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THE STATUTORY REQUIREMENTS OF WRITING AND CONSENT IN
RESPECT OF CONTRACTS FOR SALE OF LAND IN KENYA.

A Research on the Origin, Purposes and Effects of the
Statutory Requirements of writing and consent in
respect of Contracts for sale of land in Kenya.

[A dissertation Paper in part fulfilment of the
requirements for an LL.B. Degree, University of
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P R E F A C E

The origin, purpose and effect of most statutory requirements are sometimes confusing to lawyers. To the laymen, they are largely unintelligible. The requirements of writing and consent are no exceptions to this. In this paper, an attempt has been made to trace the origin, purpose and effects of non-compliance with either of the requirements of writing and consent in respect of contracts for the sale of land in Kenya.

Sale of land obviously includes a sale of interest in land such as a lease or charge. My regret, however, is that time and space could not allow me to make any thorough going research in all aspects of sale of land in Kenya. Consequently, to make my investigation at least useful, I have in this paper, focussed my attention to the sale of absolute proprietorship of land although I have, by way of illustrations referred to leases and charges. I should however, not be understood to imply that the research I have made on this aspect is exhaustive. This is due to the fact that I was mainly researching in the University of Nairobi Library, which I was obviously sharing with other readers and mainly because in this library, books are not collected from desks and shelved in their respective shelves regularly. So it could take me hours, if not days before I could get a mere report book. Some readers of this paper are therefore, likely to find something missing and others may even find the views herein expressed contrary to their own. In either case, the paper may be taken as a basis for further research.

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3. Crown Lands (Amendment) Ordinance 1944
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15. Minerals Act Cap. 307
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17. Registered Land Act Cap. 300
18. Registration of Titles Act Cap.
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20. Trusts of Land Act Cap. 290
21. Water Act Cap. 372

22. English Law of Property Act, 1925
23. English Statute of Frauds, 1677

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A B B R E V I A T I O N S

1. ALL ER - All England Reports
2. App. Cas. - Appeal Cases
3. Ch. - Chancery
4. Ch.D. - Chancery Division
5. Civ. App. - Civil Appeals
6. E.A. - East Africa, East African Law Reports
7. EACA - Eastern Africa Court of Appeal
8. G.L.A. - Government Lands Act
9. J.A.L. - Journal of African Law
10. K.L.R. - Kenya Law Reports
11. KHCD - Kenya High Court Digest
12. L.A.A. - Land Acquisition Act
13. L.C.A. - Land Control Act
14. L.T.A. - Land Titles Act
15. R.L.A. - Registered Land Act
16. R.T.A. - Registration of Titles Act
17. T.L.A. - Trusts of Land Act
18. T.L.R. - Times Law Reports
19. T.P.A. - Transfer of Property Act
20. Vol. - Volume

CHAPTER 1

INTRODUCTION:

This paper is concerned with the statutory requirements of writing and consent in respect of contracts for the sale of land in Kenya. The narrow focus of the discussion to only these two requirements will, it is hoped, illuminate a significant feature of each requirement. That is, preventing fraud and maintaining a general governmental supervision over all dealings in land in the country. Before proceeding to deal with these requirements it is important to first understand what is meant by the term "land" and the expression a "contract for the sale of land" in Kenya. In this chapter both land and a contract for the sale of land in Kenya are defined. In chapters 2 and 3 an attempt will be made to trace the origin and the rationale behind having the requirements of writing and consent respectively. In the course of the discussion, it is hoped to demonstrate the effect of non-compliance with each of them. Finally, in chapter 4 concluding remarks will be made pin-pointing on the injustice, if any, engendered by the requirements and suggestions as to what the position "should be" for the requirements to be equitable.

DEFINITION OF LAND:

Land, which in Kenya is sometimes referred to as immovable property, to a lawyer is not the virgin rent-bearing soil and other natural resources of economic theory. It is much more. Kenyan Acts have defined it variously depending on the objects of each, but in substance the definitions are similar. For instance the Trusts of Land Act ¹ has defined it as follows -

" 'Land' includes land of any tenure, and mines and minerals, whether or not held apart from the surface, building (whether the division is horizontal, vertical or made in any other way) and other immovable property; also a rent, easement, right, privilege or benefit in land."

The Interpretation and General Provisions Act ² defines it as follows -

" 'Immovable property, includes land, whether covered by water or not, an estate, right, interest or easement in or over any land and things attached to the earth or permanently fastened to anything attached to the earth, and includes a debt secured by mortgage or charge on immovable property."

Various writers ³ have in substance also defined it in the same way.

In general terms therefore, land can be said to be the soil and all things on and attached to it and those underneath it. A lawyer in defining it however, does not stop there. He goes further to adopt an old latin tag cuius est solum, ejus usque and coelmet ad inferos. (He who owns the surface owns it to the heavens and the depths of the earth)⁴.

Taking any of the above definitions, one would think that anything on and, particularly that attached to the land, forms part of it hence should come within the ambit of its definition. That however is not the case. Several things, albeit, attached to land have been excluded from the definition of land. These include the following -

(1) Industrial growing crops for instance wheat, rice, cabbages and any other crop cultivated year by year. These are regarded as goods.

(2) Crops which are not industrial in the above sense of being cultivated year by year but are nevertheless a natural product of land. These include standing timber and grass⁵ the contract for the sale of which must be such that the property in them is only to pass after severance, otherwise they form part of the land hence should come within its definition - (see Settlement Fund Trustee V. Nurani⁶)

(3) Fixtures. None of the Kenyan Acts has specifically defined the term "fixtures". But their definitions of land have alluded to the definition of fixtures. In particular, the R.T.A.⁷ in defining land provides that land includes "things embedded or rooted in the earth or attached to what is embedded for the permanent beneficial enjoyment of that to which is attached or permanently fastened to anything so embedded, rooted or attached ..."

Thus fixtures are "chattels which are so fixed to the land or to a building on land as to become infact part thereof."⁸

They are so sufficiently annexed to the land that the law has to regard them as part of the land: Quicquid Plantatur Solo, Solo cedit (whatever is annexed to the land forms part of it).

"So sufficiently annexed" does not however tell us the exact annexation required to turn a chattel into a fixture hence part of the land. The determination of this is a question of law for the judge to decide and the decision depends entirely on the merits of each case. To ease the problem alittle, two criteria have been devised, namely the degree and the object of annexation.
tration of titles, within the purview of the

A chattel is deemed to be a fixture when it has actually been fastened to or connected with land or a building on land. Mere juxtaposition or the laying of an article, however heavy, on land does not prima facie make it a fixture even though it subsequently sinks into the ground. On this criterion there is a distinction between lands under T.P.A. and those under R.L.A.

FIXTURES UNDER THE T.P.A.

The Kenyan law under the T.P.A. does not stop at mere annexation as it has been held⁹ that the maxim Quicquid Plantatur Solo, Solo cedit does not apply to Kenya. It goes further to require the chattel to be annexed with some amount of "permanency" in order to turn it into a fixture. In Viriji & Awadh V. Abdulrcham¹⁰ where the question was whether the corrugated iron sheets which were annexed to a plinth which in turn was embedded in the earth were chattels or fixtures, Modera, J. held that they were chattels. He said that the definition of land as embodied in the R.T.A. and the other of immovable property in the T.P.A. and in the Interpretation of General Clauses Act and indeed in the L.A.A.¹¹ and the L.T.A.¹² reveals a prerequisite of "permanency". He said,

"though the plinth may well have been embedded in the earth the evidence does not satisfy me that this building was of such a 'permanent' nature to warrant a finding that it was either part of the 'land' or was 'immovable property'".

Noting the difference in the position of law under the T.P.A. on this point between Kenya and England, he said,

"Had the building been governed by the provisions of the Law of Property Act, 1925 applicable in the United Kingdom, the position might well have been different".

On the authority of this case and that of Saleh V. Hassan¹³, one can say that wattle and mud houses with corrugated iron roofs in Kenya in the lands under the T.P.A. are chattels because they are not "permanent" but of a temporary nature. The authorities also show that the amount of annexation required to turn a chattel into a fixture is greater under the T.P.A. in Kenya than it is in England.

FIXTURES UNDER THE R.L.A.

The proposition that the maxim Quicquid Plantatur Solo, Solo cedit does not under the T.P.A. apply to Kenya because a chattel requires to be annexed with some amount of "permanency" to turn it into a fixture, is however of a limited application. This is because most of the land in Kenya has been brought, by regis-

The T.P.A. has ceased to apply to it.¹⁴ By virtue of section 163 of the R.L.A., the law on this point is basically the same in Kenya as it is in England. That is to say, the maxim Quicquid Plantantur Solo, Solo cedit applies to almost the whole of Kenya.

The other criterion for the determination of what is a chattel or a fixture is the object of annexation. The test here is whether an article has been fixed for its convenient use as a chattel and it has all along been intended to continue to be a chattel, or for the more convenient use as land or building. If it is "for the permanent beneficial enjoyment of that to which it is attached,"¹⁵ then it is a fixture and not a chattel. Blackburn, J. gave an example of seats secured on the floor of a cinema hall or statues which he said are fixtures. But "if stones are deposited in a builders yard", he said, "and for the sake of convenience stacked one on top of another they are not fixtures"¹⁶. In Shaw V. Shah¹⁷, Lane Ag. J. held that what is annexed to the land for the beneficial use and improvement of the property and permanent enjoyment becomes part of the land.

The law has however been relaxed on this point in favour of tenants. They are allowed to remove ornamental and domestic fixtures and others which come within the meaning of the term "trade" or "tenant" fixtures. These are articles which the tenant has attached to the property for his own convenient use and has intended them to, all along, remain chattels. They include even huts he has built on the land which, unless otherwise stated¹⁸ he can remove, without occasioning substantial damage to the property,¹⁹ before the expiry of his tenancy.

Once, following the above criteria, it has been determined that an article is a fixture, it forms part of the land and comes within the definition of land. If, on the other hand it is a chattel, it is not a fixture and does not come within the definition of land, even if it is annexed to land or something embedded in land.

Where a piece of land is mortgaged, fixtures pass to the mortgagee even though no specific mention of them is made in the mortgage deed and even if they have been added to the land later by the mortgagor. Similarly as between the vendor and the purchaser, in the absence of any express reservation, fixtures pass to the purchaser even without specific mention and these include articles which as between the landlord and tenant would have been tenant fixtures.

A CONTRACT FOR THE SALE OF LAND:

A contract for the sale of land is a contract for the sale of "land" as defined above. Although it is a special type of contract, like any ordinary contract, it is governed by the general principles of the law of contract ²⁰.

In Kenya, no Act of Parliament has specifically defined a "contract for the sale of land" it has however, been included in the term "disposition" used in most Acts dealing with land. Section 2 of the R.L.A. defines "disposition" to mean.

"any act by a proprietor whereby his rights in or over his land, lease or charge are affected but does not include an agreement to transfer a lease or charge."

An agreement to lease or charge a piece of land is therefore, by this definition, a contract for the sale of land. But as stated earlier ²¹ we are here mainly concerned with the sale of an absolute proprietorship.

This definition does not give us a clear picture as to what exactly is the contract for the sale of land. One or two definitions given by writers might make this clear.

Walton, R. has defined it as "a contract whereby one legal person called the vendor, agrees to convey by the appropriate legal method to another legal person called the purchaser some land or some interest in land, in consideration of a sum of money called the price"²². It is sometimes called an estate contract defined as,

"any contract by an estate owner or by a person entitled at the date of the contract to have a legal estate conveyed to him, to convey or create a legal estate including a contract conferring either expressly or by statutory implication a valid option to purchase, a right of pre-emption or other like right" ²³.

Two important elements can be noted in this last definition. Firstly, the contract must be "a contract to create or convey a legal estate". This may be a transfer from a proprietor to a trustee who will hold the legal ownership as distinct from the beneficial ownership which is vested in the cestui que trust for whom the trustee buys and holds it. It may also be a transfer from a proprietor or even from a trustee to another person who will hold both the legal and beneficial ownership. Secondly, the contract may be by the "estate owner or by a person entitled at the date of the contract to have the legal estate conveyed to him". The latter may be a beneficiary who, at the date of the contract is entitled to have the legal estate conveyed to him. This emphasizes the legal capacity to enter into a contract

because to be "entitled to have the legal estate conveyed to him," the beneficiary must be of age and of sound mind as the law²⁴ does not allow infants to hold land.

A contract for the sale land, although it is a special type of contract, like any other contract, can take any form provided it is evidenced in writing to be enforceable²⁵. It can be oral, by correspondence, by auction by the exercise of the option to purchase or even by compulsory acquisition of land. What is important in each case is the proof of a binding contract.²⁶ Where it is oral and later reduced into writing, it must be shown that all the terms and conditions orally agreed upon have been recorded. If it is by correspondence, a perusal of all the documents exchanged must reveal consensus at some point. If by auction the rule is that the auctioneer must read all the terms and conditions of sale before the commencement of the sale and the bidders are bound by those conditions and terms²⁷. The highest bidder becomes the purchaser at the fall of the hammer - Payne V. Cave²⁸. When it is by compulsory acquisition it must be in accordance with the provisions of the L.A.A. Here the contract is a binding one when the notice of acquisition has been given under section 6 of that Act. If there is any purported withdrawal of the notice, the owner of the land can, if he wishes, proceed with mandamus - see R.V.Hungerford Market Co.²⁹

DISCLOSURE OF MATERIAL FACTS:

Since contracts for the sale of land are a special type of contracts, the law imposes certain obligations on the vendor in respect of the description of the property and disclosure of some material facts. However, they are not contracts "uberrimae fidei" in which there is an absolute duty upon each party to make full disclosure to the other of all material facts of which he has knowledge"³⁰. The vendor does not, for instance, have to disclose even patent defects of the quality of the property which are discoverable by inspection and ordinary vigilance on the part of the purchaser. Unless there has been an active concealment of the said patent defects by the vendor, the maxim caveat emptor applies here. But the vendor has to disclose latent defects which he has knowledge of and which the purchaser cannot discover by ordinary inspection and also the defects of title exemplified by encumbrances³¹ (see section 55 - T.P.A.)

The purchaser on the other hand must not hurry the vendor into the conclusion of the contract before the vendor has had

an opportunity to get the right value of his land.

Where these facts are not disclosed or where there is any concealment of the patent defects, or if they are disclosed then they are misrepresented or there is any fraud on either party, the contract can be avoided or rescinded at the instance of either party.

CONSEQUENCES OF A BINDING CONTRACT PENDING EXECUTION

GENERAL PRINCIPLES

Contracts for the sale of land are rarely concluded and completed within a short time. They take months or even years before they are executed. During the period pending execution, the purchaser may have paid a deposit or part or even the whole of the purchase price. But as the rule is, unless otherwise provided, the vendor remains in possession and has a lien on the property for the balance in the purchase price. During this time, the purchaser has an equitable interest in the property and he is therefore entitled to an equitable lien on the property for the amount he has paid. The vendor from "the time you have a valid contract for the sale ... becomes in equity a trustee for the purchaser of the estate ... and the beneficial ownership passes to the purchaser"³². But he is a trustee in a special and qualified sense because he has also an interest in the property to the extent of the unpaid purchase price. He has however to take reasonable care of the property in the interest of the purchaser. He must not sell the property to any other person. If he does so and that other person has notice of the previous sale, that other person becomes a constructive trustee for the original purchaser.³³ The purchaser, however, bears the risks of fire, fall in value or any other calamity which might befall the property and which is not caused by the vendor. This general equitable principle does not however apply to Kenya.

Under the T.P.A.

Under the T.P.A. the foregoing equitable principle that the contract creates in favour of the purchaser an equitable interest in the land, the subject matter of the contract, does not apply. Section 54 T.P.A. provides that a contract for the sale of immovable property "does not, of itself, create an interest in or charge on such property." Section 55 however imposes a duty of care of the property on the vendor. It provides that,

"s. 55(i) The seller is bound -

- (a)
- (b)
- (c)
- (d)

- (e) between the date of the contract of sale and the delivery of the property, to take as much care of the property and all documents of title relating thereto which are in his possession as an owner of ordinary prudence would take of such property and documents".

This care includes ensuring that the property does not deteriorate in value. In Abdullay. Shah ³⁴ the committee of the Privy Council held that the words "to take care of the property" in s.55(i)(e) T.P.A. are not restricted to the preservation of the property from physical deterioration but ^{also} include deterioration in value, which had happened here due to the vendors not taking the care expected of them. In this case, there was a contract for the sale of a piece of land with buildings thereon at River Road in Nairobi. Before delivery to the purchasers, one of the tenants vacated part of the premises and the vendors without consulting the purchasers relet it. It was common ground that had the purchasers been consulted, they would, have preferred having that part remaining vacant to reletting it and would have paid the vendors the part of the rent they were entitled to. This is because owing to the shortage of accommodation in Nairobi the value of the property if delivered to the purchasers with the vacated part still vacant would have increased by Shs.18,000/-. The purchasers therefore sued for an order of specific performance but with the abatement of the purchase price by Shs.18,000/- and it was granted.

In Souza Figueiredo v. Moorings Hotel ³⁵ where an agreement to sub-lease some premises was not registered, the E.A.C.A. held that no interest passed to the purchaser and that the equitable doctrine in Walsh v. Landsdale ³⁶ will not apply to Uganda to override the provisions of an Act of Parliament. Also excluding the application of the equitable doctrine in the Walsh case is the case of Actm. General V. Suleiman ³⁷. Here there was a sale of land and the purchaser had paid the purchase price but before conveyance by registration some coconut trees on the land were sold and the purchaser relying on Walsh V. Londsdale claimed the proceeds of the sale. Law J held that "the right of the seller or buyer ... to rents and profits are specifically stated to be conditional on the passing of ownership". Until therefore ~~the~~ conveyance was executed and registered the purchaser acquired "no right to rents and profits in the said property, but only a charge on the land in respect of the purchase price paid". ³⁸ Section 57(1) of the R.T.A. also provides that the purchaser can protect his "interest" by lodging a caveat with the Registrar of Titles.

Under the R.L.A.

Although section 163 of the R.L.A. applies to Kenya the Principles of English Common law as modified by the doctrines of equity, the said section provides that these have to apply subject to the provisions of the Act. Section 38(1) which provides that no disposal of land shall be effectual "to create, extinguish, transfer, vary or affect any estate, right or interest in the land ..." except in accordance with the Act read together with section 85(2) of the same Act which makes it clear that an interest can only be created after registration, like s.54 of the T.P.A. exclude the application of equitable doctrine in Walsh V. Londsdale.

It can therefore be said that in Kenya under both the T.P.A. and the R.L.A. a contract for the sale of land per se does not create in favour of the purchaser any interest in that land.

EXECUTION

A contract is executed when there is the complete transfer of the estate to the purchaser and the final settlement of the business.³⁹ This must be done on the specified date unless time is not made of the essence. In Syedha V. Jamil Engineering Co.⁴⁰ there was a contract for the sale of land but time was not made of the essence. The purchaser was in financial straits and could not complete the sale within the time expected. On a subsequent agreement, time was expressly made of the essence and the purchaser paid a deposit which he undertook to forfeit if he did not complete within the specified time thereof. He did not. In an action for an order of specific performance, Phadke J. refusing to grant the order, prayed held that although time is generally not of the essence in equity, here it was expressly made of the essence and since the purchaser undertook to forfeit the deposit he had to, for "chancery mends no man's bargains".

RESERVATION OF EASEMENTS etc.

Easements of necessity, for instance light and support, are implied in favour of the grantor, vendor in this case. This is the case where the vendor disposes part of his property. But in the grantee's, or purchaser's favour they have to be reserved expressly.

In Kenya therefore, a contract for the sale of land is one where an owner disposes of the soil and the things permanently attached to it and does not "of itself" create in favour of the purchaser any interest in that land until registered.

FOOTNOTES TO CHAPTER 1

1. Cap.290
2. Cap.2 Section 3.
3. For instance Burns, E.H. in Cheshire's Modern Law of Property, 7th Edition P.99, has defined it as including "all corporeal things subjacent and superjacent to the soil and annexed thereto".
4. An Introduction to the law of sales of Land by Walton Raymond at P.45.
5. See L.T.A. Cap.282 Section 2.
6. [1970] E.A. 562.
7. Cap.281 Section 2.
8. Leake - Uses and Profits of land at P.103.
9. Shaw V.Shah 17 K.L.R.20.
10. 24 K.L.R.(1) 24.
11. Cap.281.
12. Supra Footnote 5.
13. 24 K.L.R. (1) 17.
14. Section 164 - R.L.A.
15. See R.T.A. Cap.281 s.2.
16. Halland V. Hodgon (1872), L.R.70328, at P.335.
17. Supra footnote 9.
18. See section 71 - G.L.A. Cap.280.
19. Ibid.
20. G.H. Treitel - the Law of Contract 3rd Ed.
21. in the Preface.
22. Supra footnote 4.
23. George F.F. - The sale of land at P.37.
24. See section 13 - T.L.A. Cap.290.
25. See next chapter.
26. Contracts should not be made "Subject to".or conditional. They must be definite.
27. See ss.12-17 G.L.A. Cap.280.
28. (1789) 3 T.L.R. 148.
29. (1832) 4 B & Ad 327.
30. The Law of England - Earl of Halsbury Vol.25 P.296.
31. See s.60(3) and 94(4) R.L.A.
32. Per Jessel, MR. In Lysaght v. Edwards [1876] 2 Ch.D.499 at P.506.
33. See settlement Fund Trustee V.Nurani (supra).
34. [1958] E.A. 54.
35. [1960] 7 E.A. 926.

36. (1882) 21 Ch.D.9.
 37. [1958] E.A. 513.
 38. Ibid at P.517.
 39. Supra Footnote 23 at P.79.
 40. [1973] E.A. 54.
 41. Wheeldon V. Burrows (1879) 12 Ch.D.31.
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CHAPTER 2

THE REQUIREMENT OF WRITING

The general rule of the law of contract is that there are no formalities required in the creation of a contract. A Contract may be created by word of mouth, by writing, by conduct or by a combination of two or three of these.¹ To this general rule however, some statutes have created exceptions and in that respect they have provided the form some contracts should take. Among the exceptions, the most important is a contract for the sale of land or an interest in land which the law requires to be in writing.²

The statutory requirement of writing in respect to contracts for the sale of land in Kenya has its origin in the English law. It is therefore pertinent at this point to understand the importance of the requirement and how it has developed under the English law.

THE ENGLISH HISTORY AND POLICY OF THE REQUIREMENT OF WRITING.

By the latter half of the 17th century, English law accepted mutual promises as founding contractual liability without any proof of a quid pro quo and yet the procedure in the courts and the rules of evidence were not fully developed to mete out justice. Not only were the juries entitled to decide from their own knowledge apart from evidence, but also no proper control could be exercised over their verdicts. To make it worse, some ludicrous common law rule until the middle of the 19th century forbade any person to testify in any proceedings in which he was interested even if such a person was the only witness in the case. This and the "confusion attending the rapid succession of civil war, cromwellian dictatorship and restoration had encouraged unscrupulous litigants to pursue false or groundless claims with the help of manufactured evidence"³. The result was a frequent perpetration of fraud causing great hardship especially in cases involving land which was then almost the entire source of wealth of the country. The English statute of Frauds 1677 was therefore enacted and avowed as its object the "prevention of many fraudulent practices which are commonly endeavoured to be upheld by perjury and subordination of perjury"⁴.

The draftmanship of the statute was so bad that in due course when the law of evidence and the procedure in the law courts were fully developed, it created greater hardship than it sought to prevent, so it was repealed.⁵ Section 4 of the Act in so far as it was governing contracts for the sale of land was repealed and re-enacted with slight modifications by section 40 of the Law of Property Act, 1925 which need not be set out as it is a prototype of section 2(3) of the Kenyan Law of Contract (Amendment) Act 1968, which will be considered shortly. The justification for this re-enactment was not only that these contracts were of considerable importance but fairly complex. So writing, it was thought, could give the parties to such a contract an opportunity of seeing what they were letting themselves in for.

THE KENYAN HISTORY AND POLICY OF THE REQUIREMENT OF WRITING:

The Kenyan law of contract, during the colonial era and until quite sometime after independence, did not contain the requirement of writing in respect to contracts for the sale of land. This is because by virtue of Article 4 of the E.A. Order in Council 1897, the Indian contract Act 1872 and the Indian Transfer of Property Act 1882 applied to Kenya in cases dealing with land and had no provision for the requirement of writing. This is further illustrated in Bennett V. Garvie⁶ and in Thaker V. Kaur⁷. In Bennett V. Garvie the question was whether a verbal contract for the sale of land could be specifically enforced. Hamilton c.J. held that although the English statute of Frauds required such a contract to be in writing, the above mentioned statutes applying to Kenya did not contain the requirement hence the contract could be specifically enforced, and that the statute of Frauds which applied to peculiar circumstances in England cannot be called in to vary the law. Giving reasons why the statute cannot apply to Kenya, he said,

"what may be suitable to a highly civilized country like England may be entirely unsuitable to a country such as this where a small fraction of the population can read and write and there are grave objection to holding that an Act of this nature is suitable to some of the population of the protectorate and not all, for that would inevitably tend to an uncertain application of the law. 'Where the law is uncertain the people are unhappy'"⁸

The enactment of the Kenyan Law of Contract Act 1961⁹ and which replaced the Indian Contract Act 1872¹⁰ and expressly forbade the application of the English statute of Frauds 1677 to Kenya did not make any change in this respect. So oral contracts for the sale of land in Kenya continued to be enforceable until 1968 when the Law of Contract (Amendment) Act was enacted. Meanwhile in 1968 the requirement had been introduced in the R.L.A., section 38(2), but this was not universally applicable as some parts of the country had not been brought under the ambit of the R.L.A.

The contract (Amendment) Act which rendered a greater part of s.38(2) of the R.L.A. superfluous and amended section 2(3) that, of the Law of Contract provided that:

"No suit shall be brought upon a contract for the disposition of an interest in land unless the agreement upon which the suit is founded, or some memorandum or note thereof is in writing, and signed by the party to be charged or by some person authorised by him to sign it."

The objects of this enactment, like those of the English statute of Frauds 1677, were to prevent fraud. The Attorney General, Mr. Njonjo, introducing it in Parliament said that the transactions involving land are not only important but equally complicated and protracted because of various rights and obligations to which land can be subject. This calls for careful examination and the government felt it necessary to have them reduced to writing. Talking of the fraud which might be perpetrated where a contract is made orally and where there are no witnesses, the A.G. said,

"... imagine the difficulties which can arise, particularly when we have a number of our people, at the present time, who are what I call 'smart alecs', people who are prepared to exploit the ignorance of the ordinary man, people who take the advantage of an illiterate person That is why ... these transactions should be reduced to writing in order to avoid this kind of difficulty." 11

THE MEMORANDUM:

Although section 38(2) of the R.L.A. (as amended) does not tell us what should go into the memorandum or note, the phrase "No suit shall be brought upon a contract ..." can be construed to mean that all the essential terms of the contract must be contained in the memorandum. Under the English common law, which is by section 163-R.L.A. applied to Kenya, the position is that the memorandum can take any form so long as the essential terms appear on it and it can be in any language. It can also be in parts, but in that case there must be a nexus between the parts and it must be shown to be a memorandum of the contract entered into. 12 More importantly the memorandum should express the

intention of the parties and sufficiently identify them,¹³ and the property. It does not have to be contemporaneous with the making of the contract, but must be in existence before the suit is filed.¹⁴

Once the essential terms of the contract have been recorded, the law does not bother about trifles.¹⁵

SIGNATURE OF THE PARTY TO BE CHARGED:

The Act only requires the signature of the party to be charged because he is the one apt to deny the existence of the contract. The signature can take any form. For instance it may be in full names, initials and it can be typed, written or printed.¹⁶ It can be in the middle, at the top or at the end of the document.

Where the signing is by the agent of the party to be charged, it must be shown that the agent had the defendant party's authority to sign it on his behalf. In Ramraji Coffee Estate V. Otano Estate¹⁷ where there was an alleged contract for the sale of land signed by an advocate acting for the defendant party, it was held that the defendant company was not bound by that contract because it had not authorized the advocate to sign the contract on its behalf and that an advocate does not bind his client unless the latter expressly authorizes him. In Abel Salim V. Okongo¹⁸ (unreported) where there was an oral agreement to lease some premises in Nairobi, it was held that the agreement was unenforceable not only because it was not in writing but also because it had to be signed by the party to be charged.

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EFFECTS OF NON-COMPLIANCE WITH THE REQUIREMENT OF WRITING:

Section 38(1) of the R.L.A. provides that any land disposition which is not in accordance with the provisions of that Act is "ineffectual to create, extinguish, transfer, vary or effect any estate, right or interest in land ..." This Act (as amended) and which provides that, "No suit shall be brought upon a contract... unless it is in writing," read together with section 85(2) of the same Act, makes it clear that the contract itself is not void but no suit shall be brought upon it.

Under the English common law, which, as it has been reiterated, is applied to Kenya by section 163 of the R.L.A., the position is the same as in Kenya and has been stated as follows -

"The effect ... is not to render void a contract which does not comply therewith, nor to make it illegal but to make a note or memorandum in writing indispensable evidence in proceeding to enforce it." 19

The aim is "to make it unenforceable by the courts." 20

In a recent Kenyan case of Abel Salim V. Okongo 21 (unreported) this was reiterated in clear terms. In that case, there was an oral agreement to lease certain premises in Nairobi. The plaintiffs who had paid a deposit and obtained a receipt went and checked the premises in case they needed any repairs and placed a lock on the door. The premises were leased to the third defendant. Consequently the plaintiffs sued for an order of specific performance and damages. The Kenya High Court, Muli, J. held to the effect that the contract having not been reduced to writing, it was not only unenforceable but was also void. The appeal to the E.A.C.A. was dismissed not because it was void but merely unenforceable. Mustaffa, J.A. disagreeing with Muli J., said that there was clearly a valid contract but unenforceable for want of writing. He said that "the Act deals with enforceability in a court of law of a lease and not with its validity".

For any non-compliance to be regarded as a triviality and the contract to be enforceable by action, it must be shown that it did not occasion substantial prejudice to the persons for whose benefit the requirement of writing was intended. 22

Even without the clarity in the wording of the statute, applying the common law principles of interpretation one would still arrive at the same conclusion. Dealing with procedural and formal requirements, De Smith 23 said that in determining what is the effect of non-compliance with statutory requirement,

"the whole scope and purpose of the enactment must be considered and one must assess the importance of the provision that has been disregarded and the relation of the provision to the general object intended to be secured by the Act." 24

Although De Smith was dealing with procedural matters, the general principle of interpretation he enunciated is applicable in the present case. Taking the whole scope and purpose of the enactment of the Law of Contract (Amendment) Act, as that of the English Statute of Frauds, it is clear that it was intended to prevent fraud. The A.G., giving the object and purpose of the Act, said so and did not indicate anywhere that the contracts made in contravention thereof would be absolutely void or illegal.

EXCEPTIONS TO THE REQUIREMENT OF WRITING:

1. PART PERFORMANCE:

Notwithstanding the statute of Frauds 1677, oral contracts were still entered into. A party to such contract wanting to get out of it could later repudiate it and plead the requirement of writing in the statute as a defence. Equity, on the maxim that "Equity will not allow a statute to be used as an instrument of fraud", stepped in to give relief to this kind of fraud by the application of the doctrine of "part performance".²⁵ This is where the party being defrauded has, pursuant to the oral agreement, partly or wholly performed his part of the contract. In most cases the other party leads him into performing it. This doctrine is clearly an amelioration of the rigours of the common law because under the common law, that a contract had been partly performed was immaterial ^{and could not be enforced} if it was not in writing.

After the plaintiff has partly performed part of it, the contract is at that stage, said to be beyond the ambit of the statute. Stating the law on this point, the Earl of Selbourne L.C. in Maddison V. Alderson ²⁶ said:

"In a suit founded on such part performance the defendant is really 'charged' upon the equities resulting from the acts done in execution of the contract and not (within the meaning of the statute) upon the contract itself. If such equities were excluded injustice of a kind which the statute cannot be thought to have in contemplation would follow."

The statute had in contemplation a simple case in which one is 'charged' on the contract only "and not that in which there are equities resulting from res gestae subsequent to and arising from the contract." In Kitching V. Conforzi ²⁷ the E.A.C.A. held that where there has been part performance the plaintiff is not seeking to enforce an unenforceable contract but another contract which is enforceable.

This equitable doctrine of part performance after having applied to Kenya for sometime ²⁸ was incorporated in explicit terms in the proviso to s.38(2) of the R.L.A. (as amended). It is therefore an established principle of the Kenyan law of contract which will continue to supply "the want of formal execution of a contract." ²⁹ and render it enforceable.

It is important, however, to note that the doctrine only applies to those cases to which the equitable remedy of specific performance can be granted. There must also be a binding contract so that the acts of part performance taken together are unequivocally attributable to a recognition of the validity of the alleged contract. ³⁰

ACTS OF PART PERFORMANCE:

Not every act done pursuant to an oral contract can be said to constitute part performance of the contract. It was said in the Maddison case that "the acts of part performance relied upon must be such as to be consistent with the agreement alleged and with no other title." They must be unequivocally referrable exclusively to the agreement so that the existence of the contract is the only reasonable inference to be drawn from the fact that they have been done.

The payment of the purchase price or part thereof has been held not to constitute an act of part performance. ³¹ The Earl of Selbourne L.C. in the Maddison case said that the payment of the money is an equivocal act not (in itself) until the connection is established by parol evidence indicative of the contract alleged. If however the payment of the purchase price has been accompanied by, say, taking possession of the property, then those are sufficient acts of part performance. The rationale of holding the payment of the price alone as not a sufficient act of part performance is that the plaintiff's status quo can, with least inconvenience, be restored. That is why in Abel Salim V. Okongo (above) the learned Justice of Appeal seemed not to regard the ~~payment of the deposit and the placing of the lock on the door of~~ the premises as ~~sufficient~~ acts of part performance ~~to make the~~ oral agreement for a lease enforceable. The ~~placing of the lock on~~ the door apparently did not constitute taking possession of the premises.

2. SALE PURSUANT TO AN ORDER OF THE COURT:

This is another exception to the requirement of writing because the nature of the transaction precludes the mischief which the statute is intended to prevent.

3. FAILURE TO PLEAD NON-COMPLIANCE:

Where the defendant does not plead in his defence non-compliance with the requirement of writing, he is taken to have connived it and he is accordingly bound by the oral agreement. In Parry V. Carson ³² there was an oral transfer of an equitable interest in shares in a sisal company to the plaintiff. In an action by the plaintiff to enforce her interest against the executor of her deceased father's estate, the executor did not plead in his defence non-compliance with the requirement of writing, and the Tanzania High Court, Sir Ralph Windham C.J., held that the plaintiff was entitled to enforce her interest because the defendant did not plead non-compliance with the requirement. He said,

"The statute of Frauds was not pleaded in any of the written statements of defence .. ." and yet, "... it is laid down in very clear terms by O.8, r.2, of the Indian Civil Procedure Rules, that the defendant must raise by his pleading all matters which show the suit not to be maintainable ...: I therefore hold that if s.9 of the statute of Frauds is being relied on, it must be pleaded ..." ³³

4. WHERE THE DEFENDANT HAS FRAUDULENTLY CAUSED THE FAILURE OF WRITING.

Where the defendant has fraudulently caused the failure of writing he will not be allowed to plead non-compliance with the statutory requirement because "equity will not allow a statute to be used as an instrument of fraud."

Conclusively, it can therefore be said that failure to comply with the requirement of writing which is meant to prevent fraud does not make a contract void or illegal, but unenforceable unless there is a sufficient act of party performance.

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FOOTNOTES TO CHAPTER 2

1. ~~Atiyah~~, P.S. - An introduction to the law of contract, 2nd Ed. P.112.
2. The other exceptions which the law requires to be in writing include transfer of shares in a company, contracts for the sale of certain goods contracts of Bills of exchange and money lending contracts provided in the relevant Acts.
3. The Law of Contract, 8th Ed. by Cheshire and Fifoot at P.173.
4. Ibid.
5. Ibid at P.175.
6. (1917) 7 K.L.R. 48.
7. 17 K.L.R.1
8. Ibid Footnote ⁶ at P.49.
9. Cap. 23.
10. The Indian T.B.A. still applies to Kenya.
11. House of Representative Debates Vol.14/1968 Co.1737.
12. Smith V. MacGowan (1938) ALL ER 447.
13. See Leslie & Anderson V. Kassam Jirraji (1959) E.A. 79.
14. Kanti Printing Works V. Tanga District Council (Unreported) Civil APP 18/70 (Tanzania).
15. Lobo V. E.A. Agencies (1954) 21 E.A.C.A. 22.
16. Hill V. Hill (1947) Ch.231 - initials; schneider V. Norris (1814) 2M & S 286 - Printed; cohen V. Roche (1927) 1 KB 169 - stamped.
17. KHCD 96/71.
18. Civil APP No.44 of 1975 (CA).
19. The Earl of Halsbury Vol.7 P.362.
20. R.E. Meggery & H.W.R. Wade - The Law of Real Property 3rd Ed. P.554.
21. Supra.
22. Lobo V. E.A. Agencies Supra. Although the case was dealing with money lending contracts, it is analogous to the present one.
23. De Smith - Judicial Review of Administrative Action 3rd Ed. at P.12
24. Ibid at P.123.
25. The doctrine of part Performance first came to the courts in Butcher V. Stapley (1686) 1 vern.363 in the judgement of Lord Jeffreys L.J. and was firmly established in the decision of the House of Lords in Lester V. Foxcroft (1701) Colles. P.C. 108.

26. (1883) 8 APP Cas. 467 at P.475.
27. (1936) 6 E.A.C.A. 35.
28. Kitching V. Conforzi (Supra) Mohamed V. Said (1957)
E.A. 211 Credit Finance Corp. V. Ali (1959) E.A. 79.
29. Per Windhow C.J. in the Credit Finance Case.
30. See Britain V. Rossifor (1879) 11 Q.B. D.123.
31. See the Okongo case (Supra).
32. (1963) E.A. 91.
33. Ibid at P.97.

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CHAPTER 3

THE REQUIREMENT OF CONSENT

A. CONSENT FOR SALES OF AGRICULTURAL LANDS

In developing countries whose economies depend, in the main, on agriculture, the success of agricultural planning schemes is of crucial importance. This in turn depends on the availability of suitable agricultural land which unfortunately is scarce in Kenya. The articulation of land policies in ways most favourable for the effective and proper utilization of this scarce economic resource does therefore not only become important but also imperative. This calls for effective control of dealings in agricultural lands which has been achieved by requiring all transactions involving disposals of or dealings in agricultural lands to get the consent of the land control board¹ for the the area where the land concerned is situated.

The purposes the requirement of consent is intended to serve can hardly be seen even by reading between the lines of the provisions of the L.C.A. which provides for it. However, a study of the political economic and social circumstances prevailing in the country before, during and after the enactment of the land control legislation preceding this Act, clearly show the said purposes and how they have varied with time right from the beginning of the colonial era to the present day.

THE HISTORY AND POLICY OF THE REQUIREMENT OF CONSENT DURING THE COLONIAL ERA.

The requirement of consent made its appearance in the Kenyan statute book as early as 1897 when, pursuant to the E.A. Order in-council 1899², the Commissioner of the E.A. Protectorate promulgated the Land Regulations 1897. The Regulations invalidated any transfer of any interest in land from any native of any part of the Protectorate outside the Sultan's dominions to any of Her Majesty's subjects or any foreign sovereign without the approval of the Collector of the district in which the land was situated. The Commissioner was actuated to promulgate these regulations by the increasing number of land sales between the natives outside the Sultan's dominions and the early European settlers who did not like the conditions³ of occupation of the lands allocated to them by the Commissioner. The regulations were intended to prevent the problems of title to the lands which were thought could inevitably arise if it could later be discovered that the ownership of the land

did not lie in the natives who disposed of it.⁴

The Crown Lands Ordinance 1915, which repealed and replaced the Crown Lands Ordinance 1902, prohibited in section 70, as amended by the Crown Lands (Amendment) Ordinance 1944,⁵ Transactions in agricultural land between persons of different races and transfers of shares in a company holding land without the written consent of the Governor. This was intended inter alia to prevent Africans and Asians from getting into the White Highlands which were reserved for European Settlement only.

This intention is clearly manifest from the objects of the Amendment Ordinance - to remedy a defect in the existing law. The defect was the non-provision in the Crown Lands Ordinance 1915 for the control of transfers of shares in land holding companies which are not land transactions. Stating its policy, the colonial Government said:

"There is no need to run over all the grounds ... as to the reservation of land in the Highlands for European ownership and occupation; that is the declared policy of this Government and the Imperial Government and it is the policy that is being rigorously acted upon ..."⁶ The statement continued that:

"It is desired therefore to take steps to ensure that the intentions of His Majesty's Government in this matter shall be properly carried out."⁷

This continued to be the only purpose for controlling transactions and dealings in agricultural land until the 1940s when control was also necessary for the purposes of effective and proper land use.

The world wide depression of 1930s and the Second World War had the combined effect of creating in the colony greater demand for agricultural products, especially the cereal crops, than the settler economy could cope with. This called for government action to promote such production and this was done by legislative control over land usage and dealings in the Highlands. Hitherto, the government had allowed the settlers to use their parcels of land the way they liked. In answer to the criticisms levelled against such measures it was said that "... the day has gone when private interests of an individual should be allowed to override the interests of the community."⁸ So the government went ahead and enacted the Land Control Ordinance 1944, implementing the Lands Tenure Committee of 1941's recommendations of control. The Committee had noted that "any system of land tenure would be unsatisfactory which permitted unrestricted transfer and unrestricted use or misuse of land."⁹

The purposes and objects of the Land Control Ordinance were stated as:

"to further the interests of White Settlement in the White Highlands of Kenya", and "to ensure that the most beneficial use is made of land in the White Highlands to give the Governor power to acquire land for settlement purposes and to prevent speculation in agricultural land ..."¹⁰

The Ordinance established a control Board which, on the advice of the Highland Board, could recommend to the Governor as to whether he should or should not give his consent to a proposed land transaction. It had also to recommend to the Governor as to any land in the Highlands which was not being effectively used to be compulsorily acquired for settlement purposes.

By early 1950s, it was realised that inspite of the organization and control of land use in the Highlands, the output from there could not meet the internal demand let alone the export demand. Consequently the government thought that the African areas should similarly be controlled and organised to increase the production.¹¹ Hitherto there had been no control over land use and dealings in these areas. The government, however, realised that effective control over land dealings was difficult if not impossible without, first, the individualization of land titles. So the Land Registration (Special Areas) Ordinance 1959¹² was passed and provided an opportunity for control which started with the enactment of the Lands Control (Native Lands) Ordinance 1959.¹³

In addition to ensuring proper and effective land use in the Native areas, the Land Control (Native Lands) Ordinance was intended to prevent social and economic problems which, it was thought, were an inevitable consequence of the individualisation of land titles. The E.A. Royal Commission and the Working Party had noted that with the individualisation of titles Africans might, to solve their immediate short term financial problems, dispose of their lands indiscriminately leaving their families destitute, or use the titles to secure loans which might place them in a chronic state of indebtedness. So the Ordinance implemented these views as well as ensuring that fragmentation culminating into uneconomic parcels was prevented. It established land control boards as that in the Highlands which, prior to giving consent, had to ensure that any disposal or dealing in land in these areas did not result into any of these problems.

This land control policy¹³ was intended to secure effective and ¹⁴which proper use of the land, to prevent Africans and Asians from going into the White Highlands, to prevent chronic indebtedness on the part of Africans, and to prevent land fragmentation into uneconomic sizes; continued up to independence.

THE PURPOSES OF THE REQUIREMENT OF CONSENT IN THE POST-COLONIAL ERA.

The advent of independence made little change in the land control policy. Effective and proper land use still remained the most important purpose for land control legislation but the prevention the Africans and Asians from getting land in the White Highlands as Vinnai, V.¹⁴ had noted did not survive independence. The dual control legislation, that is the Land Control Ordinance 1944 and the Land Control (Special Areas) Ordinance 1959 were merged to give rise to the 1963 Transitional provisions¹⁵ providing, for the first time, for uniform land control legislation. They were intended to suit the Regional Constitution and were to last for only two years but in 1965 they were extended¹⁶ for a further period of two years, that is, up to 1967 when the present Land Control Act was enacted.

Except for the composition of the land control boards,¹⁷ the L.C.A., 1967, did not, in substance, change the previous legislation. Its objects and purposes as those of the previous legislation were stated to be to ensure effective and proper land use, to prevent fragmentation, to prevent the chronic state of indebtedness and to prevent indiscriminate dispositions and purchases geared to further speculative motives. In addition to these, the Act also brought under control, adopting the provisions of the Crown Lands (Amendment) Ordinance 1944, transfers of shares in land holding private companies and co-operative societies. It also gave effect to sentiments expressed in the National Assembly in May 1967¹⁸ that there should be limited, or if possible no, dispositions of land to foreigners. So in section 9(1)(c) of the Act we find that the board should refuse giving its consent to a transaction intended to dispose land to a non-citizen or to a private company or co-operative society all of whose members are not citizens of Kenya. The foreigners will therefore not be able to purchase land in Kenya unless the President exercises the powers vested in him by sections 22 and 23 of the Act.

The composition of the boards¹⁹ and the absolute discretion given to them by section 8 enables them to discharge their duties properly. The board's decision is appealable under section 11 to the Provincial Land Control appeals Board.²⁰ Further appeal is allowed under section 13 to the Central Land Control appeals Board whose decision "shall be final and conclusive and shall not be questioned in any court."²¹

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B. CONSENT FOR SALES OF LAND IN TOWNS:

Land dealings in towns and townships, like those in agricultural lands also require the consent of some authority who controls it. In respect of government lands in towns which, as provided by section 9 of the G.L.A.²², are not needed for public use can be divided into plots which can be leased. That is to say that there are no sales of absolute titles of government lands in towns. Instead there are sales, by auction,²³ of leases for a term not exceeding 99 years.²⁴ In every such lease, section 18(1) provides for the requirement of consent as follows -

"... there shall be an implied ... covenant by the lessee not to divide the plot and not to assign or subject any portion thereof, except with the previous consent of the Commissioner in writing and in such a manner and upon such condition as he may prescribed or require."

As to the other lands within towns which are owned by individuals, or corporations or any other "person"²⁵, dealings therein which include sales²⁶ require the consent of the interim authority which is the local authority of the area²⁷ or the central authority.²⁸

The purpose the requirement of consent is intended to serve here as shown by the Land Planning Act Regulations 1961 is to ensure that whoever owns or holds land in town and in dealing with it does so in conformity with the local authority's public health standards. As Kanyehamba notes,²⁹ the town or city has always held a magnetic attraction for all manner of men and so there is an exodus of people from the rural areas into the towns. That therefore necessitates stringent control of land dealings in towns for the purpose of maintaining public health and the requirement of consent acquires great significance as shown by the Land Planning Act Regulations 1961.

THE EFFECTS OF NON-COMPLIANCE WITH THE REQUIREMENT OF CONSENT:

(a) Agricultural Land:

Unlike in other areas, the legislature came out very clearly as to the effects of non-compliance with the requirement of consent in respect to dealings in agricultural land. One only needs to read section 6 of the L.C.A. to know that any transaction involving a disposal of, or dealing with any agricultural land "is void for all purposes unless the land control board for the land control area or division has given its consent in respect of that transaction ...". Even an agreement to be a party to a controlled transaction³⁰ becomes void for all purposes if, after three months of the making of the agreement no application for consent has been made, or if it has been made it has been refused, then it is, after 30 days of its refusal

or if an appeal against its refusal has been dismissed; void.

The courts have found little difficulty in interpreting these provisions. In Chemelil V. Makongi ³¹ where consent was not obtained for a lease of agricultural land, the court held that the transaction was void. Unless expressly stated, consent covers only one transaction. That is, if there is a lease with an option to renew or to purchase, either of the options requires fresh consent notwithstanding that consent was given to the leasing agreement. In Russell V. Principal Registrar ³² consent was given to a lease with an option to purchase. The parties, without applying for fresh consent, purported to exercise the option but the Principal Registrar refused to register it. The parties contended that the consent given to the leasing agreement covered the option and therefore they could exercise it without getting fresh consent. The Registrar contended otherwise. On reference of the matter to the High court for its decision, the Registrar's contention that the consent given for the lease did not cover the option to purchase was upheld. The exercise of the option required a separate consent. This is because, it has also been held, ³³ the lessee might die and his personal representative might not be ~~considered~~ considered capable of developing the land as required, or the lessee himself might, in consequence of illness or accident, not be able to develop the land or he might even acquire land elsewhere.

Although an agreement to be a party to a transaction involving agricultural land is also void for all purposes if consent has not been obtained as provided by section 6 of the L.C.A., the making of the agreement per se does not require consent. Consent is required to effect it. In Denning V. Edwards ³⁴ it was held that such an agreement is valid and only becomes void if the parties prior to obtaining consent purport to effect ^{it}. The money or any other valuable consideration paid under such an agreement which has subsequently been declared void, it has been held in Chemelil V. Makongi, is, without any set-off on the profits ~~realized~~ realized from the use of the land by the "purchaser", recoverable as a civil debt. But no compensation is payable on any buildings erected on the land the proposed sale of which has not obtained consent. ³⁵

Where consent has been sought and refused, if any one purports to pay or receive money or enters or remains in possession of land in circumstances which give rise to a reasonable presumption that that is done in furtherance of the avoided transaction, such a person is guilty of an offence punishable under section 22 of the L.C.A.

(b) Land in Towns:

Like in agricultural land, failure to obtain the Commissioner of Lands' consent in respect of Government lands or the interim or the central authority's consent in respect of any other lands within the town makes any dealings in such lands null and void absolutely. This is provided for by section 18(1) of the G.L.A. and by Regulation 10(3) of the land planning Act Regulations 1961 respectively. So any dealings in agricultural lands and lands within towns which have not obtained the consent of the appropriate authority are void for all purposes.

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FOOTNOTES TO CHAPTER 3

1. The boards are established under the Land Control Act 1967, Cap.302 Laws of Kenya.
2. The Order-in-Council gave the Commissioner Power to make regulations for peace, order and good government in the protectorate.
3. See Y.P. Ghai & J.P.W.B. McAuslan - Public law and Political change in Kenya chapter 1.
4. See the views of Henry Maine and Paul Vinogradoff about the African ownership of land.
5. No.23 of 1944.
6. By Mr. Mortimer - Kenya Legislative Assembly Debates 1944 Col.89.
7. Col.90 Ibid.
8. See Mr. Mortimer in Col.9 Ibid.
9. The Land Tenure Committee Report of Sept. 30th 1941 Part II Para. 6.
10. Col. 12 supra.
11. The land Tenure Committee's report supra.
12. Law No.27 of 1959 (Kenya).
13. Law No.28 of 1959 (Kenya).
14. The Africanization of the White Highlands.
15. The 1963 Kenya (Land Control)(Transitional Provisions) Regulations.
16. By the Constitutional (Amendment) Act 1965.
17. For the composition of the land control boards see the Schedule to the Act.
18. See the Motion tabled by the late J.M. Kariuki in May 1967 in Parliament.
19. Supra.
20. The schedule, supra.
21. Section 13 of the L.C.A.

22. Cap. 280.
23. See sections 12-17 Ibid.
24. Section 10 Ibid.
25. S.M. Kiman - The structure of land ownership in Nairobi
J.E.A.R.D. Vol.2 April, 1972.
26. Land Planning Act Regulations Reg.10(4)(a).
27. Reg. 12(1)(a) Ibid.
28. Central authority is defined in section 2 of the Interpretation
and General Provisions Act (Cap.2).
29. In Urban Planning Law in E.A. Vol.2 Part I.
30. Controlled transactions are enumerated in s.6(1) L.C.A.
31. (1967) E.A. 166.
32. (1973) E.A. 249.
33. Case No.97 of 1971 K.H.C.D.
34. (1960) E.A. 755.
35. Mobi Goko V. Kibaki case No.67 of 1972 K.H.C.D.

CONCLUSION AND RECOMMENDATIONS:

In Kenya, save for the lands still under the T.P.A. which comprise a negligible fraction of the total area of the country, land under the R.L.A. has been defined with reference to the maxim Quicquid Plantatur Solo, Solo cedit. So an owner of a piece of land within the meaning of sections 27 and 28 of the R.L.A. owns it subject to some matters of public interest¹ up to the heavens and depths of the earth, and in disposing of it, he passes the same title to the purchaser thereof. But, as has been noted a contract for the sale of land "does not of itself" pass an interest in the land to the purchaser until the sale is completed by registration. This is because the doctrine in Walsh V. Lonsdale has expressly been excluded from applying to Kenya by s.54 of the T.P.A. and by necessary implication in sections 38(1) and 85 of the R.L.A.

Taken at face value, this looks quite an inequitable provision having regard to the fact that these contracts take quite long before they are completed. Courts are also of the same view and have held that during this period pending completion, it is unfair to have the vendor enjoying the possession of the land and the profits accruing thereto and at the same time have the purchase money or part thereof. But given the clear statutory provisions, they are unable to apply the doctrine. Expressing his view on this, Law, J. in Adm. Gen. V. Suleiman said:

"... it is obviously inequitable in the absence of express stipulation that either party to a contract should at one and the same time enjoy the benefits flowing from possession of the property and those flowing from the possession of the purchase money ... 'You cannot,' said Knight - Bruce. L.C., ... 'have both the money and the mud'... But I am very doubtful whether in the circumstances of this case equitable considerations can be applied having regard to the clear statutory provisions." 2

But when looked at in the policy consideration there is nothing light of inequitable about the provisions. It is the declared policy of the government that the register should be conclusive evidence as to who owns what interest in what land in the country. Holding otherwise would not only be defeating this policy, but would also be confusing to the Kenyan masses who are largely illiterate. It is therefore submitted that the provisions are not inequitable and should stand. Moreover the purchaser's "interest" is protected by s.55 of the T.P.A. and he can also protect it further by lodging a caveat under section

57(i) of the R.T.A. and on the authority of Adm. Gen. V. Suleiman and a caution under section 131 of the R.L.A.

Writing.

The requirement of writing was not, until the enactment of the R.L.A., provided for in the Kenyan law. This is because it was undesirable having regard, as Hamilton, C.J. noted in Bennett V. Garvie, to the fact that the bulk of the Kenyan population was illiterate. It is still largely illiterate hence it would seem that the requirement is demanding a little too much from the ordinary man because, as the practice has shown, he has to go to a lawyer to have his agreement drafted for him and this is expensive. It can however be argued that it will even be more expensive for the same ordinary man to enforce his legal rights against fraudulent claims instituted by unscrupulous people who Mr. Njonjo, A.G. has called "smart alecs" basing them on "manufactured evidence." It is therefore submitted that, in spite of its unfairness to the ordinary man, the requirement serves an important purpose, i.e. preventing fraud and should be rigorously enforced. Going to a lawyer to have the agreement drafted, albeit, admittedly expensive, will enlighten the ordinary man as to his legal rights, if any, on such land.

Consent.

The requirement of consent, unlike that of writing, goes to the root of the contract. Non-compliance with it renders the contract "void for all purposes." Although a very important requirement, it is to some extent inequitable in that money or any valuable consideration paid under a transaction which, due to non-compliance with it, has been declared void, is recoverable as a civil debt. In Chemelil V. Makongi, a leading authority on this proposition, Newbold, Ag. P. (as he then was) after holding that the profits reaped from the land by the lessee cannot be reflected in the set-offs on the amount to be recovered by him, he noted that this is inequitable when he said:

"I cannot help feeling that where a person has agreed to a rental for the sale of land and has had the use of the land then there can be little justice in any claim made by him for the return of the rent. It may be that the law gives him a right to the return of the money paid for something which he has enjoyed, if it does so, the courts have no alternative but to enforce the law ... As Makongi had de facto obtained the use of the land in respect of which the payment was made the result created ... would appear to be most unjust but I find no escape from the clear words of the paragraph ..." 3

That is to say that both the parties having "obtained what they contracted for, Makongi the possession and the use of the land demised and Chemelil the contractual rent",⁴ there was no justification for Makongi having the right to recover the rent paid.

In spite of this inequity, it can, however, be argued that this is an important and indispensable requirement. This is because, as it is well known, Kenya's economy depends, in the main, on agriculture. It is therefore of crucial importance that the government ^{controls} dealings in ~~the~~ land for the social and economic welfare of the whole country. In any case the requirement does not inhibit the freedom of contract, as in socialist states where the government owns all the land and allots it to those who, in its opinion, can use it profitably. It merely enables the government to have an upper hand in dealings involving this important economic resource. The practice has shown that the vendors, in cases of sales of absolute ownership, nowadays first ensure that consent has been obtained before any land dealing lest they stand to lose. Leases do not pose any problem and in fact most of them do not obtain consent.

What instead would be recommended is the boards' thorough scrutiny of the "purchasers'" development plans before giving consent. If they are geared at increasing provision for the purchasers' sons consent should accordingly be refused. Similarly, consent should be refused where it is found that the purchaser is one who in Kenyan parlance is described as a "telephone farmer". That is one who by virtue of his employment cannot properly manage his farm.

Another important point which merits consideration is the question of land ceiling. Since the government policy as stipulated in the KANU Manifesto and in the Sessional Paper No.10 of 1965 places great emphasis on economic growth, and as the law provides for the free enterprise economy, it is submitted that unless a land ceiling is fixed, most of the land in the country will end up in the hands of a few under the pretext that they are economically well to do and will develop it but will not. This is because it has been said that "... it would be wrong (for the boards) to turn down an application on the grounds that a man already owns a bigger plot of land,"⁵ hence the rich will continue accumulating land at the expense of those socially and economically poorly placed.

From the foregoing, it can therefore be conclusively said that the law relating to contracts for sale of land in Kenya; and the statutory requirements of writing and consent, inspite of any inequity which might result from their existence, are very important requirements and; should remain being applicable but with the modifications here and there as already recommended and where it will be found necessary to suit the country's changing social and economic needs.

FOOTNOTES TO THE CONCLUSION:

1. See ss 4 - Mining Act Cap.306, 3 - Water Act Cap.372, 3 - Aerodromes (Control of Obstruction) Act Ca.396, 3 Minerals Act Cap. 307 and 184 - Agriculture Act Cap.318.
 2. at P.516 Supra.
 3. at P.168 Supra.
 4. Per Spry, J.A. in Chemelil V. Makongi Supra.
 5. Arap Kōitie - Permanent Secretary to the Ministry of Lands and Settlement - in 1969. See "Handbook for the Guidance of Land Control Boards."
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