads/IKM-Advocates-New-Land-Laws-inKenya.PDF> Accessed 16/11/2018, 2:52 p.m.

with others, to acquire and own property of any description in any part of Kenya.⁹⁶ Parliament is limited from enacting laws that permits the state from arbitrarily depriving a person of any interest in or right over any property.⁹⁷

Article 60 spells out the principles of land policy. It provides for the manner in which land in Kenya shall be held, used and managed which is: equitable, efficient, productive, sustainable and in accordance with the principles of land policy. Article 61 acknowledges that all land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals. Types of land in Kenya are classified as public, community or private in Article 61, 62, 63 and 64 respectively. Most notably is the National Land Commission which is established by Article 67 with its functions listed therein. Article 68 obligates Parliament to revise, consolidate and rationalize existing land laws besides enacting legislation to: regulate private land acreage, regulate conversion of land, regulate matrimonial property and protect access to all public land. Article 162 (2) (b) mandates parliament to establish courts with the status of High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land.

3.3 Acts of Parliament

3.3.1 The Land Control Act (Cap 302 of 1967)

The Land Control Act was enacted with an aim of regulating, by means of public control, the manner in which the landowner or the owner of an interest in land is supposed to deal with it.⁹⁸ Virtually every transaction affecting agricultural land within a land control area requires the consent of the appropriate Land Control Board and, unless that consent has been given, it is void for all purposes.⁹⁹ The subject matter of this Act is agricultural land that is not within a municipality or township or land in the Nairobi Area that is declared by the Cabinet Secretary, by notice in the Gazette, to be agricultural land.¹⁰⁰

The crux of the Act is its part III that provides for the control of dealings in agricultural land.¹⁰¹ This part defined a controlled transaction as any dealing in any agricultural land.¹⁰²

⁹⁶ Article 40 (1), *Constitution of Kenya* (2010).

⁹⁷ Article 40 (1), *Constitution of Kenya* (2010).

⁹⁸ Ojienda T, *Conveyancing principles and practice*, 216.

⁹⁹ Section 6(1), *Land Control Act* (1967).

¹⁰⁰ Section 2, *Land Control Act* (1967)

¹⁰¹ Ojienda T, *Conveyancing principles and practice*, 217.

The Act provides that for any transaction affecting agricultural land is 'void for all purposes' unless the Land Control Board has given its consent.¹⁰³ The upshot of this provision is that parties to a transaction pertaining to an agricultural land must apply and obtain consent of the Board before they enter into the transaction.¹⁰⁴ If the consent of the Board is not sought and/obtained, then any money paid in a transaction that has thus been rendered void only that money is recoverable as a debt by the buyer from the vendor.¹⁰⁵

An application to obtain consent must be made within six months.¹⁰⁶ If no application is made or if the Board refuse its consent or does not give its decision within the stipulated timeframe of six months, then the transaction is void.¹⁰⁷

Since 1967, there have been only two amendments made to it. The first amendment was as regards the 'controlled transaction' definition. There was a dispute as to whether trust lands fell under the category of controlled transactions. The second amendment came in the form of section 8 which replaced the rule in section 6 (2) (a) which prescribed the deadline period for obtaining consent to be three months after which the agreement became void.¹⁰⁸ The amended provision now requires that 'an application for consent be made within six months which may be extended by the High Court where it deems fit.'¹⁰⁹

Despite these amendments, the Act has been seen to cause a lot of injustices and in particular section 6(1) and 7 on the legal consequences of failure to obtain consent. Any transaction affecting agricultural land is rendered void and the buyer is only entitled to the consideration he paid respectively. These issues will further be discussed in chapter 4 of this paper in which it will be depicted that this Act is in dire need of amendments if it is to meet its objective.

3.3.2 The Land Act, (Act No. 6 of 2012)

The Land Act was enacted to give effect to Article 68 of the Constitution, to revise, consolidate and rationalize land laws; to provide for the sustainable administration and

¹⁰² Section 6 (1), *Land Control Act* (1967)

¹⁰³ Section 6 (1), *Land Control Act* (1967)

¹⁰⁴ Ojienda T, *Conveyancing principles and practice*, 217.

¹⁰⁵ Section 7, *Land Control Act* (1967)

¹⁰⁶ Section 8 (1), *Land Control Act* (1967)

¹⁰⁷ Section 8 (2) *Land Control Act* (1967)

¹⁰⁸ Mohammed K, 'The Land Control Act, 1967, as amended with particular reference to the question of compensation for improvements', published LL. B dissertation, University of Nairobi, 1982, 41.

¹⁰⁹ Section 8 (1), *Land Control Act* (1967)

management of land and land based resources, and for connected purposes.¹¹⁰ Pursuant of section 161 of this Act the Wayleaves Act and the Land Acquisition Act were repealed.

The Act provides for the requirement of various consents. It provides that no transfer, assignment, lease or sublease shall be registered if the charge contains a condition, express or implied that prohibits the charger until the written consent of the charge has been produced to the register. Any transaction affecting a matrimonial property requires spousal consent¹¹¹ in instances where the proprietor may charge any land or lease to secure the payment of an existing, future or a contingent debt.

Surprisingly, this Act does not provide for the Land Control Board consent which is an important aspect when it comes to conveyancing. This Act was deemed to have consolidated various Land Acts but this may just not be the case in reality as it excluded the Land Control Act. It was repealed by Parliament on 26th April 2012 pursuant to section 109 of the Land Registration Act but strangely not included in the list of Repealed Acts.¹¹² From this it can clearly be depicted that one of the factors that the Land Control Board considers when granting consent in controlled transactions affecting agricultural land has already been incorporated in this Act.

3.3.4 The Land Registration Act (Act No. 3 of 2012)

The Land Registration Act was enacted to revise, consolidate and rationalize the registration of titles to land, to give effect to the principles and objects of devolved government in land registration, and for connected purposes.¹¹³ This Act further simplified the Land Adjudication process. This Act provides for various forms of consents. It requires that the lessee must obtain the written consent of the lessor for any transfer, sublet, charge or part with the possession of any of the leased land.¹¹⁴ Consent of the first charge must be obtained before the second or subsequent charge is created.¹¹⁵ A borrower is required to obtain consent of the lender to transfer, assign or lease the land or in the case of a lease, sublease, no transfer,

¹¹⁰ Preamble, *Land Act* (Act No. 6 of 2012)

¹¹¹ Section 79 (3), *Land Act* (Act No. 6 of 2012): a charge over a matrimonial home shall only be valid if the form of charge is executed by the chargor and any spouse of the chargor living in the matrimonial home or there is evidence to indicate that it has been assented to by the spouse(s).

¹¹² Gichuhi Waiyaki Allen, 'A Litigator's Guide to Topical Land Issues under The Land Acts', 2019, 2.

¹¹³ Preamble, *Land Registration Act* (Act No. 3 of 2012)

¹¹⁴ Section 39, *Land Registration Act* (Act No. 3 of 2012)

¹¹⁵ Section 57, *Land Registration Act* (Act No. 3 of 2012)

assignment, lease or sublease shall be required until the written consent of the lender has been provided to the Registrar.¹¹⁶ A disposition that is inconsistent with a caution¹¹⁷ shall not be registered while the caution is still registered except with the consent of the cautioner or by a court order.¹¹⁸

This Act also does not discuss the Land Control Board consent which is a sad situation because it is vital when it comes to transactions concerning agricultural land. However, this could be depicted from the fact that the requirement to obtain consent in controlled transactions is provided for in the Land Control Act Cap. 302. For a transaction to be registered, consent has to be obtained as required by the said Act.

3.3.5 The National Land Commission Act (Act No. 5 of 2012)

The National Land Commission Act makes further provision as to the functions and powers of the National Land Commission, qualifications and procedures for appointments to the Commission; to give effect to the objects and principles of devolved government in land management and administration, and for connected purposes.¹¹⁹ Some of the key areas over which the Commission can exercise powers include: management of public land; recommendations on national land policy; monitoring land use planning and natural resources; alienation of public land with the consent of the national and county governments; and developing and encouraging alternative land dispute resolution mechanisms.¹²⁰

This Act covers only one type of consent. It requires the Commission on behalf of and with the consent of the national and county government, alienates public land.¹²¹ It does not provide for the consent regarding agricultural land which is an important factor.

3.3.6 The Environment and Land Court Act (Act No. 19 of 2011)

The Environment and Land Court Act gives effect to Article 162(2) (b) of the Constitution; to establish the Environment and Land Court to hear and determine disputes relating to the

¹¹⁶ Section 59, *Land Registration Act* (Act No. 3 of 2012)

¹¹⁷ A caution forbids the registration of dispositions and the making of entries.

¹¹⁸ Section 72, *Land Registration Act* (Act No. 3 of 2012)

¹¹⁹ Preamble, *National Land Commission Act* (Act No. 5 of 2012)

¹²⁰ <http://www.ikm.co.ke/export/sites/ikm/news/articles/2012/downloads/IKM-Advocates-New-Land-Laws-inKenya.PDF> accessed on 16/11/2018, 2:38 p.m.

¹²¹ Section 5 (2), *Land Commission Act, (Act No. 5 of 2012)*

environment and the use and occupation of, and title to, land, and to make provision for its jurisdiction functions and powers.¹²² Its principal objective is to enable the court to facilitate the just, expeditious, proportionate and accessible resolution of dispute.¹²³ It has original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (2) (b) of the Constitution.¹²⁴

3.4 Case Law

The courts in Kenya have had a myriad of opportunities to interpret salient legal issues arising from the application of the Land Control Act.¹²⁵ In *Rosebella Iranmwenya Mirieh v Mwangi Ngugi* the plaintiff paid the substantial amount of the purchase price and was given possession of the suit property on signing the agreement of sale. He averred that the Defendant willfully breached the agreement of sale and stalled the completion of the transaction. He filed a suit seeking an action of specific performance.¹²⁶ ‘The jurisdiction to order specific performance is based on the existence of a valid, enforceable contract...it will not be ordered if the contract suffers from some defect, such as failure to comply with formal requirements or mistake or illegality, which makes the contract invalid or unenforceable.’¹²⁷ The court held that the failure to obtain the necessary consent automatically vitiated the transaction which was subject to a controlled transaction. He found that the transaction in that case was void, invalid and therefore the remedy of specific performance was not available to the plaintiff.¹²⁸

3.5 Institutional Framework

3.5.1 Land Control Board

The Land Control Act establishes the Land Control Board, the Provincial Land Control Appeals Board or the Central Land Control Appeals Board. The Land Control Board is established by a notice in the Gazette by the Cabinet Secretary in every control area to control

¹²² Section 5, *Land Commission Act, (Act No. 5 of 2012)*

¹²³ Section 5 (2), *Land Commission Act, (Act No. 5 of 2012)*

¹²⁴ Section 13 (1), *Environment and Land Court Act (Act No. 9 of 2011)*

¹²⁵ Ojienda T, *Conveyancing principles and practice*,

221.

¹²⁶ [2017] eKLR

¹²⁷ Chitty J, *Chitty on Contract*, 30th edition, volume 1, para. 27.

¹²⁸ *Rosebella Iranmwenya Mirieh v Mwangi Ngugi*, [2017] eKLR

specified transactions in agricultural land.¹²⁹ The Act also establishes the Appeals Boards to which an applicant whose transaction has been denied consent by a Land Control Board may lodge an appeal.¹³⁰ The Cabinet Secretary is mandated to establish for each province a Provincial Land Control Appeals Board.¹³¹ Any appeals should be made within thirty days to the provincial land control appeals board for the province in which the land in question is situated.¹³² This board has absolute discretion to hear and determine all appeals made to it under the necessary provisions and subject to the right to appeal to the Central Appeals Board. Its decision is final.¹³³

The Central Land Control Appeals Board is established pursuant to section 12 of the Land Control Act. It is mandated to receive appeals from the Provincial Land Control Board within thirty days of the copy of the Provincial Land Control Board's decision being delivered or posted.¹³⁴

3.6 International Instruments

3.6.1 Universal Declaration of Human Rights (1948)

This instrument was adopted in 1948 and it recognizes the right to property as a human right with two components: everyone has a right to own property alone as well as in association with others; and no one shall be arbitrarily deprived of his property.¹³⁵ Property is viewed as a bundle of sticks, rights or entitlements that an owner has in a thing which includes the right to exclude others, the right to possess and use and the right to transfer.

3.6.2 International Covenant on Economic, Social and Cultural Rights (1976)

The right to property is not enumerated in this instrument; it is implicitly protected as part of the right to housing, the right to food, and the right to an adequate standard of living.¹³⁶ For

¹²⁹ Section 5, *Land Control Act* (1967)

¹³⁰ Ojienda T, *Conveyancing principles and practice*, 220.

¹³¹ Section 10, *Land Control Act* (1967)

¹³² Ojienda T, *Conveyancing principles and practice*, 220.

¹³³ Section 11(1), *Land Control Act* (1967)

¹³⁴ Section 11(2), *Land Control Act* (1967)

¹³⁵ Section 13 (1), *Land Control Act* (1967)

¹³⁶ Article 17, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

¹³⁶ <https://ijrcenter.org/thematic-research-guides/economic-social-and-cultural-rights-2/>

example, to effectuate the right to food, States are encouraged to guarantee “the right to inheritance and the ownership of land and other property.”¹³⁷ It is only provided that the rights enunciated under this covenant will be exercised without discrimination of any kind as to property among others.¹³⁸

3.6.3 European Convention on Human Rights (1953)

Article 1 of Protocol No. 1 guarantees the right to property by providing that every natural or legal person is entitled to the peaceful enjoyment of his possessions and shall not be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.¹³⁹ In *Marckx v. Belgium* the European Court of Human Rights considered for the first time Article 1 of Protocol No. 1 and explained that by recognizing that everyone had the right to the peaceful enjoyment of his possessions, this Article was in substance guaranteeing the right of property. It further provides that the enjoyment of any right set forth by law shall be secured without discrimination on any ground such as property.¹⁴⁰

3.7 Conclusion

From the foregoing discussion, it can be argued that the legislative framework is not effective enough to address the injustices caused when it comes to transactions that require the Land Control Board consent other than the stipulation in the Constitution on protection of property rights. This explains why there are different courts interpretations on the consequences of failure to obtain consent. A further observation is that all the legislations above are post 2010 except for the Land Control Act which was enacted in 1967. It should be amended to accommodate the recent changes as provided in the Constitution.

¹³⁷ <https://ijrcenter.org/thematic-research-guides/economic-social-and-cultural-rights-2/>

¹³⁸ Article 2 (2), *International Covenant on Economic, Social and Cultural Rights*, International Covenant on Economic, Social and Cultural Rights, vol. 993.

¹³⁹ Article 1 of Protocol No. 1, *European Convention on Human Rights*, 4 November 1950, ETS 5.

¹⁴⁰ Article 1 of Protocol No. 12, *European Convention on Human Rights*.

CHAPTER FOUR

A REVIEW OF COURT DECISIONS

4.1 Introduction

The Land Control Act remains one of the most litigated statutes in Kenya and as a consequence, a consistent line of case law has emerged, both from different courts on the interpretation and application of various provisions of that statute.¹⁴¹ This, chapter seeks to answer the research question: ‘what is the approach taken by the courts in reaching a decision concerning the consequences of failure to obtain consent of the Land Control Board?’ Courts have adopted two approaches in the interpretation of section 6(1) and section 7 of the Land Control Act on the legal consequences of failure to obtain consent. The two approaches are the literal interpretation approach and the liberal interpretation approach which will be discussed hereunder.

Under section 6 (1) any transaction listed therein is void for all purposes unless the Land Control Board has given its consent.¹⁴² An agreement to be a party to a controlled transaction is void for all purposes at the expiration of six months after the making of agreement, if application for the appropriate Land Control Board's consent had not been made within that time.¹⁴³ By this the contract is avoided. It can clearly be depicted from this that the contract does not become void *ab initio* but rather it becomes void only after the stipulated six month timeframe expires.¹⁴⁴ However, after the six month timeframe expires, the High Court may extend the period where it considers fit to do so.¹⁴⁵ This proviso provides an avenue for breathing life into an otherwise dead transaction.¹⁴⁶ It can be depicted that section 6 (1) read together with section 8 renders the transaction voidable and only becomes void after the court fails to find concrete reasons to extend it. This residuary power in the High Court, it is submitted, will have far-reaching consequences indeed, and will arm the courts with an effective weapon with which to mitigate harshness and injustice that had hitherto been

¹⁴¹ *David Sironga Ole Tukai v. Francis Arap Muge & 2 Others*, (2014) eKLR

¹⁴² Ojienda T, *Conveyancing principles and practice*, 217.

¹⁴³ Mohammed K, ‘The Land Control Act, 1967, as amended with particular reference to the question of compensation for improvements’, published LL. B dissertation, University of Nairobi, 1982, 42.

¹⁴⁴ Section 8 (1), *Land Control Act* (1967)

¹⁴⁵ Section 8, *Land Control Act* (1967)

¹⁴⁶ *Isaac Ngatia Kihagi v Paul Kaiga Githui* [2017] eKLR,10.

inflicted on innocent buyers.¹⁴⁷ If it was lapse of the period of six months which makes a controlled dealing void, parliament would not have provided for a window to apply for the consent after the lapse of the six months.¹⁴⁸ Section 9 further amplifies this argument by providing that the transaction only becomes void after an application to obtain consent of the Land Control Board has been refused.¹⁴⁹ Section 6(1) read together with the provisions of Section 8 and 9(1) of the Act makes it improbable that it is the failure to obtain the consent of the Land Control Board within six months of entering into the controlled dealing which makes the dealing void.¹⁵⁰ This only makes it voidable whereas it is the refusal of the application by the Land Control Board to grant consent that renders the transaction void.

The Act, surprisingly, is silent on the question of improvements which is indeed a sorry state of affairs since it is not rare that an action is brought to recover compensation.¹⁵¹ In most instances the purchaser has been in possession of the land for a number of years in which he has made improvements thereon such as erecting buildings and to deny him compensation for this after a transaction is rendered void is unjust because he was there with the consent of the owner and under an agreement albeit void and had no intention to trespass.¹⁵² Compensation for improvements subsequently undertaken on the property cannot be recovered as stated by most courts.¹⁵³ Under common law the general principle is that an illegal contract is void and unenforceable,¹⁵⁴ and thus a party cannot recover any property undertaken therein. However, section 7 modifies this rule by providing that only the money paid in a transaction that becomes void, that money shall be recoverable as a debt.¹⁵⁵ This section provides an exception to the general rule that any money paid under an illegal contract is not

¹⁴⁷ Mohammed K, 'The Land Control Act, 1967, as amended with particular reference to the question of compensation for improvements', published LL. B dissertation, University of Nairobi, 1982, 42. ¹³² Joseph Mathenge Kamutu v Joseph Wainaina Karanja & another [2015] eKLR, para 29.

¹⁴⁸ Isaac Ngatia Kihagi v Paul Kaiga Githui [2017] eKLR

¹⁴⁹ Isaac Ngatia Kihagi v Paul Kaiga Githui [2017] eKLR

¹⁵⁰ Isaac Ngatia Kihagi v Paul Kaiga Githui [2017] eKLR

¹⁵¹ Mohammed K, 'The Land Control Act, 1967, as amended with particular reference to the question of compensation for improvements', 30.

¹⁵² Mohammed K, 'The Land Control Act, 1967, as amended with particular reference to the question of compensation for improvements', 30.

¹⁵³ Ojienda T, *Conveyancing principles and practice*, 224.

¹⁵⁴ Elliot C and Quinn Frances, *Contract Law*, 7th edition, Pearson education limited, Great Britain, 2009, 234.

¹⁵⁵ Section 7, *Land Control Act* (1967)

recoverable.¹⁵⁶ The purpose of this section as held by the court in *Chemelil Sisal Estate Limited v Makongi Limited*¹⁵⁷ is not punitive and imperative but rather restitution as it geared towards restoring the parties to their *status quo ante* (i.e. position they were before they entered the agreement).¹⁵⁸

As stated in the above case that the purpose of section 7 is restitution, the court observed that the owner of land that has been rendered void might be able to successfully maintain an action for trespass or for recovery of possession with a claim for mesne profit.¹⁵⁹ Section 7 expressly states that only the money paid or valuable consideration is recoverable by the buyer but the courts have gone ahead and inferred that also mesne profits are recoverable by the vendor. In all fairness why then should a buyer not be able to recover compensation for the improvements he/ she made on the land that has been rendered void?¹⁶⁰ If the purpose of section 7 is restitution geared towards restoring the parties to their *status quo ante* (i.e. position they were before they entered the agreement).¹⁶¹ Then denying the buyer compensation for improvements does not meet this objective. Furthermore, denying the buyer compensation results to an injustice which is unjust enrichment. In addition, the buyer is only entitled to the money paid without interest regardless of the time period. Money being a valuable asset it accumulates interest overtime but this interest is disregarded when the buyer is recovering the money he paid from the vendor. But then, hasn't the fraudulent seller also had interest free use of the purchase money? and if he, the seller, can in an appropriate case recover mesne profits, the buyer should also, where the facts of the case require it, be able to recover compensation for improvements, substantial portion if not full portion.¹⁶²

¹⁵⁶ Mohammed K, 'The Land Control Act, 1967, as amended with particular reference to the question of compensation for improvements', 44.

¹⁵⁷ [1967] EA 166.

¹⁵⁸ Ojienda T, *Conveyancing principles and practice*, 225.

¹⁵⁹ *Chemelil Sisal Estate Ltd v Makongi Ltd* [1967] EA 166.

¹⁶⁰ Ojienda T, *Conveyancing principles and practice*, 225.

¹⁶¹ Ojienda T, *Conveyancing principles and practice*, 225.

¹⁶² Mohammed K, 'The Land Control Act, 1967, as amended with particular reference to the question of compensation for improvements', 45.

4.2 Courts Interpretation, Approaches and Perspectives

4.2.1 Literal interpretation approach

A literal interpretation involves reading the statute and applying the plain meaning of a provision of the law. Nothing is presupposed or derived from the words apart from the exact meaning that it adheres to.¹⁶³ In interpreting section 6(1) of the Act most judges have always used this approach. Under this approach, the courts find that the provision of Section 6 of the Act is an express provision of a statute and no principle of equity can soften or change it.¹⁶⁴

In *David Sironga Ole Tukai v Francis Arap Muge & 2 others*¹⁶⁵ the trial court held that the cut and dry provisions of section 6 (3) of the Land Control Act, would wreak injustice and that this could be solved by applying the principles of equity to temper the harshness of the law.¹⁶⁶

It relied on *ex turpi causa non oritur action*, an old and well known legal maxim that states that no court ought to enforce an illegal contract. It was further contended that section 3 (1) of the Judicature Act embodies the hierarchy of norms and provides for how the jurisdiction should be exercised. The application of the substance of common law and the doctrines of equity is subject first to the Constitution and the statutes.¹⁶⁷ Benjamin Cardozo stated in his speech that equity works as a supplement for law and does not supersede the prevailing law.¹⁶⁸

In *Hirani Ngaithe Githire v Wanjiku Munge*¹⁶⁹ the appellant and the respondent who are brother and sister entered into a sale agreement. They did not seek the consent as required under section 6 of the Act. The respondent paid the full agreed sale price and took possession of the land, on which she has carried out some development. The appellant refused to effect a legal transfer of the land to the respondent, however, and the latter filed a suit for specific performance.¹⁷⁰ The court found that the Trial Magistrate had erred by finding that section 6(1) of the Act is strict and harsh, and ought to be softened by equity and thus granting

¹⁶³ Sreya B., *Literal interpretation versus liberal interpretation*, National University of Juridical Sciences (NUJS), Kolkata, 2.

¹⁶⁴ *Hirani Ngaithe Githire v Wanjiku Munge*, [1979] eKLR

¹⁶⁵ *David Sironga Ole Tukai v Francis Arap Muge & 2 others* [2014] eKLR

¹⁶⁶ [2014] eKLR

¹⁶⁷ Section 3 (1) (c), *Judicature Act* (Cap 8 Laws of Kenya)

¹⁶⁸ *Graf v Hope Building Coperation*, 254 N.Y 1, 9.

¹⁶⁹ [1979] eKLR

¹⁷⁰ *Hirani Ngaithe Githire v Wanjiku Munge* [1979] eKLR

specific performance in respect of an illegal contract.¹⁷¹ He stated that the agreement between the parties became void for all purposes at the expiration of three months thus nothing could resurrect such an agreement.¹⁷² Failure to obtain the necessary consent automatically vitiated an agreement to be a party to a controlled transaction. From this case the court did not consider the injustices caused but rather applied the Act as it is.

In *Gabriel Makokha Wamukota v Sylvester Nyongesa Donati*¹⁷³ in which the court stated that once again the trumpet of Equity had called into question the operation of the Land Control Act (Cap 302) by a party who has sold land and having not helped the purchaser to get consent to that sale, had resold later to another person, to which sale consent had been given, and the land transferred by registration to the new purchaser.¹⁷⁴ It was sought by a finding of fraud to set aside the registration, and to induce the authorities to assist the first purchaser.¹⁷⁵ The Court stated that if the Act were applied by the appellant and the owner as a means of fraud as the learned trial judge had put it, so long as the procedure that was followed was what was laid down in the law, however sympathetic the respondent's case was, there was no way, as the matter stands, that the court could not interfere. That It was the law of the country that unless the transaction was consented to by Land Control Board, the would-be purchaser would have no claim of title to the land after three months from the date of the agreement. He would be regarded as a trespasser. It is the operation of section 6 of the Act that deprived the respondent of his development over the year because it rendered the agreement null and void *ab initio*. It was expected that any purchaser should not enter the land and start developing it without obtaining the Land Control Board consent.¹⁷⁶ One would be permitted to doubt whether the Act was judicially construed and applied, met the ends of justice or was a true reflection of the legislative will.¹⁷⁷ He was of the opinion that parliament should have a second look on the particular provision. In this case the court was aware of the fraud but again applied the Act as it is.

¹⁷¹ *Hirani Ngaithe Githire v Wanjiku Munge*, [1979] eKLR

¹⁷² *Hirani Ngaithe Githire v Wanjiku Munge*, [1979] eKLR

¹⁷³ [1987] eKLR

¹⁷⁴ *Gabriel Makokha Wamukota v Sylvester Nyongesa Donati* [1987] eKLR

¹⁷⁵ [1987] eKLR

¹⁷⁶ [1987] eKLR

¹⁷⁷ [1987] eKLR

Similarly, In *John Onyango & another v Samson Luwayi* the court concluded that once a transaction is rendered void, no complaints of any nature can be resolved.¹⁷⁸ This interpretation of the law clearly creates loopholes in the law to be used by fraudsters to cause injustices to the weaker party who in this case is the buyer.

In *Rosebella Iranmwanya Mirieh v Mwangi Ngugi* the plaintiff paid the substantial amount of the purchase price and was given possession of the suit property on signing the agreement of sale. He averred that the Defendant willfully breached the agreement of sale and stalled the completion of the transaction by failing to obtain consent.¹⁷⁹ He filed a suit seeking an action of specific performance. The court held that the failure to obtain the necessary Land Control Board consent automatically vitiated the sale of land which was subject to a controlled transaction.¹⁸⁰ It found that the transaction in that case was void, invalid and therefore the remedy of specific performance was not available to the plaintiff.¹⁸¹

Similarly in the Court of Appeal case of *Elizabeth Cheboo v Mary Cheboo Gimnygei*¹⁸² the court stated that to its knowledge had become prevalent to find cases wherein some of the provisions of section 6 had been used to perpetrate obvious injustices on unsuspecting wananchi very often leaving the courts powerless to grant relief even where as in this case the facts and the circumstances clearly saw demands.¹⁸³ However, Madan JA was of the opinion that special damages were recoverable despite the valuable consideration referred to in section 7 being limited to the purchase price only.¹⁸⁴

4.2.2 Liberal Interpretation Approach

In the liberal interpretation, the construction of the statute is done in such a way that it enlarges the meaning of the legislation to bring within its ambit situations or cases which are within the spirit of the statute, within the mischief the statute was meant to remedy, or which ultimately gives such a meaning to the statute that the end can be achieved without being

¹⁷⁸ [1986] eKLR

¹⁷⁹ [2017] eKLR

¹⁸⁰ *Rosebella Iranmwanya Mirieh v Mwangi Ngugi*, [2017] eKLR

¹⁸¹ *Rosebella Iranmwanya Mirieh v Mwangi Ngugi*, [2017] eKLR

¹⁸² Civil Appeal No. 40 of 1978 (Unreported).

¹⁸³ Civil Appeal No. 40 of 1978 (Unreported).

¹⁸⁴ *Rosebella Iranmwanya Mirieh v Mwangi Ngugi*, [2017] eKLR

inconsistent to the words of the statute.¹⁸⁵ In *Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagiri*¹⁸⁶ the court expressed itself as a court of law and equity on the basis of the maxim that states equity shall suffer no wrong without a remedy.¹⁸⁷ The courts have circumvented the Act to ensure that the Buyer does not benefit from his wrong and thus being unjustly enriched by failing to obtain consent of the Board.

Most of the Courts that have used this approach are the Courts of Appeal and this is as a result of its Overriding Objectives and the need to dispense substantive and not technical justice.¹⁸⁸ According to the principles that guide the Courts in exercising judicial authority, justice is to be administered without undue regard to procedural technicalities.¹⁸⁹ The Act can be equated to procedural technicalities.¹⁹⁰ In light of this provision in relation to the Land Control Act, the courts that have taken the liberal approach consider the rights of the parties while preventing the injustices being perpetrated as opposed to just the requirement of obtaining consent.

The Constitution of Kenya (2010) had by virtue of article 10 (2) (b) elevated equity as a principle of justice to a constitutional principle and required the courts in exercising judicial authority to protect and promote that principle, amongst others.¹⁹¹ It followed that the equitable doctrines were applicable and to and supersede the Land Control Act where a transaction relating to interest in land was void and enforceable for lack of consent of the Land Control Board.¹⁹²

Under this approach, courts decline to follow authorities/ decisions to the effect that lapse of the six months contemplated in section 8(1) without an Application for consent having being applied for renders a controlled dealing under the Act void for all purposes; being of the view that if it was lapse of the period of six months which makes a controlled dealing void, parliament would not have provided for a window to apply for the consent after the lapse of six months.¹⁹³ Seemingly, this flows from the decision in the case of *Gatere Njamunyu v*

¹⁸⁵ Sreya B., *Literal interpretation versus liberal interpretation*, 3.

¹⁸⁶ [1956] KLR 328

¹⁸⁷ *Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagiri* [1956] KLR 328.

¹⁸⁸ Gichuhi Allen Waiyaki, 'A Litigator's Guide to Topical Land Issues under The Land Acts', 7.

¹⁸⁹ Article 159 (2) (d), The Constitution of Kenya (2010).

¹⁹⁰ *Lucia Mwethya T/A Kale Bran Enterprises v Nairobi Bottlers Limited & 3 others*, HCCC No. 10 of 2012.

¹⁹¹ *Macharia Mwangi Maina & 87 Others vs Davidson Mwangi Kagiri* [2014] eKLR.

¹⁹² [2014] eKLR

¹⁹³ *Joseph Mathenge Kamutu v Joseph Wainaina Karanja & another* [2015] eKLR.

*Joseck Njue Nyaga*¹⁹⁴ where the Court of Appeal held that the agreement did not become void because consent was given, and there was no appeal against it but was binding between the parties who make it though it is not enforceable until consent has been given.¹⁹⁵ From this case it can be depicted that failure to obtain consent only makes the contract unenforceable and that it is rather its denial by the Land Control Board that renders it void.

In *Joseph Mathenge Kamutu v Joseph Wainaina Karanja and another*¹⁹⁶ the plaintiff and the defendant entered into an agreement to sale. Following the execution the plaintiff was given possession of the suit property pending completion of the transaction. The sale agreement imposed an obligation on the defendants to obtain consent before the balance of the purchase price could be paid. The defendants refused or ignored to fulfill their contractual obligations and threatened to pull out of the transaction. The Plaintiff contended that the defendants should be ordered to meet their part of the bargain because for six years he had been in possession of the suit properties, he had undertaken massive developments thereon. The defendants justified their refusal to fulfill their contractual obligation on their contention that the transaction became unenforceable after expiry of six months from the date of execution of the sale agreement.¹⁹⁷ The High Court sitting in determining what renders a transaction void under the Land Control Act, began by pointing out that the proviso to section 8(1) gives parties to a controlled dealing a window to make an application for extension of the time within which they ought to apply for consent under the Act. She further made reference to section 9(2) which makes it clear that a controlled transaction becomes void only after the application has been refused. She held that it is the refusal of an application for consent by the Land Control Board which renders a controlled dealing void as opposed to lapse of time.¹⁶⁵

In *Isaac Ngatia Kihati v Paul Kaiga Githui* the appellant's case was that despite having met his obligations under the sale agreement and being ready and willing to fulfill his obligations under the agreement. He thus filed a suit seeking specific performance. The Court stated that although both the High Court and the Court of Appeal had in many decisions held that the import of failure to obtain the consent was to render the controlled dealing void. It drew this from the reading of the provisions of section 6(1) together with the provisions of section 8

¹⁹⁴ [1983]eKLR

¹⁹⁵ *Gatere Njamunyu v Joseck Njue Nyaga* [1983] eKLR.

¹⁹⁶ [2015] eKLR

¹⁹⁷ *Joseph Mathenge Kamutu v Joseph Wainaina Karanja and another*, para 20-21.

and 9 that make it improbable that it is the failure to obtain consent within six months of entering into the controlled dealing which makes the dealing void.¹⁹⁸ It is noteworthy that the overly quoted Section 6(1) does not provide that the otherwise voided controlled dealing shall become void by dint of the provisions of that section but by dint of the provisions of the Act.¹⁹⁹ Section 8(1) recognizes that it is possible to breathe life to the otherwise voided transaction, the only reasonable construction that can flow from that section 8 giving the court power to revive the otherwise voided transaction is that the transaction did not become void but voidable at the lapse of the time provided in section 6(1). This is further amplified by section 9(1).²⁰⁰ She thus dismissed the appeal.

4.3 Conclusion

From these judgments it can clearly be depicted that the Judges agree that the Land Control Act causes an injustice. Some Judges have tried to circumvent the provisions of this Act by rendering the transaction voidable through reading section 6(1) and 7 together with section 8(1) and 9(2). Others have helplessly refrained from any bold attempts to bypass the provisions of this Act.²⁰¹ Even in cases where it is being used as an instrument of fraud and as a result injustices are caused, some Judges cannot apply equity but instead apply section 6(1) which renders a transaction void for all purposes as it is. The judges further stated that it is for them to only interpret the law and not make the law. Other judges feel that the buyer in a transaction rendered void should be entitled to compensation for improvements thereon but their hands are tied as it for Parliament to make laws. Amendments should be done to harmonize these two court interpretations.

¹⁹⁸ *Joseph Mathenge Kamutu v Joseph Wainaina Karanja & another* [2015] eKLR

¹⁹⁹ [2015] eKLR

²⁰⁰ *Isaac Ngatia Kihagi v Paul Kaiga Githui* [2017] eKLR

²⁰¹ Mohammed K, 'The Land Control Act, 1967, as amended with particular reference to the question of compensation for improvements', published LL. B dissertation, University of Nairobi, 1982, 34.

CHAPTER FIVE

SUMMARY OF FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

This chapter constitutes the summary of findings, recommendations and conclusions.

5.2 Summary of Findings

The application and interpretation of the Land Control Act is wanting in several respects as it largely occasions injustices. From the appraisal of section 6(1) it was found that it causes a lot of injustices. These injustices include: once the transaction is rendered void the land is reverted back to the vendor who is unjustly enriched whereas the buyer is not entitled to any compensation for the improvements he made on the land. This has resulted into many disputes being brought to court in which some Judges have tried to circumvent the provisions of the Act whereas others have helplessly refrained from any bold attempts to bypass the provisions of this Act.²⁰² Most judges in their decisions have admitted that this provision of the Act causes an injustice but their hands are tied.²⁰³

There is no harmony in interpretation of section 6(1) of the Act by the courts. This is evident in different judgments in which judges have rendered different decisions; some have rendered the transaction void whereas others have rendered the transaction voidable.

Judges who made the latter decision based their judgment on the fact that section 6(1) should not be read on its own but rather together with sections 8(1) and 9(2). Section 8(1) provides that the application to obtain consent must be made within six months after the parties make an agreement. It further provides that after the expiry of the six months, the High Court may extend that period where it considers it fit to do so.²⁰⁴ Judges who rendered the transaction voidable instead of void as provided by the section 6(1) were of the view that if it was lapse of the period of six months which makes a controlled dealing void, parliament would not have

²⁰² Mohammed K, 'The Land Control Act, 1967, as amended with particular reference to the question of compensation for improvements', published LL. B dissertation, University of Nairobi, 1982, 34.

²⁰³ Judge Kwach JA in *Jacob Minjire Gichuki V Agricultural Finance Corporation* stated that 'whether the Act is being used by unscrupulous people to defraud innocent citizens is a matter of Parliament, their duty as judges is to interpret the law and apply it as it stands. They are not concerned with the consequences.'

²⁰⁴ Section 8(1), *Land Control Act* (1967)

provided for a window to apply for the consent after the lapse of six months.²⁰⁵ This section breathes life to the otherwise voided transaction, the only reasonable construction that can flow from Section 8 gives the court power to revive the otherwise voided transaction is that the transaction did not become void but voidable at the lapse of the time provided in section 6(1).²⁰⁶ They further made reference to section 9(2) which ‘makes it clear that a controlled transaction becomes void only after an application for the consent has been refused. It is the refusal of an application renders a controlled dealing void as opposed to lapse of time.’²⁰⁷

5.3 Recommendations

In light of the foregoing findings, the study makes the following recommendations:

5.3.1 Recommendation to Parliament

The Land Control Act was enacted in 1967 and since then only two have been made to it. After decades in existence, it was repealed Pursuant to section 109 of the Land Registration Act, 2012 on 26th April 2012.²⁰⁸ However, it was strangely not included in the list of Repealed Acts and thus still in operation.²⁰⁹ It should be amended to embody some of the Constitutional principles.

Section 6(1) should be amended to remove the void aspect and replace it with voidable. The transaction should not be rendered a nullity from the very beginning because the parties have freedom to contract but rather binding until it is avoided by either party who is protected by the law. This is because majority of the Kenyan population is based in the rural areas of which most of them do not have access to the Land Control Act which provides for the requirement to obtain consent for any transaction in agricultural land or are rather not aware of its existence. Because of this most people will transact without being aware of the requirement of consent whereas in some other instances the Vendor will take advantage of the Buyer’s naivety and intentionally fail to obtain consent.

²⁰⁵ *Joseph Mathenge Kamutu v Joseph Wainaina Karanja & another* [2015] eKLR

²⁰⁶ *Isaac Ngatia Kihagi v Paul Kaiga Githui* [2017] eKLR

²⁰⁷ *Joseph Mathenge Kamutu v Joseph Wainaina Karanja & another* [2015] eKLR

²⁰⁸ Gichuhi Allen Waiyaki, ‘A Litigator’s Guide to Topical Land Issues under The Land Acts’, 2.

²⁰⁹ Gichuhi Allen Waiyaki, ‘A Litigator’s Guide to Topical Land Issues under The Land Acts’, 2.

5.3.2 Recommendations to the Courts

Firstly, compensation for improvements on the land should be available. The object of section 7 is restitution then there is no reason as to why compensation should not be available to the buyer. A flexible interpretation of this provision of recovery of consideration can also be inferred to mean that compensation for improvements on the land is available. This is because the Act does not expressly forbid compensation but is rather silent on the issue. Equity is a source of law in Kenya as provided in section 3 of the Judicature Act and this should be applied by the courts as regards the issue on compensation for improvements made on the land. The courts should uphold the following doctrines of equity. This will ensure that the seller is not allowed to benefit from his wrong and as a result being unjustly enriched.

5.4 Conclusion

This study has achieved its objectives which were:

1. To assess the adequacy of the law that addresses the consequences of failure to obtain consent of the Land Control Board in controlled transactions affecting agricultural land.
2. To examine the legal consequences of failure to obtain consent of the Land Control Board in controlled transactions affecting agricultural land.
3. To analyze the approach taken by the Courts in reaching a decision concerning the consequences of failure to obtain consent of the Land Control Board in controlled transactions affecting agricultural land.

5.4.1 Objective One

The Law that addresses the consequences of failure to obtain consent of the Land Control Board is not adequate enough and that is why there so many injustices caused by it and an inconsistency in the approach taken by the courts in its interpretation and application.

5.4.2 Objective Two

There are only two consequences for failure to obtain consent of the Land Control Board as provided in the Land Control Act: the transaction is rendered void for all purposes; and the Buyer is only entitled to the consideration he had paid.

5.4.3 Objective Three

There is no harmony in the approaches taken by the courts in their interpretation of section 6 (1) of the Land Control Act. This is because of the ambiguous nature of section 6(1). Some Judges have strictly held that the transaction is rendered void whereas other Judges have flexibly held the transaction is rendered voidable in light of reading section 6(1) and 7 together with section 8(1) and 9(2).

5.4.4 Hypothesis

The law does not adequately address the consequences of failure to obtain consent from the Land Control Board in controlled transactions affecting agricultural land and as a result it has occasioned so many injustices to the buyer. Moreover, this law is ambiguous in nature and as a result courts have taken different approaches in addressing the disputes that arise as a result of failure to obtain the consent in controlled transactions affecting agricultural land.

The study has tested and proved the hypothesis by highlighting the ambiguity in the law by examining the inconsistency in the approaches taken by the courts to apply section 6(1) of the Land Control Act.

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Appendices

Appendix 1: Application for Consent of the Land Control Board Form.

Appendix 2: Agreement of Sale.

Appendix 3: Sample of Minutes for obtaining consent of the Land Control Board.

Appendix 4: Letter of Consent from the Land Control Board.