

THE LAND CONTROL ACT, 1967, AS
AMENDED WITH PARTICULAR REFERENCE
TO THE QUESTION OF COMPENSATION
FOR IMPROVEMENTS

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INTRODUCTION

Land control is a mechanism employed by the government for controlling transactions in, and the use of, land. Its local proponents¹ argue that as Kenya is predominantly an agricultural economy, land is so important a natural resource that its distribution and disposition become a matter of vital importance to the individual and community.

Further, with a rapidly increasing population and the resulting scarcity of land, government control of land, especially its development and use, is justified by its proponents to avoid acute landlessness and to achieve optimum productivity and maximum exploitation of land.² Thus the need for and existence of some regulatory machinery for the use and disposition of land.

The main weapon of control in the hands of the government of Kenya is the Land Control Act³ which provides for the control of transactions in agricultural land and was designed to ensure that land was "efficiently and economically used, and undesirable fragmentation and speculation are prevented" and to contain the scramble for land by foreigners as against 'natures' with limited purchasing power.⁴ The Act does this by ensuring that almost every transaction pertaining to agricultural land is subject to government scrutiny.⁵

In other words, control is designed to ensure that land is efficiently and economically used and this is partly achieved by preventing people who are incapable of so using the land.^{5b} The risk of land speculation is also minimised. Unnecessary fragmentation and parcelation and resulting loss

of economies of scale is avoided and most important of all, control ensures that land is put to uses intended by the government.

The control device employed by the Land Control Act is that of 'consent'. The Act establishes land control boards,⁶ and consent of the appropriate board is a prerequisite to all dealings in land specified under Section 6 of the Act. The board may either grant or refuse its consent⁷ and omission to obtain consent within six months⁸ invalidates the agreement.

It is on the above reasons that land control is supported, so that even though the Registered Land Act⁹ confers upon the Registered owner absolute ownership and an independent title, freedom of disposition and use of agricultural land must be restricted, it is argued, where public policy demands it.

Whether or not the above reasons in support of land control hold any water is another matter, but what is obvious is that the operation of the Land Control Act has not been very smooth in that some problems have arisen and great injustice has in some instances been occasioned, so that it has not been rare for judges to remark that the Act can readily be used as an engine of fraud and injustice.¹⁰ This problem in fact prompted the 1980 amendment to the Act, but some of the main problems, e.g. that of compensation for improvements, still remain. It is the object of this paper to look at some important aspects of land control with special reference to the problem of compensation for improvements.

CHAPTER I

HISTORICAL DEVELOPMENT OF LAND CONTROL LEGISLATION

This survey of the historical development of land control legislation will be divided into two main periods for the simple reason that control legislation is to some extent a manifestation of government policy as a whole, and as will be briefly shown, government policy changed drastically after World War Two. The history is therefore 'periodised' into first, the period between assumption of British control and the Second World War, and second, the Post Second World War period.

A: Period between assumption of British Control and the Second World War

The first signs of control can be traced back to the era of the imperial British East African Company, to which Britain had delegated authority to administer lands falling within the British sphere of influence. In 1891, the company administration being "desirous of protecting the rights and interests of the native population and of discouraging land speculators", issued a proclamation forbidding all dealings in land between the Africans and Europeans of any nationality.¹¹

But it is only after the Foreign Office takes over from the I.B.E.A. Company in 1895, that we start seeing substantive control legislation. This can be better understood in light of the desire that Kenya should be another settler country similar to Australia, New Zealand or Rhodesia. It was therefore necessary to induce the inflow of settlers into Kenya

by offering favourable terms, for example, in the acquisition of land. There was as yet no clear cut policy as to what role the Africans were to play. Settler interests were supreme and all efforts had to be made to appease them and to encourage them to come to Kenya. Up to the Second World War, government policy was aimed at promoting settler interests, and this is the context in which control legislation during this this period has to be viewed.

Thus in 1902, acting under authority rested in him by the 1901 East Africa (Lands) Order in Council, the Commissioner enacted the Crown Lands Ordinance.¹² This ordinance fixed a ceiling to the acreage that could be held by one settler at 1,000 acres, though this could be exceeded with the consent of the Secretary of State. Furthermore, and this is what really aggrieved the settlers, there were restrictions on the duration and transferability of the lease. Also, lessees were required to cultivate their land within a given deadline. Some of the sections having an element of control are:-

Section 9(1): "If any land sold under the provision of this ordinance appears to the Commissioner to have been unoccupied for a period exceeding 12 months, he may give notice that if within the next 6 months the owner does not appear and afford reasonable proof that he intends to use and develop the land to a reasonable extent, the land will be forfeited."

Section 14: "Except where expressly varied or excepted, there shall, by virtue of this ordinance, be implied in every

lease under this ordinance, covenants by the lessee:

- (a) not to assign, except by will, the land leased ... without the consent of the Commissioner;
- (b) to keep in reasonable repair all buildings erected before the commencement of and included in the lease;
- (c)
- (d)
- (e) to use and develop the natural resources of the land leased with all reasonable speed ---".

Section 16: "In all leases under this ordinance of areas of land, for the purpose of agriculture ... there shall be implied covenants by the lessee:

- (a) To improve and develop the resources of the land in a prudent and business like manner, and to abstain from the undue distruction or exhaustion of any timber, trees or plants ..."

Being unsatisfied with too many restrictions, and also the short duration of the leases, the settlers agigated for better conditions. To them, nothing less than the equivalent of the English 'freehold' was desirable.

As a move to appease the settlers, the 1915 Crown Lands Ordinance¹³ was enacted. Though it alienated land to settlers

on more favourable terms¹⁴ in the direction of duration, the new Act imposed harsher controls on the settlers.

For example, the Ordinance, under Section 24, prohibits subdivision of town plots; in every lease of such plot there was an implied covenant not to subdivide or assign.

Under Section 39 there was in the lease included a covenant that without the consent of the governor, "in every lease granted under this part to a European -- he shall not -- appoint or allow a non-European to be manager or otherwise to occupy or be in control of the land leased". Already apparent is the initiation of the 'dual' land policy whereby certain lands were to be reserved exclusively for either the European settlers or for the other races including the 'natives'. This mechanism acted as a kind of a fence on the respective areas.

Section 41 laid down the basic standard of improvements to be effected. Finally, and as usual, under Section 71(3), in all cases the consent of the governor was required for any transactions. Lack of it avoided the transaction, although the governor could exempt a particular transaction, under Section 74.

What emerges from the above is that government policy at that time was directed at satisfying the settlers' demands. Thus for example, through the weapon of land control, the government could protect the settler interests by keeping non-Europeans out of the highlands (S.41). So although appearing as a restriction on the settlers, some of the

provisions of the Act were designed, in fact, to protect the settlers.

This trend of appeasing the settlers continued up to the beginning of the Second World War, when the emphasis in government policy shifted. This shift in emphasis was mainly due to difficult economic conditions worldwide, and a change in the colonial outlook and attitude.

B: 1940 and onwards

This period witnessed a change in the emphasis in government policy and this was due to several reasons. One of the reasons was the great depression and economic crisis which was being felt all over the Western world. But domestically, in Kenya, also, there was the problem of poor land use and undercultivation of land in the settler areas.

Though the settlers had all the government support and help they needed (in order to sustain their interest in Kenya), their farms were doing badly agriculturally and a great deal of land was poorly developed or underdeveloped. For instance, speculation, which the government had desperately tried to avoid, was rampant and it was discovered that some land owners were not interested in farming but in speculation. The problem of 'absentee owners' was another pain in the back. This worried the colonial state which was suffering from the war, and whose agricultural produce had fallen.

Also the administration was perpetually short of funds and it was hoped that through increased export of

agricultural produce, the colony should be as self sustaining as possible. This idea was in keeping with the settler view that there should be as little control as possible by the metropolis.

Thus the government increased public control over all aspects of use and ownership of land. The control mechanism was precisely designed to tackle the effects of bad land use, to stimulate agricultural production and stop speculation.

The first few attempts in this direction were piecemeal regulations made by the governor. For example, the Land and Water Preservation Ordinance 1940¹⁵ empowered the governor to make wide rules over preservation of agricultural land. The rules made by the governor required owners of land to develop their farms up to certain standards. To show that the governor this time meant business, inspectors were appointed to ensure adherence.

Also passed were the 1940 Defence (Agricultural Production) Regulations which required compulsory planting of cash crops and laid down a system of guaranteed minimum returns in respect of certain crops. Farmers were expected to submit production programmes to their local committees which passed them over to the agricultural production and settlement boards. The latter could either accept or reject the proposed programmes. In the event of rejection, the board issued its own production orders which the farmers had to comply with.

The point to note is that the government is beginning to take agriculture seriously and it is therefore stressing good land use and increased production. Instead of protecting the settlers, the stress is now being shifted to the above goal.

The next piece of legislation is the first exclusive land control legislation. This was the Land Control Ordinance 1944.¹⁶ The ordinance was passed to provide for a system through which the government could exercise control over land use and dealings in land¹⁷ in the White Highlands. As already mentioned, the government had hitherto the settlers to deal with their land in any manner they liked, with minimum control. However, increased demand for farm production caused by the war called for government action to promote such production. The government had also spent a lot on financial assistance in the form of loans, to settlers, and was eager to realize repayment of these loans. As a result, it sought to have control in determining who was to own land, how much land he could hold and the circumstances under which that person might enter into any dealings in respect of the land. The motive behind this was the desire to ensure that land was effectively used for the benefit of the country as a whole. On the other hand, the Ordinance also performed the task of restricting African encroachment into the scheduled areas.

The Ordinance established a board to which all transactions relating to land were to be referred to for consent.

All transactions not sanctioned by the board were void, except where the governor intervened.¹⁸

No one could alienate land without the board's consent, i.e. "sell, lease, sublease, assign, mortgage -- charge, or part with the possession of the land or any right, title or interest whether vested or contingent, in or over land, to any person".¹⁹

Further, no person could "acquire any right on behalf of any company -- nor shall anybody enter into an agreement for the above purposes with the consent in writing of the board".²⁰

On the other hand, mortgages of land for the Land Bank²¹ were precluded from the operation of the board's discretion to grant or award consent.²² This was meant to ease the operation of the provision of the ordinance and to avail the settlers access to loans from the Land Bank to develop and improve their land, especially when the board imposed strict conditions as to development of the land, failure of which might lead to forfeiture of the land to the Crown.²³ For example, if in the opinion of the board, the land was not properly being developed, it could decide whether such land should be acquired either in whole or in part.²⁴ Also, the board had power to refuse consent on the ground that the applicant already had sufficient land.²⁵

Although no ceiling was fixed as to the amount of land that was to be considered 'sufficient', the board had power to enter and investigate the land, and where the user of

the land could not probably develop the land in issue economically, the board had discretion to refuse consent.

This short discussion of the 1944 Ordinance discloses the extension of government control over European agriculture and land. Individuals could no longer do what they wished with their land. This shows just how serious and enthusiastic the government was about its agricultural policy, it provided aid in the form of loans and this was channelled through the Land and Agriculture Bank.²⁶ Briefly, the need for increased production through good land use became the overriding consideration for increased control by the government over land use.

Apart from settler agitation up to this point, the Africans were also beginning to voice their grievances, the most serious problem being landlessness. One of the main reasons for this was the herding of Africans into infertile pieces of land in the reserves in order to release the more fertile land for settler occupation.

Considering that land was the basic and only source of survival for the majority of the Africans, land scarcity was indeed an explosive problem. Solutions had to be produced if a storm in the form of African uprising was to be avoided.

One solution was increased production in the African areas, but according to experts the African land tenure system inhibited meaningful and economic exploitation of land. This was another problem. Something had to be done. This

period can be summarised as a sort of "awakening" on the part of the government. In short, the position was this - the African was no longer to be ignored, he had to be attended to, if control over the colony was to be sustained.

The first step towards a solution was the appointment of the 1953 East African Royal Commission to look into the problem and see how it could be overcome. The Committee, when it reported in 1955, recommended the replacement of the African tenure system by the individualisation of land ownership. According to the commission, an individual title would most important of all, avail to the African, access to the credit institutions for the purpose of developing his land. On the other hand, if unrestricted, the commission observed, that individual titles would lead to:-

- (a) Chronic indebtedness
- (b) Fragmentation (through inheritance)
- (c) Land speculation
- (d) As a necessary consequence of the above three, landlessness.

As a result the solution would only aggravate the problems it had set out to solve, unless some form of legislation was devised to control transactions in African land. To this end, the commission made the following suggestions:

First, there had to be restrictions on mortgaging of land in African areas. Amongst the Africans, land was communally owned. It was a gift from God and was non-marketable. The effect of individual titles would be to transform land

into a marketable commodity. It would therefore be very tempting to the African to exchange his land for money. The two problems of 'under-acreage' and 'over-acreage' had also to be dealt with sure they would only lead either to plots too big for one owner to look after, or to plots too small as to be uneconomic. This meant a need for a prohibition on unnecessary fragmentation or porcelation of land and a ceiling on the size of land one could own.

Also, according to the commission, the African had to be protected from some unscrupulous Asian and European land scavengers. The protection would take the form of a prohibition on land transfer between the races.²⁸

The recommendations and views expressed by the commission were adopted by the Working Party on African Land Tenure (whose task it was to look into African tenure and devise reform legislation) though with some qualifications. For example it was realized that absolute prohibition of transfer between the races was not plausible - especially in the changing times when keeping the races apart or favouring one of them was fast becoming a thing of the past. So instead of making transfers between the races impossible, the Working Party suggested that the governor have the last say in such a transfer.

Therecommendations of the two reports above formed the basis of the Land Control (Native Lands) Ordinance.²⁷ The Ordinance was based on the 1944 Land Control Ordinance and was to come into effect hand in hand with the Land Registration

Ordinance after the process of adjudication and consolidation were complete. The operation of this Ordinance was restricted to native areas.

All dispositions of land had to be sanctioned by the divisional land control board.²⁹ All sales, leases, charges, mortgages, partitions, sub-divisions or any dealings with any interests in land were prohibited together with any sale, transfer or disposition of any share, debenture or stock in a company owning land, unless consent was obtained.³⁰ Agreements for the sale, transfers, and all other transactions were null and void if the consent of the land control board was refused or was not sought or obtained.³¹

There were also established provincial boards³² which had power to give consent to any transactions in land situate in any part of the province. Such a board had power to direct the divisional board to refuse consent where the consent would lead to parcelation or to refuse consent to any class of transactions.³³

By this time it was gradually being accepted that independence was imminent. Racially flavoured control thus had to go. More so, the African could not be kept away from the highlands. Also the 'dual' policy of separate areas and different legislation for separate races had to go. These processes were initiated, first, by the Kenya (Lands) Order-In-Council 1960³⁴ under which the governor was given power to make regulations for, inter alia, governing

the promotion of good agriculture and for the development and use of land.³⁵ Under this Order-In-Council, the governor promulgated the 1961 Land Control Regulations which were mainly designed to accommodate the Regional Structure that was to be adopted at independence. Also racially restrictive covenants and allied provisions with a racial tone were null and void.

Finally, the 'dual' system of control, based on racialism was obviated by the merging of the Land Control Ordinance 1944 with the 1959 Land Control Ordinance into the 1963 Kenya (Land Control) Transitional Provisions which were applied together with Part III, Chapter XII of the 1963 Constitution. They were intended to make provision for the pending applications for consent until further provisions were made.

The 1963 provisions were repeated and re-enacted as part of the Constitution (Amendment) Act 1965.³⁶ Later on, Section 6(7) of the Constitution of Kenya (Amendment) Act 1965 extended their application for a further period of two years, when the Land Control Act 1967³⁷ was enacted.

CHAPTER II

THE LAND CONTROL ACT CAP 302:

A STUDY OF THE 1967 ACT AND ITS INTERPRETATION

IN THE COURTS PRIOR TO THE AMENDMENTS³⁸

A: Application of the Act:

The Land Control Act 1967 is an Act of Parliament to provide for controlling transactions in agricultural land.³⁹ It was designed to ensure that land was "efficiently and economically used, and that undesirable fragmentation and speculation" were prevented so that the scramble for land by foreigners as against "natives" with limited purchasing power was controlled.⁴⁰

The system of control entailed in the Act is very extensive and can cover almost any transaction in agricultural land. This is partly due to the fact that "transaction" and "agricultural land" have been given a very wide meaning.

The Land Control Act is applicable only to agricultural land, which is defined in section 2 as:

"agricultural land means --

(a) Land that is not within --

- (i) a municipality or a township; or
- (ii) an area which was, on or at any time after 1st July 1952, a township under the Township Act (now repealed); or
- (iii) an area which was, on or at any time after 1st July 1952, a trading centre under the Trading Centres Act (now

repealed), or

- (iv) a market;
- (b) Land in the Nairobi area or the municipality of Mombasa that is declared by the minister, by notice in the Kenya Gazette, to be agricultural land for the purposes of this Act, ---".

Any land which therefore falls within the above definition is subject to the provisions of the Act for a transaction in such land to be validly effected.

Section 6 provides that a controlled transaction shall include:-

- (a) The sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a Land Control Area;
- (b) The division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations 1969 for the time being apply;
- (c) The issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area,

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

Under section 2 'mortgage' is defined to include 'charge'.

The above definition is wide enough to accommodate almost any dealing, and is re-inforced by section 2 of the Registration of Titles Act⁴¹ which defines "--- dealing" as "- any transaction of whatever nature by which land is affected".

It has further been held that consent to the granting of an option (e.g. to renew a lease or to purchase) is not consent for the future exercise of that option, which must be separately obtained. This was the decision of the Court of Appeal in Russel V Principal Registrar of Titles⁴² where consent was given under section 218 of the schedule of the Kenya Independence Order in Council 1963 by the appropriate divisional board to a transaction between two parties, firstly to a five year lease of agricultural land and second to an option the appellant to purchase the land at a fixed price during the lease. The court held that the exercise of the option was a new transaction and required consent.

There are two situations which are under the Act except from control. The first is under section 6(3) to a transmission of land by inheritance, unless such transmission would result in the division of land into two or more parcels

to be held under separate titles.

The second situation arises by virtue of the definition of agricultural land in section 2 which does not include:

"Land which, by reason of any condition or covenant in the title thereto or any limitation imposed by law, is subject to the restriction that it may not be used for agriculture or to the requirement that it shall be used for a non-agricultural purpose---".

Transactions in land falling within the above definition will not be subject to the provisions of the Land Control Act.

Acquisition of title by adverse possession is neither a disposal nor a dealing and is not therefore a controlled transaction. In the words of Madan J. (as he then was) ⁴³ in Gatumi Kinguru V Muya Gathangi:-

"I think that even though the land affected is agriculturall land and there is a change of ownership without the consent of the land control board, the acquisition of title by adverse possession is neither a disposal nor a dealing in land. The process takes place by operation of law and not by a voluntary act or by agreement between parties or by a dealing in land by parties, which in my opinion is the notion inherent in and is a prerequisite for section 6(1) and is the type of dealing

covered by it. The consent of the land control board is not required to a change in ownership occurring by adverse possession. To fall within section 6(1), dealing in land requires a free and voluntary act of parties involving disposition of land".

The above reasoning applies equally to trusts presumed or imposed by the law, which are not due to the voluntary acts of the parties.

Whether or not the express creation of a trust was a controlled transaction was the subject of much controversy and led to several contradictory High Court Judgements⁴⁴ until the Act was amended to clear the point.⁴⁵ For example in Githuchi Farmers Co. Ltd. V Gichamba and Anr,⁴⁶ Harris J. held that the creation of a trust is a controlled transaction for which consent of a land control board is required. The learned judge argued:

"--- if the contention is valid that the creation of trust is not a controlled transaction, would not the creation of trust provide so effective a means of circumventing the widely drawn prohibition regarding sales, transfers, leases, exchanges and partitions as to defeat almost completely the purpose of the Act?? --- - clearly, the creation of equitable interests is as such not excluded from the Act, for, by definition in

section 2, the term 'mortgage' includes 'charge'.^{46b.}

The opposite and more acceptable view was the holding of the court in Gatumu Kinguru V Muya Gathangi⁴⁷ where Madan J (as he then was) persuasively argued and held that an express trust is not a controlled transaction. The Judge argued that in the absence of express words, particular transactions should not be read into section 6(1).

The better view was that expressed in the second case and would have provided one way around the injustices that were evidently caused by a strict adherence to the Act and which will be discussed later.

B: Land Control Boards:

The minister is under section 5 empowered to establish a land control board for every land control area or division by notice in the Kenya Gazette.

The composition of the Boards is dealt with by paragraph 1 of the Schedule to the Act.

C. Granting of Consent:

Applications to the land control board for consent must be made in writing through forms obtainable from the D.O's office. This requirement is made clear by the decision of the Court of Appeal in Ethan Karuri V Mbuti Gituru and Others⁴⁸ where Madan J.A held that an application for consent of the land control board cannot be properly made orally but only in the required form. As the Judge put it, if an

application can be made or renewed orally from time to time, the limitation of the three months⁴⁹ for its determination would become meaningless.

The land control board will have absolute discretion either to give or refuse consent under section 8, but in light of section 9, the board can only refuse consent in particular circumstances. This in effect means that though the board has absolute discretion, it must confine itself to the provisions of the Act. In the words of Justice Trevelyan:⁵⁰

"But though the board's decision cannot be questioned in a court or board by reference to the words 'in accordance with this act', it does not have any discretion to to outside it".

Subject to the right of appeal to the provincial or central Land Control Appeal boards,⁵¹ the boards decision is final and conclusive and cannot be questioned in a court of law.⁵² But again, this provision though it appears to oust the jurisdiction of judicial review completely, has been interpreted by Madan J.A. in the case of Ethan Karuri V. Mbuti⁵³ to mean:

"The decision of the land control board is final and conclusive in respect of consent validly given and it cannot be questioned in any court. While the court may not enquire into the correctness of the decision, the court is not precluded from enquiring

into the validity of the consent to determine whether it was properly given".

The board is required to be guided by section 9 in considering the criteria stipulated in section 9, the board must satisfy itself that the applicant vendor has erected and maintained proper boundaries all around the piece of land to be affected.

A close look at the guiding considerations set out in section 9 reveals emphasis on the economic development of the land. This section is obviously based on the assumption that land should be distributed not according to one's immediate needs, but according to one's capabilities to develop and increase its productivity. The question of whether one already has sufficient land is to be decided not by reference to the acreage of the land one already holds, to be determined by a 'ceiling' but by referring to his capability to develop the land.⁵⁴

This point is further demonstrated by Arap Koite in his "A handbook for the guidance of land control boards"⁵⁵ according to whom, the effect of the grant or refusal of an application on the economic development of the land or on the maintenance or improvement of farming standards is to be the paramount consideration for the land control board.

Section 9 also stipulates situations where consent ought generally to be refused - for example where it is obvious that the purchaser is unlikely to be able to farm (the land well or to meaningfully cultivate it. This again

reflects the importance attached by the Act to optimum utilisation of land as criteria for consent rather than numerical acreage. Arap Koite enumerates certain situations to assist the board's decision, for example where it seems to the board that the land is bought for 2 speculative purposes, consent should be withdrawn, whereas an owner wishing to buy adjacent land and consequently enjoy economies of scale should be allowed to acquire that additional land. But a point of difficulty here is that it is never so easy in practice as it may seem in theory to draw a clear-cut line between the two situations.

Where one already has 'sufficient land',⁵⁶ consent ought generally to be refused. As has already been alluded to, sufficiency in this context refers not to size but to capability to develop and this is left to the sole discretion of the board to decide.

The term (sufficient land or interest in land) does not include title to land. This was held in the case of Lewin V The Land Control Board.⁵⁷ The apppe land had occupied on lease a farm comprising 500 acres as tenant from year to year for some time. She also held adjoining land direct from the Crown. In 1947 she applied to the land control board, under section 7(1)(a), Land Control Ordinance for consent to the purchase of the leasehold land she already occupied. The board, purportedly acting on the authority of section 8(1)(b)(i)⁵⁸ refused consent on the ground that Lewin "already holds sufficient land." The court

rejected the boards argument and held that since the applicant "already had" the 500 acres of leasehold land, which itself went to make up the sufficiency referred to in section 8(1)(b)(i), the conversion of this leasehold into freehold did not constitute an acquisition of additional land. In the words of the court:

"--- the terms 'sufficient land or interest in land' in section 8(1)(b)(i) does not include title to land ---. Hence the appellant's desire to enlarge or improve her leasehold title into freehold did not involve the acquisition of 'additional land' as defined in section 2".

Transactions with a non-citizen or a private company or co-operative society all of whose members are not citizens of Kenya will not be granted consent.⁵⁹ Such transactions may however be allowed under the power of exemption conferred on the President by section 24.

The board will refuse consent where it feels that the terms of the transaction are unfair to either party.⁶⁰ In reality, this section usually remains sterile since by the time the parties apply for consent, the negotiations are complete and the purchase price paid in most cases.

D: Consequences of non-compliance with Section 6

Under section 6(1) any transaction listed therein is void for all purposes unless the land control board for that

area has given its consent in respect of that transaction. Secondly, an agreement to be a party to a controlled transaction was void for all purposes at the expiration of three months⁶¹ after the making of agreement, if application for the appropriate land control board's consent had not been made within that time.

In brief, the contract is avoided. But this contract is not to be deemed void ab initio - it becomes void only after the expiration of the stipulated period. In Sospeter Wanyoike V. Waithaka Kahiri,⁶² Potter J.A. explained that section 6(2) does not render the contract of sale void ab initio, i.e. on the date of its conclusion, but at the expiration of the time limit thereafter when no application for the relevant consent has been made. The effect is that, between the date of the contract of sale and the date of its becoming void, the seller cannot sue for possession as the buyer is in possession with his consent under a contract of sale (or whatever the case may be).

In case of an agreement relating to various separate pieces of land, the only part of that agreement which becomes void is that part concerning agricultural land and the agreement in respect of other pieces of land will remain valid and will not be affected by section 6(2) - Chemelil Sisal Estates V Makongi Ltd.⁶³ - where it was held that the agreement remained perfectly valid in respect of non-controlled land, even though that part of the agreement relating to controlled transactions is void.

Further, an application made to the relevant board but which is not considered by the board within the stipulated period shall be deemed to have been refused at the expiry of that period. It necessarily follows from this that consent of the land control board given out of time is a nullity, and the application will be deemed to have been refused: Ethan Karuri V. Mabuti Githuru and Others.⁶⁴

As Madan J.A. put it:

"The consent of the land control board was clearly given out of time -- the board not having given its consent within -- (the stipulated period) the application had already expired -- as a result of its having been deemed to have been refused under section 9(2). There was no application before the board to which it could give its consent, and the consent given -- was a nullity".

The postponement of a decision by the board is not a 'decision' within the meaning of the Act, so that a postponement does not suspend the running of the stipulated period. This was stated in one case⁶⁵ where the parties having applied for consent, the board resolved that although there was no real ground for turning down the application, the vendor be asked to explain what he intended doing with the rest of the farm. It was held that the agreement became void after three months of the application and that the postponement of the board's decision did not suspend the running of the three month period (the Act has been

amended so that the stipulated period within which consent is to be sought is now six months).

Similarly, in Njoroge V. Munyuna⁶⁶ it was held that commencement of an action founded on an agreement for sale of controlled land does not suspend the operation of the stipulated period prescribed by section 6(2)(a) (now amended) so that at the expiration of that period, consent will be deemed not to have been sought with the result that the agreement will be avoided.

Finally the court has no power to order specific performance of a transaction which has already become void under section 6(2) due to lack of consent, by ordering the making or creating of a contract or agreement between the parties.⁶⁷

E: Penal Sections

Any Acts in futherance of a void transaction will render the parties thereto liable to sanctions set out in section 22 which include a fine of up to three thousand shillings.

F: Recovery of Consideration

As a general rule of the law of contract money paid under an illegal contract is irrecoverable but section 7 modifies this rule so that money or any other valuable consideration paid in the course of a controlled transaction that becomes void under the Act shall be recoverable as a debt by the person who paid it from the person to whom

it was paid.

The object of this section is not imperative and punitive in purpose, but rather its purpose is restitution: to restore the parties to their status quo ante.⁶⁸ Since the purpose is restitution, a person who has received money under a transaction which is avoided should be able to set off against it any valuable consideration given for it. Thus, a vendor can set off any claim properly the subject matter of a set off under O.8, civil procedure rules which do not arise under an agreement made void.⁶⁹

In a proper case mesne profits may be recoverable by the purported vendor since the original consent of the owner, to the entry on his land having by statute been declared illegal, any such person entering the land by virtue of such illegal consent is unlawfully on the land and as consent (of the owner) was void from the time it was given, then his (the buyers') original entry was also illegal, and accordingly that owner might be able to successfully maintain an action for trespass or for recovery of possession with the claim for mesne profits.⁷⁰

Attention must be drawn to the fact that this right under section 7 is subject to the time limit under the Statute of Limitations Act which in part provides:

"The following actions may not be brought after the end of six years from the date on which the cause of action arose:

- (a)
- (b)
- (c)
- (d) actions to recover a sum recoverable by virtue of a written law, other than penalty --".

The claimant will, by virtue of the above Act, have to bring any action founded on section 7 within the six year limit.

G: Compensation for Improvements

The Act, surprisingly, is silent on the question of improvements. This is indeed a sorry state of affairs since it is not rare that an action is brought to recover compensation. Usually, the buyer has been in possession for quite a number of years. He has usually during that period, erected buildings on the land and transformed an otherwise neglected piece of land into a fertile, cultivated land. To ask him to leave, with no compensation at all for all his efforts and expenses is morally unjustifiable. 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.

Leaving the Act aside, there are many indicators of the fact that compensation for improvements is or should be available. For example, in the much cited case of Chemilil

Ltd. V. Makoingi Ltd.,⁷² 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? 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. 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?

But contrary to the positions submitted above, and because the act is silent on the question most Judges have for some reason known only to themselves, been unwilling to give compensation for improvements though there are some who would not hesitate to grant compensation.

One Judge in the latter category is Madan J.A. who in the case of Elizabeth Cheboo V. Mary Cheboo⁷³ stated:

"In my opinion, the cost of improvements, if any, effected by the -- (buyer) on the land, the benefit of which will go to the defendant is money which the -- (buyer) paid in this case after having gone into possession of the land with

the consent of the -- (vendor), in the course of a controlled transaction to the use and benefit of the -- (vendor) thus being the person to whom it was paid and it is recoverable by the -- (buyer) as the person who paid it ---- I do not think that money or any other valuable considerations referred to in section 7 is limited to the purchase price only. Such a restricted interpretation would be an abhorrent affront to Judicial conscience. This may be a bold and new interpretation to place upon section 7, but it is consonant with Justice and equity. As was said in Chemelil V. Makongi, the improvements though they have some connections with the land, they do not appear to arise under an agreement made void in relation to them".

But since his fellow brothers, Miller and Potter, J.J.A. ^{JJA} did not, without giving reasons, agree such an order as to compensation for improvements was not made.

The law as it stands at present is that compensation for improvements is irrecoverable. This was cruelly stated by Trevelyan J. in Mobi Goki V. Chege Kibaki⁷⁴ in the following words:

"I do not think I can grant compensation for buildings since the agreement in question is declared by law to be absolutely void for all purposes".

The above, then, is the position as concerns compensation.⁷⁵ It will later be shown that this is not a correct statement of the law and that the Judges seem to have overlooked some important considerations and have not fully appreciated the true intent and extent of section 7.⁷⁶

As a point of interest, and it cannot go without mention, the Honourable Justice Muli in one case confused the issue of compensation as distinguished from money paid. This was the case of Njenga Gathama V. Kareri Njuguna⁷⁷ where in pursuance of an agreement for the sale of land, the defendant went into possession having paid the purchase price. The agreement was rendered void, the requisite consent of the land board not having been sought. According to the Judge:

"The defendant is not entitled to a refund of the consideration which he paid to the plaintiff".

Such a holding, with respect, is clearly wrong and was obviously arrived at in ignorance of section 7.

H: Powers of the Board

The board, in considering an application, has power to order the applicant or any interested party to attend before it, and require to such person to adduce evidence as to the applicant's identity and as to the ownership of the land to which the application relates or to produce any

document or other evidence relating to the land.⁷⁸ The board may also inspect any land for carrying out its functions under the Act.⁷⁹

Non-compliants with any of the above orders of the board will render the defaulter to penal sanctions under Section 17(3).

I: Power of Exemptions And Prohibition

The President has power, to either prohibit any controlled or class of controlled transactions, or to exempt any such transactions from the provision of the Land Control Act.

The significance of this section, it is submitted is to act as a safety valve in situations where it is expedient that a particular transaction not be exposed to the rigid provisions of the Act. Such instances might arise in case of Nationalized or Parastatal Organizations, or where it is necessary for a non-citizen to acquire land. The President should also, it is submitted, be able to intervene in cases where obvious injustice would be occasioned if a transaction was subjected to the Land Control Act, for example where the parties have given effect to a transaction for which consent has not been obtained and it would be inequitable to order the parties to change their positions again. The President could in such a case exempt such a void transaction for which consent is overdue.

Acting under this provision, the President in 1969,

exempted from the application of the Act any controlled transaction entered into by the East African Power and Lighting Co. Limited for the purpose of acquiring land for the generation, transmission, transformation, distribution, supply and use of electrical energy for lighting and other purposes.⁸⁰

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J: Comments on the Operation of the ACT,
As Disclosed By Case Law

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.

It is not rare that a seller 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 realises that there is this magic word in the form of section 6(1) of the Land Control 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. This is what happens in most if not all the land control cases.

It is not therefore surprising that when faced with such obvious and patent fraud and injustice, some of the Judges have tried to circumvent the provisions of the Act. Other Judges have acknowledged this injustice but have helplessly refrained from any bold attempts to bypass the provisions of this Act. Thus in the case of Joseph Kinuthia

V. John Senewa Kaurai⁸¹ where the plaintiff sought a decree of specific performance of an agreement for the sale of controlled land for which consent within time limit, Justice Trevelyan dismissed the action but sighed:

"It seems to me that the Act can readily enough be used as an engine of injustice. In the instant case the plaintiff has been injured but must lose -- were I not precluded from finding for the plaintiff, I would certainly have awarded specific performance --".

Again, in Elizabeth Cheboo V. Mary Cheboo,⁸² Miller J.

A. remarked:

"-- to the knowledge of the Bench and Bar it has become prevalent to find cases wherein some of the provisions of section 6 of the Land Control Act have 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.

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Among those who have attempted to bypass the provisions of the Act when injustice is obvious, is Justice Muli in the case of Mungai Mukiri V. James Njoroge and Another.⁸³ The plaintiff and the first defendant entered into an agreement for the sale of a piece of land to the plaintiff who

went into possession. Since the first defendant resisted attempts to obtain the necessary consent, it was never in fact sought. The first defendant later subdivided the piece of land and secretly sold it to the second defendant. The plaintiff subsequently filed an action praying, inter-alia, for a declaration that the second defendant held the land on trust for him (plaintiff). Invoking section 3(2) of the Judicature Act, Mr. Justice Muli held:

"-- according to substantial justice, without regard to technicalities of procedure, it is equitable that the plaintiff be awarded the disputed land which he bought through customary practices, -- this would not be inconsistent with any written law since the consent of the board is merely a procedural requirement which the plaintiff was prevented to comply with by being kept in the dark".

Also, in Munana Kimani V. Wahothi Kimani and Another,⁸⁴ where the appellant tried to go back on an agreement for sale of land for which consent had not been obtained, Mr. Justice Sachdeva held:

"For the appelland to now come before the court and attempt to seek refuge under the Land Registration Act or the Land Control Act, is tantamount to fraudulently backing out of the commitments which he had knowingly entered into. This court will do substantial justice to the parties

and will not countenance any attempts which clearly negate the spirit of section 3 of Judicature Act".

An even more valiant attempt was made by the Resident Magistrate at Kiambu, Mr. Okubasu (as he then was) in Mata Wangati V. Wamarite Mwirika.⁸⁵ The plaintiff filed an action for the defendant to transfer to him a piece of land which the plaintiff alleged he had purchased from the defendant in 1968. No consent had ever been sought. In finding for the plaintiff, learned Magistrate said:

"Section 3 of the Judicature Act states how the High Court and Subordinate Courts will exercise the Jurisdictions. It is clearly stated that the doctrines of equity would apply. It is obvious that the legal provisions are too harsh to the plaintiff and hence to soften this equity must come into play".

The learned Magistrate also held that public policy demanded a decision in favour of the plaintiff.

On appeal, however,⁸⁶ Justice Chesoni over-ruled the decision and held that the doctrines of equity applied in Kenya only when the Constitution and all other written laws of Kenya did not extend or apply and that in that case, since a written law, the Land Control Act applied, there was no room for equity to come in.

The above brief evaluation of the operation of the

Act has, it is hoped, revealed the ^{um} uncertainty inherent in the Act and also the obvious injustice caused by strict application of some of its provisions. A change was therefore inevitable and as Justice of Appeal Miller put it in the case of Elizabeth Cheboo:⁸⁷

"It may well be that the situation has arisen for checks within the provisions of the Act while maintaining its intendment".

CHAPTER III

AMENDMENTS TO THE LAND CONTROL ACT

AND THE QUESTION OF IMPROVEMENTS

A: Amendments

Towards the end of Chapter II, it was shown that the Land Control Act, as it stood in 1980 was silent on a number of important issues, inter alia, the problem of improvements and also the question whether the express creation of a trust in a controlled transaction, thus giving rise to a host of conflicting High Court judgements.

The Act was therefore amended in 1980, in response to some of these problems mentioned earlier.

The first area of amendment is in relation to the definition of a controlled transaction. Section 6 as amended, enacts that the declaration of a trust is a controlled transaction for the purposes of the Act. Section 6 reads:

"6(2) For the avoidance of doubt it is declared that the declaration of a trust of agricultural land situated within a land control area is a dealing in that land for the purposes of subsection (1)".

This solves the uncertainty created by cases like Githuchi Farmers Co. Ltd. V Gichamba⁸⁸ and Gatimu Kinguru V. Muyu Gathangi,⁸⁹ two of the conflicting decisions on whether a trust is a controlled transaction.

Solve the uncertainty as to trusts the amendment certainly does, but in so doing, inflicts a lot of

injustice in some cases where the circumstances of a particular case warrant the recognition of a trust in order to avoid an obvious fraud.

There seems to be no logical justification for such an amendment, except possibly, the fear that the creation of a trust might provide a means of evading the provision of the Land Control Act. But this fear, it is submitted, is misplaced, since it fails to take account of the fact that the legal and equitable interests vest in different persons and there is no transfer of title. So even if the court did recognize a trust in a particular case, the transfer to the equitable owner would still require the consent of the relevant land control board - so where is the loophole it is argued would work to defeat the provision of the Act?⁹⁰

But this amendment, it is submitted does not affect the position as regards trusts implied or imposed by the law, which since they are brought into existence by the operation of the law, are not dealings within the meaning of the Act. The same argument applies in Gatumi Kinguru V. Gathangi, as regards Adverse possession, can also be applied here.⁹¹

The second amendment came in the form of section 8 which replaces 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. But under section 8 now the prescribed period is six months and even this six

month period can be extended by the High Court if it sees fit. This means that any agreement for which consent has not been obtained within the time limit is initially voidable and only becomes void where the High Court sees no reason to extend the period. Section 8 reads:

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

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

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 inflicted on innocent buyers. Thus, for example, no longer will the unscrupulous vendor be able to plead lapse of the application period, in his scheme to repossess his land which he either never intended to sell or which has shot up in value. Before the amendment, even if the courts did discover

such a fraudulent scheme, it was bound by the absolute provisions of sections 6 and 8 and many a Judge has cried out at the injustice and obvious fraud.⁹² But since the amendment, whenever a court finds itself in such a predicament all it has to do is extend the period and thereby give the buyer a chance to claim specific performance.

The 'sufficient reasons' upon which the court may extend the period might include, it is submitted, a fraudulent vendor; ignorance on the part of both parties as to the provision of the Land Control Act (though ignorance of the law is no defence); or where, for example, it is years since the buyer went into possession and has during that period considerably improved the land so that it is only fair to extend the period in order to enable the parties to apply for consent or to give the buyer the extra time to ask for specific performance. But whatever the facts of the case or the reasons the court is a discretion whether or not to extend the period.

Further and as a logical consequence of the court's power of extension, it is submitted, that the question of compensation for improvements will only very rarely arise in court. The reason for this is that before the amendment the time limit under section 6(2)(a) was three months without any power of extension. The result was if the period expired the agreement was void for all purposes and in all cases inevitably, the land reverted back to the vendor and the only way an innocent buyer could

counter-react was to claim compensation for improvements (though he had no hope of succeeding). But with the amendment making it possible for the time to be extended claiming compensation for improvements is a course of action the buyer will certainly not take or need to take.

The above, then are the amendments. It can be seen from the foregoing that a lot of the problems plaguing the operation of the Act will no longer arise. But the legislators, surprisingly have overlooked the question of compensation for improvements, which though it has been submitted above will rarely arise, may nevertheless arise in instances where, for example, the court sees no reason to extend the period.

B: Compensation for improvements

The rule, as per the relevant caselaw is that compensation for improvements is not available.⁹³ This is indeed a harsh absolute rule which renders a court powerless to act even in cases where the court itself is of the opinion that the buyer should be awarded compensation, e.g. when the behaviour of the vendor warrants it.

Further, a close look and a flexible interpretation of the provisions of the Act definitely creates a doubt in one's mind as to the correctness of the above stated rule in improvements. For example section 7 which, as has already been explained in Chapter II, creates an exception to the general rule that money paid under an illegal contract is irrecoverable. Also alluded to was the fact that the

purpose of this section is not puritive or imperative but restitution.⁹⁴ Thus applying this section (presumably) it has been held that in a proper case mesne profits may be recovered.⁹⁵ There is no reason why, in all fairness, a deserving buyer also should not be able to recover compensation for improvements. Of course, one might here argue that the purchaser has had free use of the land. 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 compensation.

If the above argument is not convincing enough to the reader, then it would seem that as caselaw points out, compensation for improvements is not recoverable under Land Control Act but not exactly. The true position is that the Act is silent on the issue of compensation; it is not that it expressly forbids compensation - the rule against compensation is a rule fabricated only by our courts.

So does it mean that this rule is absolute and nothing should therefore be done even where it is obvious and the facts of the case demand that the buyer be awarded compensation??

There is a way around this harsh rule and that is through the intervention of equity. Right through the history of the common law equity has acted as a gloss upon

it to mitigate harshness of the law or to supplement where the law proves inadequate. In Kenya, equity applies via section 3 of the Judicature Act 1967 next to written law in order of importance. That is to say that equity only applies where the statute law is silent or is inadequate.⁹⁶

It can be argued here that since the Land Control Act is silent on the question of improvements then there is room for equity to come into play whenever the facts of the case and justice demand. And one way through which equity can interfere is through the medium of the equitable remedy of restitution which is founded on the principle of justice known as unjust enrichment. Together these principles interwine whenever a defendant finds himself in possession of a benefit which in justice he should restore to the plaintiff. Also it has been held that the object of section 7 of the Land Control Act is restitution.⁹⁷

The principles of this remedy have been applied in many of the jurisdictions of the new states including Canada and U.S.A.⁹⁸ Even in relatively conservative England, there is authority for the application of these principles as modified. One case in point is the case of Lee-Parker V. Izett (No. 2)⁹⁹ where a purchaser who improved land in circumstances in which both vendor and purchaser mistakenly thought the contract of sale was valid, was held entitled to recover the value of the improvements.

The facts, briefly, were that a purchaser having contracted to buy land, went into possession and made certain improvements which were of value to the vendor. The contract

of sale was subsequently held void for uncertainty. As to the claims of compensation, Goulding J. held:

"The most equitable compensation for expenditure made on the faith of a contract which turns out to be invalid would be an opportunity to complete the purchase".

But since this was impossible in the circumstances, the Judge allowed the purchaser reasonable compensation for her expenditure; and he assumed that the proper remedy was a lien to secure the sums so spent. The Judge however qualified this:

"But any lien devised by way of equitable compensation as between the (purchaser) and the (vendor) must in my judgement take account of the benefit to the (purchaser) of her possession of her premises. If the (purchaser) has paid no more than its fair value for her enjoyment of the property --- I see no equitable basis for charging the premises in her favour".

The above principle is tailor-made to solve the predicament of the purchaser who has improved the land but where the transaction is avoided under the Land Control Act due to lack of consent. This is an effective weapon which the courts can arm themselves with to circumvent the harsh and absolute rule that compensation for improvements is not available, whenever the court feels that justice and good conscience demand it.

CONCLUSION

The Land Control Act can be a very effective device in the hands of the government for controlling transactions in agricultural land, and for giving effect to its land policy. The legislature, realizing the important role played by the Act, has made efforts to make the Act more practicable and to enable us smoother operation. The recent amendments are a pointer to this.

However perfect the Act may be, it does not operate in isolation, and should be looked at in terms of the conditions under which it applies. Firstly, the majority of the Kenyan population is illiterate and is based in the rural areas. This makes it very difficult for most people to have access to legislation - especially when they cannot read. Secondly, the whole land tenure system now in application is totally alien to the African. The Land Control Act is no exception.

The above two facts make it very difficult for the affected people to have any knowledge of the legislation referred to, or to understand it. Section 6(2)(a) of the 1967 Act, prior to amendment, took no account of this fact. It seems that the amendments under section 8 were aimed to make allowance for this fact. An even better step would be to publicise the requirements of the Act - and coupled with amending section 8, friction in the application of the Act will be minimised.

Another fact is that the Judiciary plays the role of

applying the legislation - and this is a very heavy responsibility. It is the Judiciary that can either make the Act a 'success' or a 'failure". The Judiciary, can, by twisting the meaning of particular words, without necessarily changing the words, make the Act much more suitable and more to the point. This is because Parliament has no time for details, and also because it is the Judiciary that is more conversant with the everyday problems and grievances of the masses. There is then always room for 'modification' by the courts, of legislation - whenever the need arises.

The Land Control Act is also amenable to such modification. For example, the meaning of section 7 can easily be 'twisted' without changing the words, to allow compensation for improvements. But the Judiciary has refrained from such as exercise, especially with reference to the Land Control Act. The courts have tended to apply the Act rigidly, even in the face of obvious injustice and even when, if, flexibly applied, a lot of injustice and fraud could have been omitted.

What is therefore apparent is that the Land Control Act can be a perfect piece of legislation - and would also be much more acceptable, but for a few minor deficiencies here and there. These defects, lie, not necessarily in the Act itself, but even if they did, then they can always be rectified by our courts, without Parliamentary interference.

FOOTNOTES

INTRODUCTION

- 1: One of them being the government. See Colony and Protectorate of Kenya, Legislative Council debates, 1959, Vol. LXXXX, Part I, para 1257.
- 2: For a general view see Simon Coldham "Land Control in Kenya" 1978 J.A.L. p.63.
- 3: CAP 302.
- 4: National Assembly debates, 1st Parliament, Session 5, Volume 13, Part II, 1967, column 2485.
- 5: Supra, column 2486.
- 5(b): Section 9 L.C.A.
- 6: Section 5.
- 7: Section 8(2) But this has to be done with reference to section 9.
- 8: Section 6(1).
- 9: CAP 300.
- 10: See J. Trevelyan's Judgement in Joseph Kinuthia V. John Senewa Kaurai, K.H.C.D. (1973) Case No. 32 (unreported)

CHAPTER I

- 11: For more details, see Ross, W.M. "Kenya from Within". Chapter III, published by Frank Cass and Co. 1968.
- 12: No. 21 of 1902.
- 13: No. 12 of 1915.
- 14: See section 25 of the Act.
- 15: No. 4 of 1940.
- 16: No. 23 of 1944.

- 17: See the preamble to the Act:- "To provide for control of dealings in Land ---".
- 18: Land Control (Amendment) Ordinance 1944 S70(a) and (b).
- 19: Section 7(1).
- 20: Section 7(1).
- 21: The Land and Agricultural Bank was the first credit institution intended for the benefit of land owners.
- 22: Section 73.
- 23: Section 8(1)(c).
- 24: Section 19.
- 25: Section 8(1)(b).
- 26: See footnote 21.
- 27: No. 28 of 1959.
- 28: See paragraphs 30-36.
- 29: Section 5(1).
- 30: Section 5(1)(a),(b) and (c).
- 31: Section 5(2).
- 32: Section 10(1).
- 33: Section 11(b) and (c)
- 34: L.N. 589 of 1960.
- 35: Section 14.
- 36: Act 14 of 1965.
- 37: CAP 302.

CHAPTER II

- 38: The Act was amended in 1980 by Statute Law (repeal, Misc. amendment) Act 1980.
- 39: Preamble to the Act.

- 40: National Assembly debates, 1st Parliament, 5th session, Volume 13, Part II (1967, Govt. Printer).
- 41: CAP
- 42: (1972) E.A. 249.
- 43: H.C. Civil case No. 176 of 1973 (unreported).
- 44: This question no longer arises since the amendment to the Act expressly states that the express creation of a trust is a controlled transaction. See section 6(2).
- 45: The reason for the conflicting High Court judgements is the fact that no Judge is bound to follow the decision of the other High Court Judges - with the result that a Judge could state the law as he thought it was.
- 46: (1973) E.A. 8 46(b) Supra, page 10.
- 47: See footnote 43.
- 48: Civil Appeal No. 25 of 1980 (unreported).
- 49: Section 6(2)(a). The Act was amended, and under section 8 of the Act as amended, the prescribed time limit is 6 months, which can be extended by the High Court if it sees fit.
- 50: Joseph Kinuthia V. John Senewa Kaurai. H.C.C. No. 404 of 1970 (unreported).
- 51: Sections 11 and 13.
- 52: Section 8.
- 53: See footnote 49.
- 54: Section 9(i)(c) does not define "sufficient land" in terms of acreage.
- 55: Ministry of Lands and Settlement, 1969.
- 56: Section 9(i)(b)(i)(c).
- 57: 23 K.L.R. 15.

- 58: This is the 1940 Ordinance equivalent of section 9(1)(b)(i)(c)
- 59: Section 9(i)(c).
- 60: Section 9(i)(b)(iii).
- 61: This has now been amended. See section 8 of the Act as amended.
- 62: Civil Appeal 29 of 1980 (unreported).
- 63: (1967) E.A. 166.
- 64: Civil Appeal No. 25 of 1980.
- 65: Wambua V. Wathome (1968) E.A. 40.
- 66: Civil case 187 of 1974 (unreported).
- 67: Cheboo V. Cheboo. Civil Appeal No. 40 of 1978 (unreported). But this is possible under section 8 of the Act as amended, since the High Court can extend the period of the deadline (which is now six months) and thereafter order specific performance.
- 68: Chemelil V. Makongi Ltd. (1967) E.A. 166.
- 69: See footnote 68.
- 70: Chemelil Case above. This statement was accepted as correct in Rioki Estate Co. V. Kinuthia Njoroge, Civil Appeal No. 9 of 1979: though the Judge in that case refused an order for mesne profits since "it would --- (amount) to giving back the appellant by way of mesne profits, what the statute deprived him of in the form of rent by section 7 of the Act". But the Judge was of the view that in a proper case mesne profits might be recoverable and that the case before him was not such a case since "the real basis of the appellant's claim in this case was in breach of the agreement in respect of the use of the premises, and was not in court for wrongful occupation ..".

- 71: CAP 22
- 72: (1967) E.A. 166.
- 73: Civil Appeal 40 of 1978 (unreported).
- 74: K.H.C.D. 1972 Case No. 65.
- 75: Also refer to Ethan Karuru V. Mabutu Gituru.
Civil Appeal 25 of 1980.
- 76: Chapter 3.
- 77: K.H.C.D. 1973. Case No. 32.
- 78: Section 17.
- 79: Section 18.
- 80: See scheduled to the Act as amended.
- 81: Supra.
- 82: Supra.
- 83: High Court Civil Case 248 of 1971.
- 84: High Court Civil Appeal No. 19 of 1975 (unreported).
- 85: Civil Case 70 of 1972.
- 86: Civil Appeal No. 18 of 1975 (unreported).
- 87: Civil Appeal No. 40 of 1978 (unreported).

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CHAPTER III

- 88: See footnote 46 supra.
- 89: See footnote 47 above.
- 90: See Gituchi Farmers case. Footnote 46.
- 91: See footnote 43.
- 92: See footnotes 81 and 82.
- 93: See footnote 74 above.
- 94: Chemelil case.
- 95: See footnote 29.

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- 96: Wamarite V. Mata. Civil Appeal 18 of 1975. In the High Court, appellate side.
- 97: Chemelil case supra.
- 98: Robert Goff and Gareth Jones: "The Law of Restitution". Second edition, page 16.
- 99: (1972) 2 All E.R. 800.