EQUITY IN KENYA:

A STUDY OF THE RECEPTION AND INSTANCES OF APPLICATION OF THE DOCTRINES OF EQUITY IN KENYA

A dissertation submitted in partial fulfilment of the Requirements for the LL.B Degree, University of Nairobi

By

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For

Grace and Beatrice,

my sisters and friends,

from whom I have learnt so much.

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A C K N O W L E D G E M E N T

A work of this type would not be possible without access to a vast accumulation of scholarly research and writing which I have read and which has in many respects shaped the ideas in this dissertation. I have done my best to acknowledge such sources of materials and works.

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Otherwise, I am solely responsible for this work, any errors and imperfections. The law is in general stated in the light of materials available to me on 1st May, 1981.

1st May, 1981 Muchelule, A.O.

PRINCIPAL ABBREVIATIONS AND MODE OF CITATION

A.C.	Appeal Cases (1891 onwards)
A.I.R.	All India Reports
All E.R.	All England Reports
App. Cas.	Appeal Cases (Before 1893)
C.A.	Court of Appeal
Ch.	Chancery Reports
Ch. D.	Chancery Division Reports
Ch. Rep.	Chancery Reports
E.A.	East African Law Reports (1957 onwards)
E.A.C.A.	East African Court of Appeal Reports before (1957)
(H.C.)	High Court
H.C.C.C.	High Court Civil Case
H.L. Cas.	House of Lords Cases
(K)	Kenya
K.B.	King's Bench Reports
K.H.D.	Kenya High Court Digest
K.L.R.	Kenya Law Reports
Lloyds' Rep.	Lloyds' Reports
L.R.H.L.	Law Reports House of Lords
N.L.R.	Nigerian Law Reports
Q.B.	Queen's Bench Reports
Q.B.D.	Queen's Bench Division
W.L.R.	Weekly Law Reports

INTRODUCTION

It is undeniable that much of Kenyan law finds its source, either directly or indirectly, in England. This is easy to understand since Kenya was, until 1963, a British colony and it was the usual custom of the British colonialists in the absence of any applicable local law, to apply rules of law then operating in England to the new colony. Even after independence Kenya inherited certain English statutes, common law and doctrines of equity. The local statutes have been modelled along their English counterparts. This dissertation is concerned with the application of the doctrines of equity in Kenya, hence its objective is two-fold: to survey the reception and principles which can be extracted from the cases to rationalise the circumstances in which the doctrines of equity have been applied in Kenya, and secondly to set out certain instances in which these doctrines have been applied by the courts. In so doing it is intended that the contribution and usefulness of these doctrines in the administration of justice in Kenya will become clear.

'Equity' has been used in the dissertation in two main ways, firstly, it refers to the technical rules of equity that developed alongside and ameliorated the rigours of, the common law.

in particular by developing the liability to account or the imposition of a trust.

It is not easy to write on the application of equity in Kenya without having to look back to England where the equity system was nurtured. Hence, the first part of Chapter One will briefly be a discussion of the history and development of equity in England and its relationship with the common law. The rest of the Chapter is on the sources of equity law in Kenya and the principles underlying its application. In this respect the importance of the Judicature Act (K) of 1967 as the reception statute cannot be over emphasised. However, there are other specific reception statutes. Chapter one is therefore merely introductory but an invaluable background upon which the selected instances of the application of equity in Kenya have been dealt with.

Chapter Two is the first case study, dwelling on how the principle in Walsh v. Lonsdale has been applied over the years by the courts in Kenya. Chapters Three and Four specifically deal with the doctrines of equitable estoppel and equitable customary trust, respectively.

It is hoped that the reader will, by the end of the dissertation, appreciate the salient features of the application of equity in Kenya and also the contribution of equity in Kenyan jurisprudence.

CHAPTER ONE

THE DEVELOPMENT OF EQUITY IN ENGLAND AND GENERAL ASPECTS OF ITS RECEPTION AND APPLICATION IN KENYA

1:1 HISTORY AND DEVELOPMENT OF EQUITY IN ENGLAND

Equity consists of a body of principles built up from the precedents of the court of Chancery. In its initial growth period (about 1400 to 1535) it was administered in each case purely on 'ad hoc' grounds of fairness, morality and conscience. The court of Chancery came into being later after the common law courts had been established. When a subject failed to obtain justice in the common law courts he would petition the court of Chancery whose head was the Chancellor. The Chancellor, 'Keeper of King's Conscience', was one of the most important royal officials and he was not bound, by the rules or procedure of the common law courts nor was he afraid of powerful litigants.

The common law was originally unwritten and basically developed on the common customs by the judges of the old common law courts. The Normans had found England a primitive country with many local courts applying a variety of local customs. One of the effects of their conquest was the organisation of government and court system in England. King Henry II later reorganised the legal system by setting up the Assize Courts and also introduced the idea of fair trial. He also established the 'Curia Regis' (King's Council) which specifically dealt with civil matters. The three common law courts[1] sprang from the 'Curia Regis'.

It is King Henry II who introduced the writ system that applied in the 'Curia Regis' only. The Norman rulers sent their own legal officers to sit as judges throughout England and this brought about the observance of almost uniform principles of law and this development saw the emergence of what has generally been referred to as the 'common law'.

The writ system operated within very tight rules. The writ itself ordered the representative of the Crown of the country in which the defendant resided to ensure the attendance of the trial. Each different kind of action had its own writ, often with its special procedure and no action could succeed until a correct writ was obtained. This rigidity resulted in injustice that could only be remedied by the exercise of residual power to decide on issues which had no writs, and therefore no remedy. The chancery on most occasions was willing to issue new writs but this power was assailed by the Barons who argued that the power to invent new writs was a power to create new rights and duties. Therefore, under the leadership of Simon de Montfort, they secured the enactment of the Provisions of Oxford, 1258, in which the Chancellor swore that he would issue no further writs without the command of the King and his Council.

This would have stifled the growth of the common law had it remained fully effective. But the Statute of Westminster, 1285, provided, in its famous Chapter 24, 'In Consimili Casu' - that the clerks in the Chancery should have a limited power to issue new writs.

If there already existed one writ and in a like case ('in consimili casu'), falling under the law requiring like remedy, the clerks would agree in making a writ, or else they were asked to refer the matter to the next parliament. Consequently, a suitor whose suit was not covered by a writ was still left without a remedy unless he could persuade parliament to intervene.

The result of this was that there were a number of cases where suitors could not obtain any remedy from the courts. The only way left to them was to petition the King and his Council, for the King as 'the Fountain of Justice' was regarded as having a residue of judicial power left in his hands. Such petitions were heard by the King's Council of which the Chancellor was an important member. Enactments in 1280 and 1293 and a Proclamation of 1349 provided that certain petitions be directed to the Chancellor in the first place. After the reign of Edward III petitions were directed to the Chancellor alone. But although the Chancery was recognised during the 14th and 15th centuries, the decisions upon which petitions were made were either in the name of the King's Council or with advice of the Sergents and judges. Not until 1474 did the Chancellor make a decree on his own authority after which his decrees became frequent.

In this way there gradually came into existence the Court of Chancery in which the Chancellor, acting independently of the King's Council, sat as judge administering a system of justice called 'Equity'.

After the end of the 17th Century only lawyers were appointed to the office of the Chancellor. Equity, which varied with every Chancellor, began with Lord Ellsmere (1599-1617) to develop a code of principles, and the work of Lord Nottingham (1673-1682) in system arising the rules earned him the title of 'the Father of Equity'. When Lord Eldon retired as Chancellor in 1827 the rules of Equity were as fixed as those of common law.

It can be said that equity did not contradict or override the common law but, rather, supplemented and complemented it. This is, however, of a formal rigidity only, for it cannot be denied that the results produced by equity and operation were totally different from those contemplated by the common law. This caused a number of disputes that culminated in 1615 with the matter being taken by the Lord Chancellor and the Lord Chief Justice of the King's Bench to the fountainhead, the King James I himself. The Chief Justice demanded that the Chancellor should stop frustrating the rules of the common law; the other protested that he was not contesting the validity of those rules, but merely applying his own system to them to effect better justice. In the event the King accepted this view and declined to intervene in favour of the Lord Chief Justice.[2]

The ruling settled that equity had the power to adapt and mould the common law. It was also implicit in it that in any situation where there was a clash between the rules of equity and common law, the rules of equity would prevail. There was however, a continued conflict and this can be seen in the statement of Sr. George Jessel, M.R., in Re National Funds Assurance Company[3] that

"..... This Court is not, as I have often said,
a court of conscience, but a court of law".

Nonetheless, now various subsidiary officials had been appointed to assist the Chancellor and a system of appeals had grown up, and finally in 1875[4] the Chancery system was merged with the common law courts to form the present supreme court of Judicature. What was once a method of petitioning the King for justice became a way of starting an action before a regular court of justice. It should be emphasised that the Judicature Acts 1873-75 corrected the defects in the administration of justice in the English legal system. The same legislation[5] laid to rest what had been conflicts between the common law and equity. But this did not fuse the substantive rules. However, there was no longer the duality of jurisdiction since the supreme Court of Judicature[6] could now give effect to both legal remedies and equitable remedies, and where there was a conflict between the rules of common law and the doctrines of equity with reference to the same matter, the rules of equity prevailed. It is in this light that one can understand the decision like that in Walsh v. Lonsdale[7] which will be discussed later.

1:2 NATURE AND CONTENT OF EQUITY

The contribution of equity to English jurisprudence took the form of the creation of new rights, new remedies and new procedure. The court of Chancery created the institution of a trust.

A trust is, in essence, an equitable obligation which imposes upon a person described as trustee certain duties of dealing with property held and controlled by him for the benefit of people described as the beneficiaries, or if there are no such people, for some purpose recognised and enforceable at law. Infact the development of equitable customary trust by the courts in Kenya is modelled on the lines of the English trust.

It should be also noted in passing that the court of Chancery created the institution of mortgage and would allow a mortgagee to redeem after the due date of redemption had passed at law.

The only remedy which the common law courts could give was an award of damages. But the court of Chancery could compel or restrain the performance of some act (a remedy known as injunction) or grant an order of specific performance, in which case a person to whom the order was directed was compelled to perform an obligation existing either under a contract or a trust. Equity has also provided a defence that an instrument did not reflect the true intentions of the parties at the time of the contract. In such circumstances the Court of Chancery claimed jurisdiction to rectify the document by issuing an order of Rectification. By an order of Rescission, the Chancery court could rescind a contract where it was possible to restore the 'status quo' between the parties. Other remedies can be found in the names of 'Receiver' and Appointment'. The court of Chancery also made it possible for the discovery of documents.

Suffice it to say that the basic nature of equity is expressed in the renowned 'Maxims of equity'. These are general guidelines of the jurisdiction of equity which have been developed throughout its history. They are a collection of general principles which can be moulded and adapted to suit the circumstances of the individual case, and form a convenient way of classifying equitable principles. Maybe the most important of the maxims is that 'equitable remedies are discretionary'. Thus the court is entitled to take into account collateral matters, such as the conduct of the parties, in addition to considering their bare legal rights, in deciding whether to grant an equitable remedy. 'He who comes to equity must come with clean hands'.

Lastly, there is need to briefly make a distinction between legal interests and equitable interests. Generally a legal interest is valid against the whole world, and any person who subsequently acquires a legal or equitable interest in the same property takes the interest subject to the prior legal interest, whether he has notice of that interest or not. Equitable interests are those rights over property which were recognised by the court of Chancery but which were not valid at common law. If, for example, X has an equitable charge of plot B, and A, the owner, subsequently conveys the legal fee simple of plot B to C, who has no notice of X's equitable charge, X's equitable interest will be invalid against C. The same result occurs where a trustee in breach of trust sells trust property to a 'bona fide' purchaser for value without notice of the trust.

A legal interest in property is good as against the whole world (an interest 'in rem'), whereas an equitable interest is good only between the parties (an interest 'in personam').

1:3 RECEPTION AND APPLICATION OF EQUITY IN KENYA

By 1897, therefore, there was a realm of equity. Equity had developed immensely flexible, yet largely clear doctrines.

The usual custom of British settlers, was, in the absence of any applicable local law, to apply rules of law then operating in England to any new Colony. This was done in Kenya by the 1897 East African Order-in-Council. The Order-in-Council provided for the application of English law in Kenya (then East African Protectorate) and was therefore the background of the legal colonisation of this country. It generally established in the protectorate a court styled Her Majesty's court for East Africa, the predecessor of the High Court set up by Order-in-Council in 1902. The High Court of the territory had full jurisdiction, civil and criminal, over all persons and matters. Such jurisdiction was to be exercised in accordance with certain Indian codes and with Ordinances locally enacted, and, in so far as they did not extend and apply, jurisdiction was to be exercised in conformity with the common law, the doctrines of equity, and the statutes of general application in force in England on the 12th August, 1897[8]. It is hardly surprising that the colonial administration had, at this time, to look to the Indian legislations as good law for the Kenyan territory. The Indian administration, with its experience for several centuries, was an example in the methods of governing dependent people.

There were many direct points of contact with India from the earliest days of the establishment of British territories in East Africa, and there was to be an ever increasing influx of Indians into the protectorates, first as a class of labourers and petty traders and later playing a dominant part in commercial life and, most important, forming the majority of the members of the legal profession outside government service.[9]

The reception clause was modified by the 1921 Kenya Colony Order-in-Council. Section 4(3) of the legislation provided that the Supreme Court was required to exercise its jurisdiction with, inter alia, the common law, the doctrines of equity and statutes of general application in force in England on 12th August, 1897, subject, however, to modifications and amendments. The application was to extend and apply only so far as the circumstances of Kenya and its inhabitants permitted, and subject to such qualifications as those circumstances rendered necessary. The incorporation into the law of Kenya of the English doctrines of equity was also achieved under Rule 3 of the Kenya (Jurisdiction of Courts and Pending Proceedings) of the constitution of Kenya (Amendment) Act 1965, but the doctrines were specifically stated to be subject to 'any written law for the time being in force in Kenya'.

In 1967 the Judicature Act[10] was enacted. This is the basic statute that provides for the application of the common law and doctrines of equity in Kenya. It provides[11] that subject to the Constitution[12] and all other laws and other written laws, including certain Acts of the United Kingdom, 'and so far as the same do not extend and apply, the substance of common law,

the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897' will apply in Kenya'. This statutory provision makes it clear that the law created by the English courts of common law and equity have been received in Kenya with the result that judicial decisions must be accepted as an important source of law[13]. Both the common law and equity were evidenced by the reported decisions (and also by legal writings) of the English common law courts and the court of Chancery. Generally, therefore, a decision of English courts given in the 16th Century can be rendered as a statement of law in Kenya. It is otherwise, however, where the decision of English courts before 1897 has been changed by another decision or a statute specifically made applicable in Kenya.

It would perhaps have been more appropriate if the draftsman had used the words 'principles' or 'rules' of equity rather than the 'doctrines' of equity', since the latter term has a technical meaning referring to the four doctrines: Conversion, Election, Performance and Satisfaction. It should be noted that the reception clause refers to the whole range of principles of equity as developed by the Chancery court; the equity that developed alongside, and ameliorated the rigours of the common law, until the fusion by the Judicature Acts 1873 - 1875.

There is a controversy, however, whether the limitation to pre-1897 laws refers to statutes of general application[14] or whether it applies also to the rules of common law and doctrines of equity.

In other words, although clearly only pre-1897 English statutes are in force in Kenya, it is uncertain from the wording of the section whether the Kenyan courts are to apply the rules of common law and doctrines of equity as they exist now, or as they existed in 1897. Some writers, notably Professor Allot,[15] favour the interpretation that they apply as they existed in 1897. On the other hand other writers, notably A.E.W. Park[16], hold the contrary view, that is, that common law and equity is to be applied as it exists at the present time. The writer thinks that this is the correct and practical view. In 1897 the English law in general, from which Kenya has drawn much of its law, was still in its crude stage. English land law, for instance, was still in the medieval confusion from which it was released only 28 years later by the Law of Property Act. The Kenya Companies Act[17] is almost a copy of the 1945 English Companies Act. Even the Bankruptcy Act is modelled on a recent English legislation. Moreover, it cannot be denied that in practice the Kenya Courts seldom, if ever, draw any distinction between pre- and post-1897 English cases dealing with common law and equity principles, and that a decision is as likely to be based on the second category as on the first. Indeed little awareness of the reference date in this context is discernible. For instance, in Esmail V The Republic[18] the accused was charged with obtaining property by false pretences. In dismissing his appeal against conviction the Supreme Court relied on English cases.

The court was heard to say 'we have decided that we should follow cases which appeal to our sense of reality, whether decided before or after the reception date.'

It is also evident from certain receiving statutes that the legislature did not intend to apply in Kenya only those 'doctrines of equity' as of 12th August, 1897 as there is no mention of dates which may be taken to mean that the courts of Kenya can derive assistance from recently decided English equity cases. Examples of such statutes are the Kenya law of Contract Act[19] and the Registered Land Act[20]. These statutes are also evidence of the immense role equity plays in Kenyan jurisprudence. The Kenya Law of Contract Act which came into operation on 1st January, 1961, provides in its section 2 that:

> "the common law of England relating to contract, as modified by the doctrines of equity..... shall extend and apply in Kenya".

Section 163 of the Registered Land Act also provides that the common law as modified by 'the doctrines of equity shall extend and apply in Kenya.....'. The common law is defined in the Interpretation and General Provisions Act as follows:

> "Common law means so much of the common law, including the doctrines of equity of England as has effect for the time being in Kenya".

It is only where a particular decision is based on the post-1897 English statute which brought about a change in English law, and has no equivalent in Kenya, or where it is inconsistent with a Kenyan statute or binding precedent that the post-1897 English cases do not apply in Kenya.

It is also clear from the statutory provision that there are two principles governing the application of equity in Kenya: equity is a relevant source of law only in so far as the constitution of Kenya and other written laws 'do not extend and apply' - in which case Walsh V. Lonsdale may not be a good decision in Kenya; secondly, equity will apply in Kenya 'subject to such qualifications as local circumstances render necessary'. This is the reason why, for instance, equitable trust should be modified and developed in Kenya in the form of customary trust which, though has English attributes, has salient customary law features. The two principles governing the application of equity in Kenya should be seen as guiding principles only for equity should be seen as an embodiment of notions of fairness and substantial justice, able to ameliorate the rigours of the rigid statute. It is in this respect that the development of the equitable customary trust in Kenya as an important development in the sense that it will go a long way in mitigating the ruthlessness of the Registration Land Act (K).

There is a discussion on this later.

There is yet another area where equity has been applied in Kenya. This takes the form of specific statutory application. The Guardianship of Infants Act[21], for instance, embodies[22] the principle of equity that where the issue is the custody or upbringing of an infant, application of income or the administration of any property belonging to it, the court shall, in deciding the case, regard the welfare of the child as the paramount consideration.

Another embodiment of the doctrines of equity can be found in the Companies Act (K), which Act is similar, almost duplicate, of the English Companies Act. It has been indicated somewhere[23] that 'English Company law is the child of equity lawyers'.

Powers and duties of trustee are covered largely by local legislation. This is the Trustee Act[24]. Other relevant statutes are public Trustee Act[25] and the Trusts of Land Act[26]. These legislations are largely based on English doctrines of equity. The position of a trustee in relation of property is substantially the same as his counterpart under English Law: he is bound to deal with the trust property as carefully as a man of ordinary prudence would deal with such property if it were his own; and in the absence of a contract to the contrary a trustee so dealing is not responsible for the loss, destruction or deteroriation of the trust property. Lastly, the fact that courts in Kenya recognise equitable remedies was stated in the case of Abdul Karim Khan v. Mohammed Roshan, decided in 1965.[27]

These are just isolated instances in the Kenya legal system in which the doctrines of equity do apply and have been applied. But these instances should be able to generally show the influence of equity in the Kenya jurisprudence. Just like the common law and statutes of general application, it is the country's residual law. Three instances have been discussed in greater detail to not only emphasise the applicability of equity in Kenya, but also to point out the modifications the courts of Kenya have had to content with given the 'circumstances of Kenya and its inhabitants'

These are the principles in the case of Walsh V. Lonsdale (supra), the doctrine of equitable estoppel and the doctrine of equitable customary trust.

CHAPTER TWO

THE APPLICATION OF THE PRINCIPLE IN THE CASE OF WALSH V. LONSDALE IN KENYA

2:1 WALSH V. LONSDALE: THE CASE IN ENGLAND

In the case of Walsh v. Lonsdale the Acts 1873 & 1875, the equitable rule applicable to leases for more than three years which were in writing, but not under seal, prevailed over the common law, where the tenant had entered into possession.

Walsh prayed for an interlocutory injuction in an action against Lonsdale for improper distress, and for specific performance of an agreement for a lease dated May 29, 1879. The agreement was for a lease of a weaving shed, with plant and machinery, for a term of seven years. One of the terms of the agreement was that Walsh should pay the yearly rent of £876 in advance. The plaintiff failed to pay his rent in advance whereupon the defendant distrained. Justice Fry decided in favour of the defendant and the plaintiff appealed. For the plaintiff it was argued that at common law, the plaintiff was a tenant from year to year, and that, under the terms of such a common law tenancy, there could not be a requirement to pay rent in advance. Accordingly, distress could not be levied until the rent was due and in arrears.

The Landlord argued simply that in equity the written agreement could be turned into a lease by specific performance whereupon the provision for rent in advance would be fully enforceable.

Since equity treats as done that which ought to be done, the parties were in the same position as if the formal lease had been executed, and further since 1875, the equitable rule prevailed over the common law rule. This view of the matter was accepted by the Court of Appeal and the appeal was dismissed. Jessel, M.R. said[3]:

> "....There is only one Court, and the equity rules prevail in it. The tenant holds under an agreement for a lease. He holds, therefore, under the same terms as if a lease had been granted, it being a case in which both parties admit that relief is capable of being given by specific performance.....That being a lessee in equity he cannot complain of the exercise of the right of distress merely because the actual parchment has not been signed and sealed".

This is the rule in Walsh v. Lonsdale and has been extended to apply in many subsequent cases. For example in the recent case of Tottenham Hotspur Football and Athletic Company Limited v. Princcegrove Publishers Limited[4] a company was in possession as tenant of premises under an agreement embodied in a consent order of the Court, so as to treat them as if a formal instrument had been executed to give effect to the terms of the order. In this case a distinction was made between a lease and an agreement for a lease.

This distinction emphasised by Maitland was not always appreciated in the Courts, and expressions were sometimes used implying that a lease and an agreement for a lease were equal in value and in effect since 1875. Thus Field, J. observed:

"Since the Judicature Acts there is now no distinction that I can see, between a lease and an agreement for a lease, because equity looks upon that as done (that) which ought to be done[5].

In the case of Walsh v. Lonsdale there was only one agreement. For a long time it was wondered whether the principle in the case was limited to case when there was only one agreement. Further, was it limited to case where direct contractual relationship between lessee and person in whom legal interest vested? Numerous questions have been raised about the actual scope of the doctrine that equity looks on that as done which ought to be done.

The three questions found consideration in the case of Industrial Properties (Barton Hill) Ltd., and other v. Associated Electrical Industries Ltd. (Ward and Co. (Letters) Ltd., and others, Third Parties; Ward and Co. (Letters) Ltd., Fourth Party[6]. In Bristol there were factory buildings on an estate called the 'Barton Hill Grading Estate'. Some of the buildings had been occupied for years by Associated Electrical Industries Limited (hereinafter referred to as AEI) and their predecessors. That Company Covenanted to repair them and to yield them up in repair. Their lease came to an end and they left the premises. They were then in a very dilapidated condition. It might have cost £200,000 to put them into proper state of repair. But the AEI said they were not liable. They argued that the people who let the premises were not the legal owners of them, and for that reason they were not bound to repair the premises when they left.

It was held[7] that although the lease to AEI was defective in law, it was good in equity. The Court argued that the doctrine of Walsh v. Lonsdale, in which case there was only one agreement, could be extended to apply in this case where there were two agreements[8] in respect of each of which equity looks as done that which ought to be done. The Court further held that the doctrine in Walsh v. Lonsdale need not be limited to a case where there was direct contractual relations between the lessee and the persons in whom the legal estate vested

The doctrine in Walsh v. Lonsdale was developed so as to achieve an inherently just, and to prevent an obviously injust, result. It ensures that the courts are not powerless because of an unregistered land, or deed not made under seal, to protect the lessees against eviction by landlord, or a purchaser with actual notice, otherwise than by registration of the 'interest'. Its effect in equity depends upon the willingness of the court to grant the discretionary remedy of specific performance. If for any reason an agreement for a lease is one in which the court cannot or will not grant specific performance the position under it will be very different from that of a legal lease. In the latter case the parties can have nothing more than to sue for damages for breach of the agreement. For example, there cannot be specific performance where the contract is subject to a condition precedent (for instance, to repair) which the plaintiff has not complied with. Nor will specific performance normally be granted to a tenant who is in breach of the terms of the agreement.

and so he cannot rely on the equitable doctrine, but must stand or fall by his rights (if any at law, for 'he who seeks equity must do equity'[10].

Whereas a lease is enforceable against the whole world, a mere agreement for a lease confers only an equitable right upon the lessee which is not enforceable against a purchaser of a legal estate.

2:2 THE APPLICATION OF THE DOCTRINE IN KENYA

Generally the Judicature Act (K), 1967, applies to Kenya English Acts of general application, the common law and the doctrines of equity. But the question here is whether the doctrine as was enunciated in Walsh v. Lonsdale is applicable in Kenya. This would entail looking at the law relating to leases in Kenya and how the courts have interpreted it.

It is fair to submit that the Courts in Kenya are shy (and have always been) when it comes to radically declaring whether the case of Walsh v. Lonsdale is applicable[11], or at least declaring the extent of its applicability in the Kenya circumstances. The whole position is still unclear.

The substantive land law in Kenya is largely contained in the Indian Transfer of Property Act, 1882[12] but the code is intended to give way to the Registered Land Act (K) in due course when all the land in Kenya has been registered.

For the time being, the Registered Land Act applies only to areas in which land has been registered under it. There are other local legislations to which reference will be necessary.

Section 38 of the Registered Land Act (read in conjuction with the Law of Contract (Amendment) Act[13] provides that no interest in 'rem' can be given except by a duly registered instrument, but an unregistered instrument can act 'as a contract 'inter parties' which contract relating to land must be in writing and accompanied by delivery and possession. Section 47 of the same Act provides that:

> "all leases for specific periods of over two years for the life of the lessor or lessee or the lease containing an option for renewal where the combined term of the original lease and the renewal shall exceed two years must be registered".

The combined effect of sections 40 and 41 of the Registration of Titles Act[14] is that all leases for periods exceeding twelve months or for less than twelve months, but containing a right to purchase must be registered and are invalid if they are not.'

These legislations do not deal with agreements for a lease and the question, therefore, is whether these agreements are registrable. A true construction of the sections indicates that it is only the leases and (as well as conveyances, transfers, mortgages and charges) that are registrable...not agreements for a lease. The logical consequence is that such agreement cannot create an interest in land. The best that such agreements for a lease can do is to create a contract that gives rise to personal rights, not proprietory rights.

personal rights, not proprietory rights.) The law of Contract Act,[15] section 3(3), as amended by the law of Contract (Amendment) Act provides that any contract for the disposition of an interest in land must be evidenced in writing and signed by the party to be charged. This is, however, subject to the doctrine of part performance. Another seemingly effect of non-registration is that an unregistered agreement of a lease is sufficient basis for specific performance.[16]

The Government Lands Act[17], section 100(i), states that no evidence shall be receivable in any civil Court of the sale, lease (other than a lease for not more than one year (section 102(f)), lien, mortgage or charge or transfer thereof, unless the transaction is affected by an instrument in writing and such instrument has been registered under the Act. The Act lists various instruments to which the Act does not apply. These include agreements to sell, lease or otherwise deal with land which do not themselves limit the particular interest, but merely create a right to obtain another document that does no limit such right. Section 100 was interpreted in the case of Edwardes v. Denning[18], an appeal to the Court of Appeal concerning an unregitered agreement for sale of land adjoining Lake Naivasha, the title of the land being under the Government Lands Act. The agreement itself was not registerable under section 102(e) in so far as it 'merely created a right to obtain another document'. Nor, in view of section 54 of the Indian Transfer of

Property Act did it create any right in 'rem'. Under the provisions of the agreement the sale was not to be completed until survey had been completed, but on payment of the second instalment of the purchase price the purchaser was to be allowed to enter into possession, which he duly did. The purchaser sued for specific performance. The defence case was that there had not been registration as required by section 100 of the Government Lands Act, hence the agreement was inadmissible in evidence. The Court of Appeal held, inter alia, held that the section does not disqualify an unregistered instrument 'per se' in so far as it is to be received as evidence as any transaction affecting immovable property, but it does disqualify evidence as to the sale lease mortgage of registered land unless the provisions of the section are complied with. An instrument may affect a transaction which is required to be registered in section 99, but may, nevertheless, not itself be excluded for evidence by section 100, though not registered. The decision was upheld by the Privy Council[99].

In another case of Kenneth Thomas Clarke v. Sondhi Limited[20] it was held that section 40 of the Registration of Titles Act did not exclude an unregistered lease to show the terms of the contract between the parties. In Meralli v. Parker[21], justice Rudd said the following about the general effect of section 100 and 102 of the Government Lands Act:

> "The effect is that while evidence cannot be given to prove a lease for more than one year, evidence can be given to prove an agreement for a lease and the effect of that agreement completed with possession is to create a tenancy, or the I.T.P.A. and the G.L.A. call it, a lease for one year, only in the first instance continued under section 106 and 116 of the I.T.P.A. as either tenancy from month to month or for successive tenancy".

As indicated earlier another important legislation is the Indian Transfer of Property Act (I.T.P.A.) Section 106 of the Act provides that:

> "In the absence of a contract or local law or usage to the Contrary, a lease of immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice expiring with the end of a year of tenancy; and a lease of immovable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice expiring with the end of a month of the tenancy".

Section 107 of the same Act provides that a lease of immovable from year to year, or for a term exceeding one year, or for reserving a yearly rent, can be made only by a registered instrument.

It has been held by the Nagpur High Court in India that where a lease is invalid for registration the relation of the parties (depending on the nature of the tenancy) will be governed by section 106 of the I.T.P.A.[22]. This is the position of an agreement for a lease. The rule in section 106 is made subject to 'any contract to the contrary'. This proviso has not been litigated upon in Kenya nor have the courts interpreted it. But in India it

has been held that it is only in cases where there is no notice that the provisions of this section are applicable. But where there is a contract as to giving notice or waiving notice, the partieis are governed by the terms of the contract, and the law enacted in this section does not apply[23].

The 'contract to the contrary' is not necessarily an express contract. It may be implied but should be a valid one. The section will regulate the duration of the tenancy where there is no contract to the contrary[24]. Where a contract governs the question, the Court should read the contract in a reasonable way and ascertain the real intention of the parties[25].

Where a deed of lease, admissible in evidence but incapable of creating a lease, contains a 'contract to the contrary' as to the service of notice to quit, any notice in accordance with the contract is valid in law[26].

This is how generally the Courts in India have interpreted in India sections 106 and 107 of the I.T.P.A. These cases are good guidelines on the law as contained in the Transfer of Property Act. In the absence of any Kenyan law on this aspect or decision to the contrary, then the Kenyan Courts will admit this as good interpretation of the statute. This is because the Transfer of Property Act was imported whole without any provisions for modification in its application in Kenya. This is, however, subject to section 1(2) of the Registration of Titles Act which provides that it overrides any other statute unless otherwise

expressly provided.

The Courts in Kenya are mixed up on the issue of the applicability of Walsh v. Lonsdale in Kenya. Two views can be discerned from the judicial decisions here as to the rights of lessor and lessee in cases where the lessor delivered possession of immovable property but executed no registered document. One view is that the express words of the statute must prevail and that no lease can be created by mere delivery of possession, in the absence of registered deed. Another view is that even in the absence of a registerd lease, the lessor against whom the lessee could maintain a suit of specific performance of an oral or unregistered written agreement for a lease was disentitled from recovering possession from the lessee, or that the lessor can sue for rent, provided that the circumstances were such as to entitle a decree of specific performance in the suit.

It was in the case of Souza Figueiredo and Company Limited v. Moorings Hotel Company Limited[27], an appeal from the High Court of Uganda, that the Court of Appeal of East Africa considered the applicability of Walsh v. Lonsdale. In the East African case the respondent was the transferee of a sub-lease of certain club premises. By an agreement the respondent let the premises to the appellant for the residue of the term under the sub-lease less the last three days thereof. This term exceeded three years. Registration of the agreement was refused by the Registrar of Titles of Uganda who in evidence said that he refused to register the sub-lease and that the document was not in a registrable

form. The appellant took possession of the premises with the furniture and fittings and carried on the club business but he was never registered as proprietor under the Registration of Business Names Ordinance. The liquor licence and the business remained in the name of the respondent. The appellant remained in possession from April 1, 1956, until September 16, 1958, when the keys of the premises were handed to the respondents' accountant. There was then Shs. 50,199/96 owing for arrears of rent, and proceedings were instituted for the amount. The principle defence was that the agreement operated by way of present demise of land for three years and since the agreement was not regitered it was ineffectual to create any estate or interest in land and the covenant to pay the rent was unenforceable. The appeal was dismissed. [The Court observed that no rule of equity can override the express provisions of a statute, in this case the Registration of Titles Ordinance of Uganda. It was held that section 51 of the Ordinance provided that no estate or interest in land could be created or transferred by an unregistered instrument, but it did not state that an unregistered instrument could not act as a contract 'inter parties'[28], and that an unregistered document operates as a contract 'inter parties' and can offer on the party in the position of intending lessee a right to enforce the contract specifically and to obtain from the intending lessor a registerable lease. It was further held that whether the covenant to pay rent

contained in the agreement was looked at as a contractual obligation in a document of which specific performanc could be obtained in equity, or as a term of common law tenancy at will, it was enforceable.

At this juncture it should be noted that the provisions of the Transfer of Property Act were not considered as the Act does not operate in Uganda. However, the Ugandan Registration of Titles Ordinance is very similar to the Kenya Registration of Titles Act and like it is derived from the Australian Torrens system of Registration.

The case of Fiqueiredo was followed in Kenneth Thomas Clarke v. Sondhi Ltd., (supra), a court of Appeal decision arising from an appeal from Kenya. In this case an unregistered lease dated October 26, 1961, the respondent purported to lease certain premises to the appellant for a period of three years from November 1, 1961, at an annual rent of Shs. 42,024/= payable by monthly payments of Shs. 3,502/= in advance on the first day of each calender month. In a suit for payment of rent, the appellant had argued that the respondent had no cause of, action as the lease had not been registered as required by law, and that therefore it passed no legal estate. Observing that the respondents' claim was for payment of the rent due under the agreement for a period during which the appellant was in occupation and enjoying the premises, the Court held that an unregistered lease could operate as a contract 'inter parties'

specifically enforceable by the lessee and the proviso[29] to section 40 of the Registration of Titles Act did not exclude the use of an unregistered lease to show the terms of the contract between the parties. It was further held that there was no need to plead specifically that the 'instrument of lease' constituted in law an agreement between the parties.

It is wondered what, in practial terms, is the difference between an equitable interest in land (in Walsh v. Lonsdale) and the benefit of contract in Fiqueiredo's case. The equitable interest depends on the willingness of the Court to grant specific performance. This dependability seems also to have been highlighted in the East African case. The Courts in Kenya are entitled and bound to apply the 'doctrines of equity' to the extent mentioned in the Judicature Act 1967, and to give effect to an agreement to a lease is not to override a statute by an equitable rule, but is, merely to apply an equitable doctrine to the extent that is applicable without creating an estate or interest in the or infringing the provisions of a statute. It has been uniformly held in many, if not all, jurisdictions subject to Torrens system of Registration of title when the Court has jurisdiction to apply equitable principles, that an aggreement for a lease or an unregistered lease operates as a contract 'inter parties' of course, the agreement could not be given effect to as a contract if there was no consideration.

In the unreported case of Ideal Packaing (1970) East Africa v. J.Z. Shah and Other[30], the Court of Appeal for East Africa sitting at Nairobi considered the case of Walsh v. Lonsdale in Kenya. The appelant's claim in this case arose out of a written contract between the parties. The contract was of a lease of five years at the monthly rental of Shs. 10,000/=. A draft of the formal lease was in due course prepared by the respondents' lawyers and sent to the appellants for approval but it was neither returned nor approved; and the letter remained the written contract between the parties. The appellant Company had, inter alia, filed a suit for damages against the five respondents for a breach of a contract for a lease of the respondents' premises. Musoke, J.A. observed that as the letter contained all the essential of a lease, it was clearly an agreement for a lease and either party could have obtained an order for its specific performance. The plaintiff had gone into occupation in pursuance of that agreement and accordingly the defendants were entitled to claim rent for the whole period of that occupation. He rested - the decision on Fiqueiredo and Co. Ltd. v. Moorings Hotel (1960) E.A. 926 Clarke v. Sondhi Ltd. (1963) E.A. 107 at page 112; and Lord Robert Grosvenor v. A.W. Rogan - Kamper, Civil Appeal No.51 of 1974.

An interesting decision is that of A.W. Rogan - Kamper v. Lord Robert Grosvenor[31]. It is interesting because there was dire need for the Court of Appeal to finally lay down the principles guiding the application of Walsh v. Lonsdale in Kenya, which duty it abdicated, either by avoiding the task or doing circumlocutously.

The landlord was claiming possession rent arrears of Shs.37,800/= and ensure profits on the basis of a draft lease which neither party executed. This action was tried before the High Court which dismissed the landlord's claim with costs. The landlord then appealed to the Court of Appeal which remitted to Chanan Singh, J. who heard further submissions and decided in favour of the respondent landlord in terms of prayers in the plaint'. The Court of Appeal had remitted the case to be heard and decided 'on the basis that there was a valid contract between the parties of 5 years and one month'.

It was from this judgement of the High Court that the tenant was appealing to the East African Court of Appeal. The main ground of appeal was that the trial judge decided 'the case on the basis that there was a lease, as though there was a lease (Walsh v. Lonsdale) for a term of five years one month certain...' yet the Appeal Court had directed that the Court decides 'the case on basis that there was a contract for a lease'; that a contract for a lease was different from a lease and each had different legal incidents attaching to it, and one could not be substituted for the other. The Court agreed that there had been a misinterpretation on the part of the trial judge. It observed that the tenant had entered into possession of the premises with the permission of the landlord, there was consensus and a tenancy had been created by the payment and receipt of rent (Bains v. Chogley (1949) 16 EACA 27).

However, there was the question what sort of tenancy had been created. The court of Appeal held that the 'tenancy created by the payment and receipt of rent was a monthly one terminable on 15 days notice in terms of sec. 106' of the Transfer of Property Act. This was unfortunate a holding because section 106 applies to a case where 'there is no contract to the contrary'. In this case there was an agreement for a lease for over 5 years, and though there was no term regulating the giving of notice this could have been inferred from the intervals of rent payment. After all, section 106 does not apply where there is agreement as to duration[32]. The Court also observed that it was not following the case of Walsh v. Lonsdale. It made it clear that the case of Walsh v. Lonsdale has no application where the defendants' right to enforce a contract has been barred before the commencement of a suit (Arit v. Judanath Majundar (1931) I.A. 58, which case has been quoted with approval in Fiqueiredo's case and also in Abdul Rehman and Another v. R.H. Gudka (1957) E.A. 410). The Court further reiterated that no rule of equity could override the express provisions of a statute and that it was proper for a court to enforce an unregistered leases or agreements for leases as contracts 'inter parties' where the contract was one capable of being specifically enforced and that this did not affect the rights of third parties.

Lastly, there is the recent case of East African Power and Lighting Company Ltd. v. A.G.[33] in which the equitable doctrine was also considered. An action was commenced by the Company for arrears of rent under an alleged agreement for a term of 6 years on the 12th floor of Electricity House, Nairobi, or alternatively, under a monthly tenancy thereof. It was argued for the respondent that no agreement for a lease was concluded and the evidence did not substantiate the indication of a monthly tenancy. Consequently the occupation gave rise to a tenancy at will, for which is notice to quite was not necessary.

At first instance, Muli, J. found that a tenancy at will by implication of law had been created, and that it could, and had been, validly terminated without the need for a notice in writing. On appeal, it was held that this was not a tenancy at will because to create such a tenancy there must be a clear intention, which intention was not apparent in this case. It further held that this was a monthly tenancy under section 106 of the Transfer of Property Act. However, it was contradictory on the part of the Court to state that 'section 106 has no application where there is a valid document of lease'. In this case there were agreed terms of a lease with all the essentials of a lease but the lease was not executed. It is submitted that it was not possible to apply section 106 as there was an agreement, 'a contract to the contrary' as to the terms of the lease. Section 106

is merely directory and caters for exigencies, especially where no clear terms can be discerned from the agreement.

CHAPTER THREE

EQUITABLE ESTOPPEL IN KENYA

3:1 GENERAL

> ".....'My word is my bond', irrespective of whether there is consideration to support it. Once a man gives a promise or assurance to his neighbour on which the neighbour relies - he should not be allowed to go back on it".

These words broadly describe the underlying principle of the doctrine of equitable estoppel. It is a doctrine which estops (prevents) a person acting inconsistently with a representation which he has made to the other party, in reliance on which the other acts. The person will not be allowed to go back on what he represented, by words or conduct, when it would be unjust or inequitable for him to do so.

Although the basic idea of estoppel is the same both at common law and in equity, there are differences that exist. Only statements of existing fact[2] can give rise to an estoppel at common law whereas in equity an estoppel can arise not only from a statement of existing fact but also from a representation as to future intention, when it is known as promissory estoppel. It is sometimes said that estoppel at common law is a mere rule of evidence preventing a person from putting forward an argument or claim inconsistent with his representation; whilst estoppel in equity may operate to give the representee actual substantive rights over property - this is the effect of proprietory estoppel.

The two main species of estoppel in equity are thus, promissory estoppel and proprietory estoppel.

3:2 PROMISSORY ESTOPPEL

The principle of promissory estoppel was first established in Hughes v. Metropolitan Railway Company[3], in which case it was confined to 'definite and distinct terms involving certain legal results - certain penalties or legal forfeiture'. In Birmingham and District Land Company v. London and N.W. Railway Company[4] Bowen, L.J. said that the equity was not confined to penalties and forfeitures but extended to all cases of contractual rights. But the doctrine did not come into prominence until the celebrated judgement of Denning J. (as he then was) in Central London Property Trust Ltd. v. High Trees[5], where it was given its modern definition. The doctrine of promissory estoppel has been described by Professor Hanbury, thus:

> "Where, by words or conduct, a person makes an unambiguous representation as to his future conduct, intending the representation to be relied on, and to effect the legal relations between the parties, and the representee alters his position in reliance on it, the representor will be unable to act inconsistently with the representation if by doing so the representee would be prejudiced"[6]

This may be illustrated by the High Trees case itself. The facts of this case were simple. During the War many people left London owing to the bombing. Flats were empty. In one block, where the flats were let on 99 year leases at £2,500 a year, the landlord had agreed to reduce it by half and to accept £1,250 a year.

When the bombing was over, and the tenants came back, the landlord sought to recover the full £2,500 a year. It was held that the landlord could not recover it for the time when the flats were empty. Denning, J. argued that there was a promise intended to be binding, intended to be acted on, and in fact acted upon. He distinguished Jorden v. Money[7] because the promissor there made it clear that she did not intend to be legally bound. It was further held that the logical consequence was the promise to accept a smaller sum in discharge of a larger sum and that this was binding notwithstanding the consideration as the promise gave rise to an estoppel - a natural result of the fusion of the common law and equity.

The principle became known as promissory estoppel. In the High Trees case there was actual promise or assurance. In Charles Richards Ltd. v. Oppeinheim,[8] the case there was only conduct. Mr. Oppeinheim wanted a body built on a chassis of a Rolls Royce 'Silver Roith'. In July, 1947 the coach builders promised to deliver it 'within six at most seven months'. They did not deliver it in that time. Oppeinheim agreed to extend the time of delivery. This in fact happened. It was held that the defendant led the plaintiffs to believe that he would not insist on the stipulation as to time. By his conduct, Mr. Oppeinheim evinced an intention to affect their legal obligations.

He made a promise not to insist on his legal rights, that promise was intended to be acted on and was infact acted on and so he could not be allowed to go back on it.

The significance of the High Trees Case, as far as the law of Contract is concerned, is that the defendant had furnished no consideration to the plaintiffs' promise to accept the reduced rent, and so to hold them bound by their promise was clearly in contradiction to the line of cases starting with the Pinnel's Case[9] and ending with Foakes v. Beer[10] which had laid down that if a creditor agrees without consideration to accept part of the debt in satisfaction for the whole, this was not 'accord and satisfaction' and he could later resile from the gratuitous promise and sue the debtor for the full amount. But it was merely to temper the rigours of this rule that Denning, J. invoked the principle of promissory estoppel. He accordingly held in Combe v. Combe[11] that the doctrine of promissory estoppel could be invoked only as a defence, where it would be inequitable to allow the plaintiff to assert his full rights, and not as an independent cause of action. However, it is still arguable that there are situations in which the doctrine could be used as a sword.

There is no need for a 'detriment' in order for the principle in the High Trees to apply. Lord Denning, M.R. observed in W.J. Alan and Company v. E.L. Nasar Export[12] that 'detriment' is not necessary. All that is required is that one should have 'acted on the belief induced by the other party.

This view was also accepted by Mocatta, J. in Biemer v. Vanden[13] with the approval of Lord Wilberforce in the House of Lords.[14]

The Court of Appeal for East Africa in Century Automobiles Ltd. v. Hutchings Biemer Ltd.[15] accepted (Spry, J.A.) that the doctrine of promissory estoppel applied in Kenya. Here, X leased premises to Y allowing a 3 months' termination period by either side. Y wanted to convert one of the buildings but did not want to risk incurring expenses only to find that X might exercise his right of termination. X promised however that there was no chance of doing for three to four years. Y therefore carried out £1,800 of alterations. Eight months later X gave his three months' notice. The Court held that X was estopped from doing this.

Quoting from its earlier judgement in Nurdin Bandali v. Lonbank Tanyanyika Ltd.[16], the Court of Appeal said:

> "The precise limits of an equitable estoppel are, however by no means clear.[17] It is clear, however, that before it can arise one party must have made to another a clear and unequivocal representation, which may relate to the enforcement of legal rights, with the intention that it should be acted upon and the other party, in the belief of the truth of representation, acted upon it. To quote again from Nurdin's case (1963) E.A. 304 at 317: 'in the case of estoppel if the representation, by words or (sic) conduct, of the respondent were such as to induce the appellant to alter his position in the belief of the respondents' rights would not be asserted, then the respondent may be estopped from asserting those rights even though it never intended to give them up'".

In the same case Sir Charles Newbold, V.P. said:

> "The three elements which must be present are first, a clear and unequivocal representation; secondly, an intention that it should be acted upon; and thirdly, action upon it in the belief of its truth".[18]

Equitable estoppel had also been considered in the earlier case of Commissioner of Income Tax v. A.K.[19], where the plea gave a defence in an action for unpaid income tax, penalties and other damages. The Commissioner had served notices of assessment on the defendant; the defendant did not comply with statutory rules where by he could dispute the assessment within the time provided by the then Income Tax (Management) Act, 1958. Subsequently, however, an assessor of the Income Tax Department agreed with the taxpayer's accountant to accept late notice of the objection, and to act upon that notice. The assessor and the accountant then reached an agreement on revised figures which were to form the basis of revised assessments. The Commissioner unilaterally repudiated the agreement (under which the taxpayer's liability would have been reduced to some Shs. 26,000/=) and sued for Shs. 72,732/= being the sum of the original assessment, with penalties and other damages. The defendant pleaded that the Commissioner was estopped; the Commissioner claimed that he could not be estopped from performing a statutory duty. The Commissioner also argued that the defendant had not altered his position on the faith of the representation. This was unsuccessful. It was held by Madan, J. (as he then was) that the defendant had complied with all requirements of the proviso to section 109 of the Act, with the result that the notice of objection which was accepted by the Commissioner was not 'ultra vires' and therefore it was a valid notice.

Therefore, the plaintiff was estopped from relying upon the original assessments. However, it is a general rule that an estoppel cannot be invoked against the exercise of a statutory discretion. Also, equitable estoppel cannot be invoked against exercise of a statutory duty. The latter point was heralded in the case of Mulji Jetha Ltd. v. Commissioner of Income Tax[20], in which it was observed that promissory estoppel cannot be used as the ground and for an action,[21] it is defensive rather than offensive. The plaintiff sought a declaration that the Commissioner of Income Tax be prevented from enforcing his legal right to collect taxes on the ground that he had given the plaintiff an oral undertaking that he would examine fresh accounts before deciding on the amount owed.

In dismissing the plaintiff's claim Harris, J. explained the fundamental aspect of the doctrine of promissory estoppel that it will be used as a shield and not as a sword; it cannot be used as a cause of action. The Court agreed with the ruling in Combe v. Combe (supra) and held that in the instant case the plaintiff was 'seeking not to protect a legal right conferred upon him, but to defend himself against the exercise of a right conferred by law upon the defendant'.

The defence estoppel must be pleaded as the facts giving rise to the plea are material and should be pleaded,[22] although on certain occasions defects in the pleadings have been noted.[23]

3:3 PROPRIETORY ESTOPPEL

Proprietory estoppel arises where a person incurs expenditure (for example by building on land), or otherwise prejudices himself, in the belief, actively or passively encouraged, that he had (or would obtain) a sufficient interest in the property to justify such expenditure. This type is different from promissory estoppel in many respects. Proprietory estoppel is brought about by the conduct (especially acquiescence) of the person estopped and not usually by an express promise on his part. Whereas promissory estoppel is merely temporary,[24] proprietory estoppel may be permanent in effect. And also the latter can confer a right of action whereas promissory estoppel can be raised only as a defence. Lastly, promissory estoppel is usually concerned with contracts, whilts proprietory estoppel is generally concerned with rights over land.

The classic exposition of proprietory estoppel, which has been cited in whole or part in several Kenyan judgements, is that of Lord Kingsdown in Ramsden v. Dyson[25] in a dissenting speech. It is as follows:-

> "If a man under a verbal agreement with a Landlord for a certain interest in land, or what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest takes possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without any objection by him, lays out money upon the land, a court of equity will compel the landlord to give effect to much promise or expectation".

In that case, X, a builder, built on Y's land under the impression

Y stood by and failed to assert his rights. Subsequently Y was not allowed to assert his title without recouping X for expenditure involved.

If the owner of the property asserts his claim to the property, but inspite of this the other party continues to build or otherwise expend money on the land, no estoppel can be raised; for the equitable rule as to the effect of a person's lying by and allowing another to expend money on his property does not apply when the money is expended with knowledge of the real state of the title.[26] Further, no estoppel can be raised against the true owner if he did not realise that he was entitled to interfere, for instance, where he does not know that the property is his, or where he thinks that the property, such as prior life interest, prevents him from objecting.

Proprietory estoppel, as stated above, differs from promissory estoppel and estoppel at common law in that its effect is to confer substantive rights on the person in whose favour the equity is raised. The nature of the right so acquired varies according to the circumstances of the particular case and also the relief differs with each case.

The doctrine of proprietory estoppel was applied in Kenya in the case of Commissioner of Lands v. Hussein[27].. In this case Army authorities suggested to Hussein that he should build a canteen on land which they occupied. Hussein agreed on condition that he be given a 50 year lease.

An officer suggested 30 years and the canteen was built but no formal lease was drawn up. Some years later the land came into the possession of the Ministry of Health. Hussein's sons claimed that they were estopped from demanding the land by the actions of their predecessors, both the Army and the Ministry being 'part and parcel' of Government.

Harris J. found for the defendant and followed the judgement of Lord Kingdown in Ramsden v. Dyson (supra).

Proprietory estoppel was also pleaded in an earlier case of Runda Coffee Estates Ltd. v. Ujagar Singh[28] where the defendant's father had been given permission to build a house and shop on land forming part of the plaintiff's farm. But it was a term of the agreement that the licence could be terminated at any time, without restriction, by the licensors or their successors 'in title'. The land in fact passed through several ownerships, until ultimately it was acquired (with notice of the agreement) by the plaintiff. By that time the original licensee was dead; his son, the defendant, continued in occupation and carrying on business. The plaintiff terminated the licence and brought proceedings for possession. The Court of Appeal (reversing the trial judge's decision that the defendant was entitled to compensation) held that the defendant was not entitled to compensation: that the agreement was personal to the father; he was not assisted by the Indian Transfer of Property Act, section 40 which provides that:

> "Where a third person is entitled to the benefit of an obligation arising out of contract and annexed to the ownership of immovable property, but not amounting to an interest therein or easement thereon".

Such an interest may be enforced against a volunteer or transferee with notice. The basic finding in Ujagar's case is therefore that the agreement to pay compensation was personal to the original licensee, and died with him, so that it could not even be recovered by his estate, because the defendant would only have a claim if he could establish a proprietory right; but any proprietory right would be outside section 40. Furthermore , it was held that the defendant could not rely on the doctrine of proprietory estoppel because the defendant and his father both knew that their only interest in the land was one determinable freely by the licensor; they could not find an estoppel on their hope (not being induced by the licensor) that the right to determine would not be exercised.

The Court did not seem to appreciate that the defendant's father had been allowed (and in fact encouraged) to build a house and a shop on the plaintiff's land by the plaintiff. Obviously, the defendant had expended money. Any action of termination of the licence was subject to the equitable right of the defendants in the land in terms of the property they had erected on the land.

Under section 120 of the Kenya Evidence Act[29], an estoppel based on representation operates not only between the parties to the representation but also, in proper cases, between their representatives. This has also been held to be the English case of Hopgood v. Brown[30] which case cited and agreed with the decision of Denning L.J. (as he then was) in Errington v. Errington[31] that even licensees who have more privilege to remain on the land, with no right to assign or sub-let, were licensees with a contractual right to remain.

As such they have no right at law to remain but only in equity, and equitable rights now prevail.

In Errington v. Errington (supra) the appellants sought recovery of house built by licensee and the question was whether compensation was payable by successor of licensor to successor's licensee.... and there was no clear unequivocal representation to licensee's successor.

It is submitted that the Court of Appeal in Ujagar's case was short of understanding the rule pertaining to proprietory estoppel and if it understood it should have compensated the defendant because in equity he had an interest, with a contractual right to remain.

The doctrine was also applied in the recent case of Chase International Investment Corporation and George Edwin Olive v. Laxmanbhai and Company[32] Ltd., a Kenya Court of Appeal decision of 1978. In this case the action was based/estoppel and unjust enrichment, 'inter alia'. The appellants were a corporation incorporated in the U.S.A. and the respondents a firm of contractors who carried on (and still carry on) business in Kenya. The respondents sued the appellants in the High Court of Kenya for Shs. 1,843,007/= being the balance certified as due and payable to them under a building contract whereby the respondents built two lodges for a company known as African Ponderosa Limited on land belonging to the Company. The respondents had pleaded that the appellants were estopped in equity and by their conduct from their liability to pay to the respondents the said sum, on grounds that the appellants with knowledge that the company had no funds represented that all moneys due to the respondents would be paid by Chase, in consideration of the respond-

ents completing the work, and with the intention that the respondents would act on those representation, which the respondents did believing the same to be true.

It was held that it would be unconscionable for the respondents to be left without remedy, and the only way that the equity of proprietory estoppel in their favour could be satisfied was by ordering the appellants to pay the respondents their dues. The Court observed that the appellants must have known, and in fact knew, that the Company was insolvent and could not be able to pay its debts in the ordinary course of business, but still encouraged the respondents to incur expenses and provide services and materials, and the respondents had relied on this representation to their detriment.

The Court followed the decision in the English cases of Ramsden v. Dyson, Willimot v. Barber (supra), Inwards v. Barker[33] and Crabb v. Arun District Council[34], among others, to come to its conclusion. In Crabb v. Arun District Council, a man owned a piece of land in a field. The local council were building a new road near the field. The owner of the land wanted to get access to the new road. The surveyor to the local council led him to believe that he would be granted access. He actually left a gap in the fence for it and the man acted on it. The Court of Appeal held that the man had acquired a right of way by estoppel.

It should also be clear that a buyer of goods can acquire title by estoppel. This is recognised by section 23(i) of the Sale of Goods Act[35], which provides:

> ".... the buyer acquired no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell"[36].

Therefore where the true owner of goods or land has led another to believe that he is not the owner, or at any rate, is not claiming an interest therein, or that there is no objection to what the other is doing, the owner is not allowed to go back on what he had led the other to believe. So much so that his own title to the property, be it land or goods, has been held to be extinguished or limited, and new rights and interests have been created therein. And this operates by conduct - what he has led the other to believe even though he never intended it.

3:4 COMBINING THE ESTOPPELS

This is a new phenomenon in the development of law pertaining to equitable estoppel, promissory and proprietory. The justification for such combination is that both the estoppels, though having different attributes, are derived from the same source, namely, the interposition of equity to mitigate the rigours of the strict rules of equity.

The issue of combination of promissory and proprietory estoppel was heralded in Crabb v. Arun District Council (supra) in which[37] Scarman, L.J. made the observation that:

> "I do not find helpful the distinctions between promissory and proprietory estoppel. This distinction may indeed be valuable to those who have to teach or expound the law, but I do not think that in solving the particular problem raised by a particular case, putting law into categories is of the slightest assistance".

He went on to state that in any case the Court has to assess the conduct and the relationship of the parties and then answer three questions: Is there an equity established?; What is the extent of the equity, if one is established?; What is the relief appropriate to satisfy the equity?

Lord Denning, M.R. might have wanted to support the idea of the merger of the estoppels but did not articulately do this as he pointed out that there are estoppels and estoppels, some giving rise to a cause of action and some not. He was making a distinction between proprietory and promissory estoppel, respectively.

As indicated earlier the case of Crabb v. Arun District Council was followed in the Kenyan case of Chase. In this latter decision the three Justices of Appeal (Madan, Wambuzi and Law) agreed that the estoppel established was in the nature of proprietory estoppel, but again (especially Madan and Law) were for the merging of the two estoppels. Like Scarman, L.J. and Lord Denning, M.R., they did not give reasons for the merger, except that they thought it would be convenient for the Court to treat them as one. Critically analysed, they were saying one thing and doing exactly the other: pointing out that the equity established was in nature of proprietory estoppel and going ahead in favour of the merger.

It is submitted that the three questions raised by Scarman, L.J. are important, but are not explicit and justifiable in themselves. The development of equitable estoppel as a doctrine of law has been characterised by the inherent treatment as separate proprietory and promissory estoppels. One is generally able to give rise to substantive rights in property and also able to form a cause of action, and the other not.

It would have been interesting if the proponents of the merger discussed the consequences of such a merger. What characteristics would the new estoppel take? In other words, would it give rise to a cause of action and confer substantive rights on the person in whose favour the equity is raised? If it takes these two attributes then it would be akin to proprietory estoppel, in which case, the courts would be disfavouring promissory estoppel which is an important doctrine of defence. It is a principle of legal philosophy that the law should be, as far as possible, clear so that parties can obtain remedies by pleading their rights. In this sence the writer believes that the merger is uncalled for because it could bring confusion in a field of law which has taken a long time to develop (and is indeed still developing). The merger would not only stifle the separate development of proprietory and promissory estoppels but would also bring unnecessary complications in its administration. The aim should be to further clarify the rules governing each of these equities.[38]

CHAPTER FOUR

EQUITABLE CUSTOMARY TRUST AND ABSOLUTE PROPRIETORSHIP IN KENYA*

4:1 GENERAL

There were basically two systems of land tenure in Kenya during the Colonial system. One system was the English or written law which applied to transactions in land in areas formerly referred to as Scheduled Area, whilst in the African Reserves, Special Areas or Trust Land areas the African customary law applied. When the Registered Land Act was enacted in 1963 it was intended that the two systems of land tenure apply side by side until their merger when the Act is fully applied throughout the country.[1] The general effect of registration of title to land as provided under the Registered Land Act has been to weaken, if not completely abolish, African customary land law by the application of English law embodied in the Act which repeals much of the Land Registration (Special Areas) Act[2]. The Registered Land Act introduced several concepts of English law into the former Trust Lands, including part of the Prescription Act of 1832 of United Kingdom, and is designed to replace the Indian Transfer of Property Act, 1882 in time, It also contains a provision[3] specifically referring the Courts to so much of the common law in force in Kenya in the event of the Act not covering a particular situation.

4:2 NATURE OF LAND TENURE IN AN AFRICAN SOCIETY

Under the African customary land tenure system the occupants of land never claimed individual ownership of land occupied by them.

It belonged to the entire community - to the unborn, living and dead. Land was not a commercial assert, but a source of livelihood. It formed a source of inspiration and pride even during old age. Land was recognised as tribal, clan and family land in 'a tree-like manner' and an individual could not alienate it except with the consent of the family. Generally land could not be alienated outside the tribe.

Ownership of it vested in the community as a whole and restricted to use of the members of the family or clan and of a tribe in the general sense. Each member of family or clan had a cultivation interest - akin to a 'usufructory right'. There were common areas where members of a family or clan watered or grazed their livestock in common with other members, not to mention, of course, the common bathing pools, wells and rivers where they got drinking water. The pastoral tribes like the Maasai, Pokot Suk, Nandi and Kipsigis, who were nomadic, exercised their rights over the entire tribal areas by moving seasonally from one place to another in search of pastures.

Talking about the nature of land tenure in an African Society, Oginga Odinga said:

> "The Luo regarded the land as their mother, and the tribe as a whole was the proprietor of all the land in its area. Within the tribe, clan or sub-clan the individual laid claim to a shamba, or several, depending on his diligence, but he used the land for the benefit of his family and as long as he lived in the community, as soon as he left to live somewhere the land reverted to the community and was allocated to their nearest neighbour or given to a new comer joining the community. A piece of land left uncultivated for a season could be used for grazing by anyone in the clan, without his having to ask permission or pay a fee".[4]

4:3 EFFECTS OF LEGISLATION

Therefore land in the African Reserves was owned by the clan or family on communal basis for the benefit of members of the clan or family.

Under the Constitution of Kenya the African Reserves came to be known as Trust Land and became vested in the County Councils. Chapter XI of the Constitution then became the substantive law governing Trust lands vested in the Councils. The land was to be governed:

"for the benefit of the persons ordinarily resident"

on those lands and to give effect to such rights, interests or to such other benefits in respect of the land as may under the African customary law in force and applicable to those people, 'be vested in a tribe, group, family or individuals'. Thus the Constitution has confirmed customary land rights, whether in Trust Lands or in their new forms in the Registered Land Act or Land (Group Representatives) Act[5] as property rights within the meaning of section 75 of the same Constitution[6], and that even if any of the statutes intended to abolish these rights without compensation such an intention would be 'ultra vires' in so far as it purports to go against the Constitution.

The system of registration of interests in land in the Trust Lands commenced with the enactment of the 1959 Native Lands (Registration) Ordinance and continued after the enactment of the Registered Land Act in 1963. The portions of land in the Highlands had been registered already and the new legislation was to make 'further and better' provisions for registration of title to land.

The Registered Land Act was to apply to Trust Lands, the Adjudication areas and any other areas, by order of the Minister. The introduction of registration of interest in communal land under the adjudication, consolidation and registration process had the effect of vesting land in individual persons. The individual interests in land were determined by the Committees or Boards consituted under the Adjudication and Consolidation legislations guided by customary law peculiar to the area concerned. These committees comprised of local elders who heard applicants and adjudicated the individual rights. The members of a family could recommend one of the members of the family to be adjudicated the owner and registered as proprietor with an applied (though not usually registered) condition that the registered family members (usually the head of the family) would hold the land on trust for himself and the other members of family some of whom may be absent (in towns working or looking for a job, working on European farms, or under detention or imprisoned under emergency Regulations or any other law) or present but young, weak or old. This is the trust which has come to be known as the equitable customary trust.

The certificate of title issued under the Registered Land Act gives absolute proprietorship to its holder. Under section 28 of the Act the rights of the proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration, shall be rights not liable to be defeated except as provided in the Act and shall be held by the proprietor, together with all the privileges and appurtenances belonging to the land, free from all other interests and claims whatsoever, but subject, unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 of the Act not to require noting on the register.

Section 30 deals with the

> "rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where in giving is made and rights are not disclosed".

These are overriding interests. It is the interpretation of these provisions which has brought problems because such 'absolute' proprietors have exploited the situation and disclaimed the other entitled members of the clan or family claiming that they were absolute proprietors of the land to the exclusion of all others. The task of the Courts was to interprete the Act and determine the rights of the holder of title and of those other members of the family or clan in respect of the land in dispute.

Another snag of the Registered Land Act is that it provides under section 143 that a first registration may not be rectified even in cases of grave fraud, omission or mistake, Subsequent registrations could be rectified on the grounds of mistake, fraud or omission.

4:4 THE COURTS IN KENYA AND THE EQUITABLE CUSTOMARY TRUST

In the case of Kimani v. Gikanga[7] there was an action involving questions as to the title of land and other rights in land in Kenya. The question was whether the appellant had been given land in circumstances in which, under Kikuyu customary law, he had become the owner of land. Sir Charles Newbold, the then Vice-President of the Court of Appeal, observed that both the circumstances in which land had been given and the existence of the relevant African customary law as to land ownership were questions of fact which had to be proved by the appellant.

In effect the Court was saying that it did not recognise customary land rights as such. Whereas under kikuyu law of succession sons are entitled to their fathers land as of right. This is because the father holds the land he has acquired in trust for the members of his family. The sons get equal shares on succession, but the elder son might get a slightly higher portion, but this in not a right. The wife has a life interest for cultivation.[8]

Registration of family land in the name of one of the family members (usually the head of the family) deprived the other entitled beneficial owners of their rights in the land. In Sella Obiero v. Origo Opiyo and others,[9] 1972, the plaintiff was registered owner of a piece of land since 1968. Fraud, mistake or omission was not proved but before registration there had been conflicting interests which were determined by the Adjudication Committee in favour of the plaintiff. Bennett, J. held that the defendants who were the sons of the plaintiff's co-wives and sons of the deceased had no right or interest under customary law after the plaintiff had been registered as proprietor of the land, that rights arising under customary law were not overriding interests as provided under section 30 of the Registered Land Act.

The decision over-looked the fact that the defendants were the sons of the deceased who owned the land under customary law. This was family land and each son had a right to it. The adjudication committee failed to adjudicate the land according to the number of the deceased's houses' under which system each widow would hold her respective portion on customary trust for her sons. After all, the committee, in its adjudication, was supposed to be guided by customary law of the area.

The Court in this case was not enthusiastic to understand the nature of these customary law land rights. The customary law trust has its basis in the fact that land was highly cherished in the African society and the communal landholding ensured that every member of the family or clan had a share in it. The trust has origin in the philosophy or rationale or justification in the very origin of property itself of which land is one form. This institution is not therefore alien. The Court also failed to take cognisance of section 28 of the Act which provides that registration shall not relieve a proprietor from any duty or obligation as a trustee.

That case was followed in Esiroyo v. Esiroyo[10] in the following year. In this case Harris, J. overlooked the existence of customary trust. The father was suing his sons to evict them as trespassers upon his land which he had been registered as proprietor. The Court agreed with him and declared him as an absolute proprietor of the land. In the same case it was observed that once land has been registered in the name of the proprietor the matter is taken out of the purview of customary law by the provisions of the Registered Land Act. Hence the rights of the defendant sons had been extinguished; and that rights arising out of customary law are not overriding interests listed in section 30.

Kneller, J. accepted customary land rights in 1972 in the case of Mungora Wamathai v. Muroti Mugweru.[11] There are other two cases in which though the Court accepted customary trust suppressed as not overriding interests under the Act.[12]

There is an overwhelming view in the Kenyan Courts now that the doctrine of customary trust is the only equitable solution to prevent swindlers who claim to be 'absolute' proprietors from depriving others their property rights. The doctrine is useful to mitigate the ruthlessness of the Registered Land Act, in so far as it purports to extinguish customary land rights once it has been registered, by declaring the registered proprietor a trustee for, and ordering him to transfer the land to, those entitled under customary law. This will invariably take the form of circumventing rectification of the register in respect of any first registration. Under section 143 of the Act where a person represented himself as the owner of a piece of land and was registered as proprietor even if secretely or fraudulently, no remedy is available to the aggrieved party if the registration is first registration. This is a harsh effect and it is no wonder that many deaths are caused because of such cases of fraud or secrecy in registration. When the rightful owner of a piece of land learns later that in fact the piece of land has been registered in some other person's name he is left with no alternative other than trying some self-help means.

In the unreported case of Mwangi Muguthu v. Maina Muguthu[13] Madan, J. Held that it was not obligatory to register a customary trust which might be described as a custom of 'prime geniture' holding and by consent of everyone concerned. This was a landmark decision and has been regarded as stating the correct view in regard to customary trusts. It was followed in Hosea v. Njiru[14], 1974, in which Simpson, J. recognised the existence of a customary trust and ordered the defendant to execute transfer documents in favour of the plaintiff.

This was to circumvent the prohibition imposed by section 143 of the Registered Land Act. The same recognition has been done by Muli, J. in Samuel Thata Mishek v. Priscilla Wambui[15], Mani v. Mani[16] and Kibuchu v. Mbugua[17] and by Platt, J. in a case reported in The Standard, January 3, 1979, at page 7.

Maybe there is not a better view than the one contained in the case of Okoyo Imbusi v. Musa Muyiyi Imbusi[18] (unreported decision of 1978) in which Cotran, J. stated the present position of the Courts of Kenya in respect of customary trust in the following terms:

> "As to the remedy of the plaintiff, it is conceded that his being first registration, I have no power to rectify or cancel the register under s. 143 of the Registered Land Act. The Resident Magistrate, Kakamega took the same view in suit 142/77. However other remedies are available. In Edward Samuel Limuli v. Marko Lubayi (High Court Kisumu c.c. No. 227 of 1979 (o.s.) I held as follows:
>
> > 'It is now generally accepted by the courts of Kenya that there is nothing in the Registered Land Act which prevents the declaration of a trust in respect of registered land, even if it is a first registration, and there is nothing to prevent the giving effect to such a trust by requiring the trustee to do his duty by executing transfer documents (see in particular Zephaniah Nthiga v. Eunice Wanjiru Nthiga and Another, Nairobi H.C.C.C. 1949 of 1976, unreported; Muguthai v. Muguthu (1971) K.H.D. 16 and Wamathai v. Nyeri H.C.C.C. 56/72'".

In that case hen the plot was registered in one Musa's name in 1966 in the plaintiff's absence, Musa knew well that half the plot was not his. The Court held that the registration was still subject to a trust that Musa held the half portion in trust for the plaintiff.

From the foregoing analysis it would appear that the Courts of Kenya are now inclined (there is no general view though) to apply the doctrine of equitable customary trust on the basis of substantial justice between the registered proprietor of land and those who are entitled to it under customary law. In cases where the doctrine has been rejected there has been great reluctance to understand it, whereas there was a great enthusiasm to dismiss it. Generally, however, no case has shown the need to discuss the nature of this trust. It should also be borne in mind that this matter had never reached the Kenya Court of Appeal for final determination, until the decision in Alan Kiama v. Ndia Mathunya and Others.[19] In this case the Court of Appeal was reluctant to evaluate the merits of equitable customary trust, neither did it hesitate to understand its nature. It was observed that upon registration of the land, the rights in the land under customary law were extinguished. The Judges of Appeal did not agree on the nature of interest the respondents had in the suit land, but the substantive judgement should be taken as that of Madan, J.A. who held that the land was transferred to the appellant subject to the respondents' existing rights of possession, occupation and cultivation, which rights amounted to overriding interests:

> "Overriding interests which so exist or so created are entitled to protection because they are equitable rights even if they have a customary flavour or the concomittant aspect of cultivation, which is not listed in section 30", but is incidental

and an appurtenance of an overriding interest in right only of possession or actual occupation. It should be noted that in Esiroyo v. Esiroyo (supra) it was held that customary land rights were not overriding rights.

But in Alan Kiama's case customary rights were held to be basis of constructive or resulting trusts; they were overriding interests. In the latter case the Court applied section 163 of the Registered Land Act to come to the conclusion that possession or occupational rights are equitable rights and were basis of an implied trust.

The facts in Alan Kiama's case were very interesting. The appellant was the registered owner of a parcel of 47 acres of agricultural land in Embu. He averred that during the year 1958 and subsequent thereto' the respondents had wrongfully and unlawfully broken into and/or trespassed upon the said land and continued to do the same so he was praying for the order of ejectruent of the respondents from the land, and in addition to their ejectment, an injunction and damages. The respondents denied that they were trespassers on the land; they contented that the appellant had obtained the title to the land fraudulently through the assistance of one Karuru Kiragu. The particulars of the fraud given in the defence stated that the parcel of land had belonged to Agaciku/ kabareki clan of which the respondents were members and they and their forefathers had cultivated this land since time immemorial. At the time of land consolidation (at which time most of the menfolk were scattered as a result of the Emergency; some of the men were in detention) Karuru Kiragu without the knowledge of the clan registered himself as owner of the suit land and he later transferred it in the name of the appellant, in exchange for his 15 acreas. The respondents asked for the dismissal of the appellants' suit, and also counterclaimed a declaration that a trust existed wherein the appellants held the parcel of land as trustee for the respondents as members of the clan;

alternatively, a declaration that the appellant held the suit land subject to the rights of possession, occupation and cultivation of the respondents.

The trial Judge (Muli, J) entered judgement for the respondents, holding that the parcel of land belonged to the clan whose members had decided that it should be adjudicated in the name of Karuru Kiragu but without giving it to him absolutely and could not claim it as his own; that he held the land subject to a trust under kikuyu customary law; the transfer and subsequent registration of the suit land was a secret deal, having been done fraudulently, so that the appellant could not and did not obtain more than what Karuru Kiragu had and the land was transferred to him subject to respondents' existing rights or subject to the resulting trust in their favour so that the appellant now held the land on trust for the respondents and also subject to their existing rights of possession, occupation and cultivation. The trial Judge therefore ordered for the rectification of the register in the respondents' favour under section 143 of the Registered Land Act.

On appeal, the appellant argued that as purchaser of the land for valuable consideration from an absolute proprietor who acquired it on first registration the appellant himself in turn as the absolute registered owner of the land under the Registered Land Act had an indefeasible title.

The Court of Appeal objected to the reasoning in the trial judge's judgement. Madan, J.A. pointed out that the clan members themselves had claimed to have decided to register the land in the name of Karuru Kiragu as trustee, they themselves had created the trust; therefore there was no trust resulting otherwise by implication of law or under kikuyu customary law.

He said:

> "In any event it was not proved by expert evidence that kikuyu customary law contained the concept of resulting within its jurisprudence as demanded by sections 48 and 51 of the Evidence Act".

Further, the court argued that a dealing in land such as the clan embarked upon and did was prohibited by section 6(i) of the Land Control Act, Cap. 302: that any dealing in agricultural land which is situated within land control area is void for all purposes unless the land control board has given consent in respect of that transaction. At this juncture it should be clear that when the case was filed the statute was silent on whether a declaration of a trust in respect of an agricultural land was a dealing in land under section 6(i). On December 24, 1980, however, an express trust was declared a dealing in land which requires consent of the land control board. This was done by the enactment of section 6(2) by the Statute Law (Repeal and Miscellaneous Amendment) Act, 1980 Kenya Gazette Supplement No.79 (Act No.9). Section 6(2) provides that:

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

It is wondered whether the Court was applying this amendment retrospectively, and if so, if there was provision for that retrospective application.

It was observed in the judgement of Law, J.A. that:

> "section 6 does not apply to an implied, resulting or constructive trust which is created, not by an act of parties, but by operation of law".

With respect to the existence of fraud Madan, J.A. thought that it had not been proved. He was not pursuaded that because of appellant exchanged 15 acres for 47 acres - which itself was not a straightforward deal - did not amount to fraud because, as he argued, there was no evidence as to the value of each lot of land. However, this erroneous observation was rescued by Law, J.A. who submitted that there was fraud since when the appellant acquired this land in exchange for his smaller plot, he knew that it was occupied by the respondents, but he made no inquiry of them as to what they were doing on the land. This is because he knew perfectly well that they were on the land under a claim of right and not as trespassers. Kiragu was aware of his obligations to the respondents but still gave up 47 acres for 15 acres to which he could have a clear title.

The Court ordered for the rectification of the register to substitute the respondents as owners of land.

Finally, it is submitted that there is still an overwhelming uncertainity about the fate of the customary trust. If this decision of the Court of Appeal is something to go by then it is almost settled that the harshness of the Registered Land Act will not be let to prevail. A registered proprietor of land will hold that land subject to the rights of those legal claimants, either because they are occupying or cultivating it or because some customary law entitles them to the same. However, it might no longer be called a customary trust but just overriding interests which form the basis of a constructive or resulting trust.

CONCLUSION

In the 19th century the law of England was dominated by the difference between common law and equity. The common law had its own strict rules. Equity was, or should have been, more flexible. It was the means by which the needs of the people could be met. As Sir Henry Maine said in his 'Ancient Law'[1].

> "Social necessities and social opinion are always more or less in advance of law. We may come indefinitely near the closing of the gap between them, but it has perpetual tendency to re-open...The greater or less happiness of a people depends on the degree of prompitude with which the gap is narrowed".

The Courts of the Common Law had laid strict rules of law expressed in archaic terms such as 'Consideration' and 'Estoppel'. Those strict rules survived the Judicature Acts 1873 - 1875 and were capable of causing injustice in many cases. There was a gap between those strict rules and social necessities of the 20th century. The development of the doctrine of equitable estoppel (as enunciated in the High Trees Case) helped to narrow the gap.

The Courts were also impelled by th notions of equity to ensure that they were not powerless because of an unregistered land, or contract ot made under seal, to protect lessees against eviction by landlord, or a purchaser with actual notice, otherwise than by registration of interest. An agreement for a lease may, in proper circumstances, be considered as a lease (Walsh v. Lonsdale (supra)).

It has been made clear that the law created by the English Courts of common law and equity have been received in Kenya with the result that

judicial decision are accepted as an important source of law. The whole range of the principles of equity as developed by the Chancery Court is by virtue of the Judicature Act (K) applicable in Kenya. The Judicature Act limits the applicability of equity, however, to cases where the constitution of Kenya and other written laws do not extent and apply and *where the circumstances of Kenya and its inhabitants permit.*

The application of the doctrine in Walsh v. Lonsdale in Kenya is attended, geerally, by alot of confusion. By virtue of the case, an agreement for a lease is as as good as a lease, provided that there are proper circumstances to support a suit for specific performance. But in Kenya the Courts have held that Walsh v. Lonsdale does not apply because *any rule of equity cannot override* the express provisions of a statute: that a contract 'inter parties' only gives a right to specifically enforce a contract but does not give an interest in land. Any interest in land cannot be given only by a duly registered instrument, but an unregistered instrument can act as a contract 'inter parties' which contract relating to land must be in writing and accompanied by delivery and possession. The Courts have also shown lack of understanding in their interpretation of section 106 of the Transfer of Property Act. Whereas they have accepted, generally, enforceability of an agreement for a lease, they have just but generally referred to Walsh v. Lonsdale without finally ruling on its applicability in Kenya.

Estoppel has been invoked with increasing frequency in Kenya in recent years, but the Courts in their application of the doctrine of equitable estoppel, have lavishly followed their English counterparts. In many respects the English Courts have set the pace for the development of

equitable estoppel, promissory and proprietory, in Kenya. For instance the phenomenon of merger of promissory and proprietor, estoppel has found favour with the Courts of Kenya, although it is still unclear on what grounds such a merger is justified. There remains a regrettable tendency on the part of the Courts in Kenya to deal with the doctrine of equitable estoppel without specific reference to the Evidence Act (K), relying instead upon English decisions (Muli J. Jetha Ltd. v. Commissioner of Income Tax, (1967) E.A. 50,59 (K). The Evidence Act is designed to cover the law of evidence (Nurdin Bandali v. Lombank Tanganyika Ltd. (1963) E.A. 30 (C.A.)

Equitable principles are invoked to protect innocent and oppressed parties and upon this understanding the Courts in Kenya have extended the institution of trust and applied it to suit the circumstances of Kenya and its inhabitants. An absolute proprietor of land under the Registered Land Act (K), upon registration, acquires rights not liable to be defeated except as provided in the Act, and shall be held by the privileges and appurtenances belonging to the land, free from all other interests and claims, subject only to section 30 of the same Act. But the Courts in Kenya have intervened and have, on many occasions, held that such proprietors acquire land subject to equitable rights of possession or actual occupation and cultivation which is appurtenant to possession and occupation. If a person registered as proprietor of family or clan land he helds it on trust for the benefit of the family or clan members and will be bound later to allocate it to righful owners. Until recently, this trust was considered to be in the nature of an equitable customary trust and infact, on several occasions, it was held to be unrecognised as it was

contended that customary rights are extinquished upon the registration of a piece of land. However now the trust has been given recognition and whatever its nature (customary, constructive or resulting trust) the consequences are the same: the property is being held on trust and the proprietor is a trustee and the rightful owners become beneficiaries at law.

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FOOTNOTES

CHAPTER ONE

1. The Court of King's Bench, The Court of Common Please and the Court of Exchequer
2. Earl of Oxford's Case (1615) 1 Cha. Rep. 1
3. (1873) 10 Ch.D. 118, 128
4. As a result of the Judicature Acts 1873 - 75
5. The Judicature Acts 1873 - 75, S.25
6. The Court Consists of the Court of Appeal and the High Court of Justice
7. (1882) 21 Ch. D.9
8. H.F. Morris and James S. Read, Indirect Rule and the Search for Justice (Essays in East African Legal History)
9. P. 74 (hereinafter cited as 'Morris and Read')
9. See 'Morris and Read' at p. 109
10. Act No. 16 of 1967
11. See S 3(1)
12. Constitution of Kenya Act, 1969, (No. 5 of 1969)
13. This view is also expressed in The Law of Kenya (EALB[1970]) by Tudor Jackson, p. 14
14. Seee also William Burnett Harvey, An Introduction to the Legal System in East African (E.ALB[1975]), Ch. IV
14. The test of whether a statute is of general application is whether it was a statute of general application on 12th August 1897. IN I v I , (1971) E.A. 278, (H.C.) it was held that the Married women Property Act 1882 (U.K.) was

14. a statute of general application as it was a statute of general application in England on 12th August 1897

15. Allot, Essays in African Law (London: Butterworth, 1960) at p. 31

16. A.E.W. Park, Sources of Nigerian Law (London Sweet and Maxwell, 1963) at pages 20 -24

17. Chapter 486, Laws of Kenya

18. (1965) E.A.I. (S.C.)

19. Cahpter 23, Laws of Kenya

20. Chapter 300, Laws of Kenya

21. Chapter 144, Laws of Kenya

22. S.17

23. K.W. Wederbun 'Utra Vires and Redundancy

24. Chapter 167, Laws of Kenya, 1962 ed

25. Chapter 168, Laws of Kenya

26. Chapter 280, Laws of Kenya

27. (1965) E.A. 289, 290 - 296 (H.C.)

CHAPTER TWO

1. (1882) 21 Ch. D. 9

2. The Court consisted of Jessel, M.R. Cotton, L.J. and Lindley, L.J.

3. At page 14-15

4. (1947) I WLR 113

5. Re Maugham (1185), 14 Q.B.D. 956, 958

6. (1977) 2 All E.R. 293 (C.A.)

7. Per curian

8. There were two agreements of which specific performance would be granted One was the agreement by the Parker Trustees to convey to the Industrial Company The other

9. There were two agreements of which specific performance would be granted One was the agreement by the Parker Trustee's to convey to the Industrial Company The other was the agreement by the Industrial Company to grant lease to AEI

9. As per Roskill, L.J. at page 312, C to e

10. Megarry, R.E., The Law of Real Property (3rd Edition, 1962) p. 633

11. For instance, in Nigeria the case of Walsh v. Lonsdale was followed in Savage v. Sarrough (1937) 13 N.L.R. 141 where an unsealed agreement for a lease for five years was held in equity to be effectual as if it had been made under seal

12. Act IV of 1882

13. Act No 28 of 1968

14. Cap. 281 of the Laws of Kenya

15. Cap 23 of the Laws of Kenya

16. See Lalchan v. Radha Ballabu, A.I.R. 1959 Raj. 240

17. Cap 280 of the Laws of Kenya

18. (1958) E.A. 628 (E.A.C.A)

19. (1960) E.A. 755) P.C.)

20. (1963) E.A. 107 (E.A.C.A.)

21. 29 K.L.R. 26

22. Karimllakan v. Bhamupratap Singh, A.I.R. 1949 Nag. 265

23. Moosa Kutty v. Thekke, A.I.R. 1928 Mad 687 (689), 110 1.c 398

24. Ram Kumar v. Judadish, A.I.R. 1952 S.C. 23

25. Arunachala v. Ghulam Mahmood, A.I.R. 1951 Mad. 408

26. Lalchand v. Radha Ballabh, A.I.R. 1959 Raj: 240

27. (1960) E.A. 107 (E.A.C.A.)

28. See Bains v. Chogley, 16 E.A.C.A. 27 in which the Court infact said that a tenant having possession under an unregistered lease has a valid lease for the maximum period permissible for an unregistered lease, namely, one year under the I.T.P.A.

29. "provided that no lease for the period above specified (twelve months or more) shall be valid unless registered"

30. Civil Appeal No 40 of 1975 (unreported)

31. Civil Appeal No. 33 of 2976 (Unreported)

32. Ram Kumar v. Judadish (supra)

33. Civil Appeal No. 18 of 1978 (Unreported) (K.C.A.)

CHAPTER THREE

1. Lord Denning, The Discipline of Law (Butterworths 1978) at page 223

2. Jorden v. Money (1854) 5 H.L. Cas. 185

3. (1877) A.C. 439, 448

4. (1888) 40 Ch. D. 268

5. (1947) I.K.B. 130

6. Hanbury, Modern Equity, 9th Ed. p. 668

7. Jorden v. Money (supra)

8. (1950) IK.B. 616

9. (1602) 5 Co. Rep. 117a "Payment of a lesser sum on the day in satisfaction of a greater sum cannont be any satisfaction of the whole"

10. (18184) 9 App. Cas. 605

11. (1951) 2 K.B. 215

12. (1972) 2 Q.B. 212

13. (1977) I Lloyd's Report 133, 165

14. (1978) 2 Lloyd's Report 109, 116

15. (1965) E.A. 304

16. (1963) E.A. 304

17. The case was decided in 1965 With due respect to Spry J.A. it should be made clar that the limits of the equitable estoppel are non quite clear

18. Page 313

19. (1964) E.A. 50

20. (1967) E.A. 50

21. This point is further illustrated by a Privy Council decision arising from a Nigerian case in Ajayi v. R.T. Briscoe (Nigeria) Ltd. 3 All E.R. 566

22. See Order VI, rules 1 and 5; Balwant Singh v. Kipkoeh arap serem (1963) E.A. 631 (C.A.); See also the commenton Balwant's Case in Jinabhai and Co. v. Eustace Sisal Estates (1967)

22. E.A., 153, 156 (.C.A)

23. For example, Dukhiya v. Standard Bank of S.A. (1959) E.A. 958 (C.A.) at pp. 969 - 970 See also Balwant's case, Ibid For a case where the pleadings were challenged on the grounds that estoppel had not been pleaded but the Court found that estoppel was not, in fact, in issue, see Baburam Sons v. Dasturi Ram, (1938) 18 K.L.R. 21

24. See Gilbert Kodlinye, An Introduction to Equity in Nigeria 'Law in Africa' series No 35 , p. 228

25. (1866), L.R. I.H.L 129, 170

26. See Willmott v. Barber (1880) 15 Ch. D. 96, 101

27. (1968) E.A. 585 (H.C.)

28. (1966) E.A. 564 (C.A.)

29. Cap. 80 of the Laws of Kenya. Section 120 defines estoppel in the following terms: "When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceedings between himself and such a person or his representative, to deny the truth of that thin"

30. (1955) 1 W.L.R. 213

31. (1952) 1 All E.R. 149

32. Civil Appeal No 8 of 1978 (KC.A.)

33. (1965) 2 Q.B. 29

34. (1975) 3 All E.R. 865

35. Cap. 31 of the Laws of Kenya

36. See Moorgate Ltd. v. Twitching (1976) 1 Q.B. 225

37. at p. 875

38. See Alexander Turner, Estoppel by Representation (1977, 3rd Ed.) at p. 307 in which Turner expresses the view that the two doctrines must be kept apart

CHAPTER FOUR

My view on this Chapter have been influenced very much by Justice Muli's paper 'Problematic Aspects of Land Law (Legal History, Registered Land Act and Land Control Act. Customary Trusts)' and G.K. Kamau's rejoinder: 'Justice Muli's Paper - Problematic Aspects of Land Law' in alecture delivered by him on February 26, 1979 to the LL.B 11 of the University of Nairobi Both of these papers are, in one way or another, a product of yet another paper: 'The Role of Customary Land Tenure in Rural Development in Kenya' by G.K. Kamau, a paer he presented at the April 1978 Law Society Conference

1. See the transitional provisions contained in sections 12 - 14 of the Registered Land Act, cap. 300 of the Laws of Kenya
2. This statute was enacted in 1959 and replaced the Native Lands (Registration) Ordinance. It brough the benefits of registration to the Trust Lands
3. Section 163 of the Registered Land Act
4. Ogingo Oding: Not Yet Uhuru, An Autobiography (AWS), p. 13
5. Cap. 285 of the Laws of Kenya

6. This view has been advanced by G.K. Kamau in his paper: 'The Role of Customary Land Tenure in Rural Development'

7. (1965) E.A. 735 (E.A.C.A.)

8. Eugine Cotran: Cotran's Restatement of African Law: 2 Kenya: The Law of Succession, at pages 8 and 12

9. (1972) E.A. 227 (H.C.)

10. (1973) E.A. 338 (H.C.)

11. High Court of Kenya at Nyeri Civil case No. 56 of 1972 (Unreported)

12. Gachuhi v. Gichamba (1973) E.A. 8 and Gatimu Kinguru v. Muya Gathangi, H.C.C.C. No 1969 of 1975 (Unreported)

13. H.C.C. No. 337 of 1968 (unreported)

14. (1974) R.A. 526 (H.C.)

15. High Court of Kenya at Nairobi Civil Case No 1400 of 1973 (Unreported)

16. High Court of Kenya at Nairobi Civil Case No 34 of 1977 Unreported)

17. High Court of Kenya at Nairobi Civil Case No 1090 of 1970 (Unreported)

18. High Court of Kenya at Kisumu Civil Case No 72 of 1978

19. Court Appeat at Nairobi Civil appel No 42 of 1978

CONCLUSION

1. Henry Maine, Ancient Law (Everyman Ed, 1917) at p. 24