



**Kimani v Wasilwa (Environment & Land Case 99 of 2010)  
[2023] KEELC 16980 (KLR) (27 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 16980 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 99 OF 2010**

**AA OMOLLO, J**

**APRIL 27, 2023**

**BETWEEN**

**DR. CHRISTOPHER KAMANDE KIMANI ..... PLAINTIFF**

**AND**

**STEPHEN NYANDOYA C. WASILWA ..... DEFENDANT**

**JUDGMENT**

1. The plaintiff through a plaint dated 2<sup>nd</sup> March 2010 and filed in court on 5<sup>th</sup> March 2010 which was amended on 5<sup>th</sup> April 2022 sought judgment against the defendant as follows;
  - a. A permanent injunction be issued restraining the defendant and/or his family, servants or agents from trespassing, interfering, entering, erecting unauthorized structures or any dealing with the plaintiff's plots no. 110, 111, 112 and 113 in Kenya Ihenya Company Ltd at Githurai 45 Nairobi whatsoever.
  - b. An order that the defendant do compensate the plaintiff for the invasion and that the defendant do demolish his unauthorized structures within 30 days of judgment failing which the plaintiff would demolish the unauthorized structures and also remove the debris from the said plots and the costs to be borne by the defendant.
  - c. General damages to be assessed against the defendant for trespassing to plaintiff's properties, waste and erection of unauthorized structures on his plots.
  - d. Costs of the suit and interest.
2. The plaintiff averred that he is the registered owner of plot nos. 110, 111, 112 and 113 through buying as shareholder of M/s Kenya Ihenya Company Limited situated at Githurai 45 Nairobi. After the payment of the plots, he was issued with shares certificates nos. 274, 570, 871 and 872 and he took possession of the four plots with a view to developing it by erecting a hospital. He pleaded that the



defendant who was one of the directors of M/s Kenya Ihenya Company Limited misused his office to manoeuvre and invade his plots by putting up permanent buildings which he named Lions Gate School from which he continues generating income for himself.

3. The defendant filed his defence dated 27<sup>th</sup> April 2010 and filed in court on 29<sup>th</sup> April 2010. He denied the legal capacity of the plaintiff to file these proceedings but admitted that the plaintiff was the registered owner of plots no. 110, 111, 112 and 113 as shareholder of M/s Kenya Ihenya Company Ltd as at the time of the sale agreement. He contended that the property rights to plot nos. 110, 111, 112 and 113 were at all times passed to him on execution of the sale agreement. He denied the allegations that he misused his office to manoeuvre and invade the plaintiff's purported plots. He stated that the plaintiff agreed to sell his shares in the plots for Kshs. 500,000/= of which Kshs. 443,500/= had been paid to the plaintiff, evidence of which shall be adduced at the hearing of this suit.

### **Plaintiff's case**

4. The matter proceeded for hearing on 8<sup>th</sup> December 2022 with CHRISTOPER KAMANDE KIMANI testifying as PW1. He adopted his witness statement dated 2<sup>nd</sup> October 2010, testifying that back in 1986, he came back home from Germany to find his mother having acquired through his sponsorship two plots in his name and two other plots in her own name from Kenya Ihenya Company Limited in Githurai, Nairobi. The Plaintiff avers that his mother had in her custody share certificates no. 274, 570, 871 and 872 and four allotment cards each bearing a hand written number 110, 111, 112 and 113 with the government seals and all signed by the company director/secretary as proof of their ownership.
5. In 1988/1989, he learnt that there were construction materials and construction work going on the site. He confronted the contractor to stop constructing and vacate or report him to the police for trespassing. PW1 stated that Mr. Wasilwa claimed to have been allocated the serial plots by the Kenya Ihenya Company Limited where he was the company secretary. The witness stated that he reported the allegations to Kenya Ihenya Co. whose committee denied allocating the plots and authorizing construction by the Defendant. They denied having him as their company secretary stating that they had already ejected him out of office because of his abuse of office.
6. The Plaintiff continued that in 1990 he left the country for further studies and he was back in 1991. He confronted Mr. Wasila who opted to rent the plots from the date of entry or swap them with his other several plots in Githurai after paying out his rents upto date. PW asserted that after the death of his mother he presented her death certificate and applied for the transfer from his mother's name to his name which application was granted by the company and effected upon payment of Kshs. 2,200/= in 1997.
7. He claimed that by July 2000, Mr. Wasilwa had not paid up the rents agreed at the rate of Kshs. 50,000/= per month from the date of entry. Nor were there any signs of swapping but the Defendant never vacated the plots. The Plaintiff recalled meeting with the defendant several times for the swapping but it did not materialize and he demanded for rent or vacant surrender of the suit premises. He denied executing any sale agreement with the defendant. He admitted receiving two cheques of Kshs. 60,000/= and Kshs. 60,500/= through Weloba Advocates and another cheque which bounced but insisted that these were for payments of rent in arrears.
8. He was aware his advocate called Edward Mwangi wrote a letter dated 16<sup>th</sup> December 2009 to the defendant but was unaware of the letter dated 10/1/2010 addressed to Daniel whom he did not know. He continued that later the chief called him about the disquiet between the defendant and teacher Dorcas after he was called to confirm that he was the owner and to confirm that the defendant had no authority to throw out Dorcas. With time, he engaged an auctioneer called Zakayo to help him recover



- rent but instead Mr. Wasilwa and Zakayo sat down and drafted an agreement to dispose the property on claims that he was part owner. He was not aware of the agreement dated 5/12/2001. He produced the documents in his list dated 20<sup>th</sup> August 2015 as PEX 1-8. He said that he wants the occupant who claims to be Mrs. Wasilwa to vacate the premises, pay the arrears of rent and damages.
9. When put to cross examination by Mr. Isindu learned counsel for the defendant, the plaintiff testified that before occupying his plot the defendant said he knew him from Mangu High School. He got to know the defendant after he occupied his plot. During follow up of the plot, he used Edward Maina of Edmont Advocates and Mr. J. Weloba in Mombasa. PW agreed that his lawyers were authorized to communicate with Mr. Wasilwa on his behalf but not to collect money. He remembered a letter dated 19/9/2003 from Weloba & Co. Advocates to Kipkenda Lilan referring to money demanded from the defendant which he stated was pursuant to his complaint that he was not being paid rent of Kshs. 50,000/= per month.
  10. The witness stated that his signature is on the document shown to him but he denied signing any sale agreement. He denied having written a lease agreement between him and the defendant and said that the defendant was supposed to vacate the plot and pay the rent arrears. They came into agreement to be part owners but it never took off. The letter dated 20/7/2007 refers to a sale agreement and a balance to be paid upon provision of certain documents. According to him, there was no sale agreement. He knew that the defendant wanted to get the share certificates to go get a loan and there was a letter to that effect.
  11. He told the court that the defendant had suggested that they swap but he had no written agreement to this effect. That the defendant completed constructing the school which was both primary and secondary school. He said that it must have been the defendant operating the school because whenever he asked him to pay him he kept saying people were not paying. On re-examination, he said that after filing this case, his attorney got a court order on 16/3/2010 to restrain the defendant from interfering with him. He stated that the defendant and his wife went underground until he was told the order issued had expired.

### **Defence Case**

12. The only defence witness was Monica Njeri Kariuki, who in her testimony stated that she knew the original defendant who was her husband. She knew about the suit plots 110-113. She adopted her witness statement dated 30/11/2022 and the statement of Stephen Wasilwa dated 3<sup>rd</sup> November 2015 as her evidence in chief. DW1 asserted that the plaintiff and her late husband entered into an agreement on or about 1997 for the sale and purchase of the suit properties known as Nairobi/Block 124/110, 111, 112 and 113 situated in Githurai, Nairobi. She was aware of three agreements reached as between her late husband and the plaintiff dated; 6<sup>th</sup> May 1997, 3<sup>rd</sup> July 2000, and 27<sup>th</sup> May 2008.
13. It is her evidence that her deceased husband paid the purchase price to the plaintiff towards acquisition of the plots and in line with their agreements signed. She stated that the following payments were made and duly received by the plaintiff: Kshs. 20,000/= made on 6<sup>th</sup> May 1997, Kshs. 10,000/= made on 26<sup>th</sup> October 1995, Kshs. 25,000/= made on 6<sup>th</sup> May 1997, Kshs. 75,000/= made on 7<sup>th</sup> February 2000, Kshs. 40,000/= made on 15<sup>th</sup> June 2000, Kshs. 80,000/= made on 3<sup>rd</sup> July 2000, Kshs. 60,000/= paid via cheque to M/s J. Weloba & Co. Advocates on 28<sup>th</sup> January 2002, Kshs. 60,500/= paid via cheque M/s J. Weloba & Co. Advocates, Kshs. 43,000/= paid to Lenny Jany Agency Zakayo on behalf of Christopher Kamande on 27<sup>th</sup> May 2008. According to her, her late husband made a payment of approximately Kshs. 413,000/= towards acquisition of the subject plots.



14. Ms Monica avers that the plaintiff did not process the share certificates or surrender the same to her husband despite having received almost half of the agreed purchase price with respect to the suit property. She stated that the tentative agreement dated 3<sup>rd</sup> July 2000 confirmed that the parties thereto had agreed on a purchase price of Kshs. 500,000/=. From the said agreement, her late husband had undertaken to pay 50% of the said purchase price by 20<sup>th</sup> January 2001 and the balance thereof of Kshs. 250,000/= to be cleared by 15<sup>th</sup> December 2001.
15. She contended that her husband could not reach completion of the sale agreement as the plaintiff filed this present suit where he sought orders of injunction against her late husband restraining him from interfering with the suit plots no. 110-113. She said that her late husband was running a school by the name Lions Gate Schoolin plots no. 110 and 111 and it was during the good days that he used to pay the plaintiff money from the school's kitty. Her family had been in occupation of, using and residing on the suit property since 1995 and unless protected by the orders of this court they stand to be evicted and rendered destitute. She produced the documents in her list of documents filed in Court on 18/5/2016 as DEX 1-16
16. When put to cross examination by Ms. Waceke for the plaintiff, the Defendant said she was not present when the agreements were drawn but she was told. She stated that the agreement of 6/5/1997 had her husband's signature and it was for swapping not sale. She stated that the plaintiff admitted to receiving payments of Kshs. 60,000/= and Kshs. 60,500/=. The agreement dated 3/7/2000 indicated that the swapping would now be paid in cash and in her view, this constituted an agreement for sale. The agreement dated 27/5/2008 said both plots were to be sold jointly with Lenny Zakayo on behalf of the plaintiff and the defendant. That there was no additional payment after 27/5/2008 after the payment to the plaintiff of Kshs. 43,000/= made in May 2008.
17. She told the court that the property was not sold pursuant to the agreement of May 2008. In the agreement of 3/7/2000, she said that the defendant proposed to pay a deposit of Kshs. 250,000/= by 20/1/2001 and from the documents presented there is no specific payment for Kshs. 250,000/=. She asserted that when they finished paying for plots 112 and 113 they demanded for the share certificate but the plaintiff went underground. However, she had no evidence of the demand for the share certificate. The witness admitted that the defendant was the secretary of Kenya Ihenya & Company for one year and that the defendant tried to have the properties transferred to him but the board said they only recognized ownership of the plaintiff.
18. On re-examination, she stated that at the company they knew the plaintiff as owner so the defendant could not effect transfer without permission of the plaintiff. That the transaction was for sale, not rent so monies paid was towards the purchase price. When shown the letter dated 27/7/1997, she said that the letter stated the plaintiff delayed in releasing documents to enable completion of the sale. It is her contention that it is the plaintiff who frustrated the transaction. She knew that a total of Kshs. 478,000/= was paid leaving a balance of Kshs. 21,000/= which she was willing as the administrator of the estate to pay.
19. After the close of the hearing of the defendant's case, the parties agreed to exchange written submissions.

#### **Plaintiff's submissions**

20. The Plaintiff filed his submissions dated 2<sup>nd</sup> February 2023 and submitted on three issues. On whether there was a valid sale agreement, they submitted that while the parties intended to rely on the tentative agreement, the same was frustrated by the defendants as the consideration was never made as agreed.



They cited the decision in *Esther Kabugi Njuguna v Martha Chebet & 3 Others* [2020] eKLR, where Munyao J. stated as follows in paragraph 25 and 27;

- “ 25. From the provisions of sections 107-109 of the *Evidence Act*, it is clear that the Defendant had the burden to prove that the Plaintiff was paid the purchase price. It was not enough to for the 1<sup>st</sup> Defendant to say that the money was released to Chesire & Co Advocates. There was no evidence that Chesire & Co advocates was acting on as agents of the plaintiff. The agreement was not express that the Advocates were to represent the Plaintiff in the transaction...
27. There was no evidence that the plaintiff was paid the purchase price and consequently there was lack of consideration for the contract. The lack of consideration vitiated the contract and the same was rendered null and void.”

21. The Plaintiff submitted that the agreement dated 6<sup>th</sup> May 1997 which the defendant has relied on to show that the parties entered into a sale agreement, was frustrated by the fact that the defendant never offered any plot to the plaintiff. They continued to occupy his plots, doing business and earning a living while the Plaintiff had no income from his properties and the fact that the swooping never happened is not denied.
22. He argued that the 1<sup>st</sup> deposit was to be made on 20/01/2001 and the balance of purchase price to be cleared by 15/12/2001, yet a quick look at the schedule of payment by the witness does not show any payment made in the year 2001. Therefore, the said agreement is not valid and should be declared null and void as the intention by the parties to sell and purchase the property therefore did not materialize.
23. On whether the monies paid to the plaintiff can be categorized as monthly rent or payment of purchase price for the suit property, the plaintiff said that all the monies received by him went towards rent for the premises. While there is no agreement to capture the agreement for rent, it is clear the same has not been mentioned in the several agreements signed by the parties which means the paid monies were not at any point in time considered as purchase price. The witness was categorical that he has never seen the invoices produced by the Defendant and vowed that the same were a forgery.
24. On whether the plaintiff is entitled to damages for invasion and trespass over the property, it was their humble submission that the plaintiff deserves to be compensated for the wrong doing. They cited the decision in *Mwangi Macharia & 87 Others v Davidson Mwangi*[2014] EKLR where the court stated as follows in respect to payment of damages;

“ Article 159(2) (b) of *the Constitution* requires that justice should not be delayed. This matter has been in the courts since 1993. The persons or groups interested in the suit property are individuals of different status in the Kenyan society. Article 159 (2) (a) of *the Constitution* requires justice to be administered to all, irrespective of status; Article 159 (2) (g) of *the Constitution* stipulates that justice shall be administered without undue regard to procedural technicalities. This Court is a court of law and a court of equity; Equity shall suffer no wrong without a remedy; no man shall benefit from his own wrongdoing; and equity detests unjust enrichment. This Court is bound to deliver substantive rather than technical and procedural justice. The relief, orders and directions given in this judgment are aimed at delivery of substantive justice to all parties having legal and equitable interest in the suit property.”



25. It is therefore in the best interest that he be awarded damages as he has been deprived the use of his property for almost 30 years. They urged the court to further consider the case of *Sisto Wambugu v Kamau Njuguna*[1983] ECLR where the court stated;

“In my judgment the respondent cannot come to the court and obtain an order of the transfer of the land, as he sought in his counterclaim, which is in effect an order of specific performance of the agreement, unless he had performed his part of the bargain or can show that he was at all times ready and willing to do so. ... The respondent admitted that he had not, even by the time of trial, paid the full purchase price. He failed to do so in October 1959, and, again failed to pay in January 1967... in my opinion, not substantial performance and I would hold that there was failure of performance by the respondent. There was failure of consideration and on the persuasion of *United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd* [1968] 1 All ER 104, failure to perform part of the contract constitutes failure to perform whole. In the circumstances, the appellant was, in my view, entitled to repudiate the contract of sale of the suit land for failure of performance and as the respondent had failed to perform his part, he could not demand performance by the appellant. I would therefore hold that although there was originally a contract of sale of the suit land, the contract was lawfully repudiated by the appellant and no specific performance thereof in favour of the respondent could be ordered.”

### **Defendant’s Submissions**

26. The defendant filed their submissions dated 27<sup>th</sup> February 2023 and submitted that the agreements signed between the plaintiff and the defendant and the correspondences that have been exchanged between them, even through their advocates clearly show that the entry, occupation and permanent developments/constructions on the said plots were actually done with the knowledge and consent of the plaintiff. She submitted that it was important for the court to note that the plaint was not even filed by the plaintiff but one Edward M. Maina Mwangi who claimed to be acting under some Power of Attorney and this was in itself irregular.
27. She argued that the pleadings filed in the name of Edward Mwangi were fatally defective and ought to be struck out as a power of attorney does not authorize or entitle a person to file a suit in the plaintiff’s name as would an advocate except by leave of court and the suit was therefore a non-started, null and void from the onset. They cited Order 9 Rule 2 of the Civil Procedure and urged that all pleadings filed in the name of and on behalf of the plaintiff to be struck out by virtue of the law.
28. They further submitted that the claim for damages for trespass was filed in 2010 that is 12 years later and a claim for trespass can only be filed within 3 years under the *Limitation of Actions Act* hence the suit is incurably time-barred and should be struck out with costs. It is submitted for the Defendant that the plaintiff during cross-examination acknowledged the various agreements, payment receipts and the correspondences exchanged between his advocates and the defendant’s advocates all of which related to a sale/purchase transaction and not a tenancy of any sort as is being belatedly introduced in the submissions by the plaintiff. They argue that the plaintiff has not produced any evidence to prove that he was in any tenancy relationship with the defendant for which the monies were received.
29. They submitted that the evidence discloses a clear intention on the part of the parties to enter into a binding agreement for sale and out of which the plaintiff drew clear monetary benefits as consideration. The Defendant relied on the decisions in the following cases where the court held that a seller of land who frustrated the conclusion of the intended sale transaction was a constructive trustee and could not be allowed to benefit from his own misdeeds;



1. Eldoret- Civil Appeal No. 51 of 2015; Willy Kimutai Kitilit v Michael Kibet
  2. Nyeri- Civil Appeal No. 22 of 2013; Peter Mbiri Michuki v Samuel Mugo Michuki
30. Having read and considered the pleadings together with the submissions and the applicable law, I reckon that the issues that come up for determination are;
- a. Whether there was a valid sale agreement between the Plaintiff and the deceased Stephen Wasilwa;
  - b. Whether the suit is time-barred;
  - c. Whether the suit was irregularly filed;
  - d. Whether the plaintiff is entitled to damages for trespass;
  - e. Who should pay costs?
31. The first issue is on whether the parties entered into a valid sale agreement. There is no doubt that the plaintiff is the bona fide proprietor of the suit plots and he has share certificates for the same. It is also not in dispute that the Defendant is in occupation. However, the plaintiff has pleaded that the defendant trespassed onto his plots no. 110,111, 112 and 113 in 1988 and they subsequently entered into an agreement to rent the suit properties. There are three agreements in question before this court; the first one has a date of 6<sup>th</sup> May 1997; the second on 3<sup>rd</sup> July 2000 and the third on 27<sup>th</sup> May 2008.
32. The first document refers to a discussion on the swapping of plots between the plaintiff and the defendant that took place in 1997 and is mentioned on what is titled “tentative agreement” It is dated 3<sup>rd</sup> July 2000 and stated as follows;
- “In pursuant to our tentative agreement of swapping plots no. 110, 111, 112 and 113 in 1997, we have today 3<sup>rd</sup> day of the month of July 2000 decided and agreed to have the same disposed off by cash payment.
- With the new schedule, I the buyer (N.C.S. Wasike) purpose to make the first payment of 50% (Kshs. 250,000, two hundred and fifty thousand only) by the 20<sup>th</sup> day of the month of January the year 2001. The balance of Kshs. 250,000/= to be cleared by 15<sup>th</sup> December the year 2001.”
33. The document is signed by both the defendant’s deceased husband and the plaintiff. Although the Plaintiff’s name is missing, the second signature appearing on that document belongs to the Plaintiff as on the face of it, it is similar to his signatures appearing on the other documents. The Plaintiff did not deny signing this document.
34. The agreement dated 27<sup>th</sup> May 2008 stated as follows;
- “It is hereby agreed as follows;
1. Plots no. 110, 111, 112 and 113 which belong to Dr. Christopher Kamande Kimani and partly Mr. Stephen C. Nyamdoya Wasilwa ID. 9343818.
  2. Both plots will be sold jointly by Lenny N. Zakayo ID. Xxxx411 (Auctioneer) on behalf of Dr. Christopher Kamande and Mr. Stephen C. Nyandoya Wasilwa (for himself).



3. Mr. Nyandoya's personal details are: ID. xxxx818, District: Vihiga, Division: Emuhaya, Location: Bunyore North, Sub-location: Eburngwe.
  4. No party will sell the plots without the other.
  5. This agreement has been written in the presence of Dr. Christopher Kamande and Reuben Mauti Osuku.”
35. This agreement is stated to have been signed by the plaintiff, defendant and two other witnesses. It does not constitute an agreement of sale as between the Plaintiff and the Defendant based on the fact that it is meant to be an authority given to the auctioneer to sell the property on behalf of the two parties. It is interesting that as at 2008, the Defendant is acknowledging the Plaintiff as a co-owner not as the person who sold him all the plots.
36. Section 3(3) of the Law of Contract Act provides that no suit based on a contract for disposition of interest in land can be entertained unless the contract is in writing, executed by the parties and attested. Section 3(7) of the Law of Contract Act excludes the application of Section 3(3) of the said Act to contracts made before the commencement of the subsection. Section 3(3) of the Law of Contract Act, came into effect on 1st June, 2003.
37. Prior to the amendment of Section 3(3) of the Law of Contract Act in 2003, the subsection read as follows: -
- (3) No suit shall be brought upon a contract for 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 is signed by the party to be charged or by some person authorized by him to sign it; Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract-
    - (1) Has in part performance of the contract taken possession of the property or any part thereof; or
    - (11) Being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract.”
38. In the instant case, the agreement dated 3<sup>rd</sup> July 2000 was executed to by the buyer who was the defendant and the plaintiff executed. The plaintiff has admitted to receiving two cheques of Kshs. 60,000/= and Kshs. 60,500/= which according to him, the payment was rent in arrears. However, the defendant's testimony is that they were consideration for the sale of the suit properties. The defendant has been in possession of the suit property since 1995 which is years before the parties entered into any agreement of 1997 for swapping of the plots. The defendant has also stated that they have paid the plaintiff Kshs. 413,000/= towards the purchase price of the suit property as at the time of the plaintiff filing this suit.
39. In denying that there was no sale, the Plaintiff has alleged there existed a tenancy relationship between the parties. There was no evidence produced by the Plaintiff that the Defendant paid the agreed rent of Kshs 50000 per month at any given time since the amounts paid were either more or less than the Kshs 50000. It appears the intention of the parties was always to sell/buy as demonstrated in the documents



produced. Besides the agreements mentioned above, the Plaintiff's agent Edward Maina wrote to the Defendant on 16<sup>th</sup> December 2009 stating that his client (Plaintiff) stating thus,

“you gave false promises that you could buy the entire properties. Therefore, please note that the anticipated question of sale of the properties is no more. The issue of monthly rent becomes effective from the first day of invasion to date”

40. It is my finding that a written sale agreement was not necessary to sale agreements for land prior to the year 2003, therefore the documents signed between the parties was sufficient to create a valid contract. The third agreement dated 3<sup>rd</sup> July 2000 was attested by the parties herein. In the case of Nelson Kivuvani v Yuda Komora & Another, Nairobi HCCC No.956 of 1991, where the Court held that:-

“the agreement for sale of land which contains the names of the parties, the number of the property, the purchase price and the conditions attached thereto, the obligations, express or implied, of each of the parties and signed and witnessed by two witnesses who signed against their names amount to a valid contract”.

41. For the Plaintiff to succeed that there was no valid sale of his plots to the Defendant, he was under a duty to show when they agreed that the Defendant became a tenant. In his statement, he averred that by July 200, the Defendant had not paid the rents at the rate of Kshs 50000 per month. They therefore made a written sale agreement with an option of swapping the plots. The payments received by the Plaintiff were after July 2000 which was after the agreement of 3<sup>rd</sup> July 2000 hence couldnot be treated as payment of rent arrears. The letters drawn by Edward Maina in December 2009 and January 2010 purporting to rescind the contract between the parties was written too late in the day. All these time the Defendant's possession had not been interrupted. As at the time of filing this suit, the Defendant had been in quite possession of the suit plots from 1995 which is a period of more than 12 years.

42. In the Plaintiff's statement, he said that he found construction works going on as early as 1989. That he confronted the contractor who was the Defendant Mr Stephen Wasilwa to stop constructing and vacate or he was going to report him to the police. He was aware of the Defendant's presence on the land as early as 1988-1989 and the said entry was without his permission. He stated that after the demise of his mother, all the four plots were transferred to his name in 1997. It is submitted that the Plaintiff's suit is time barred by the limitation of actions which submission finds root in section 7 of the [Limitation of Actions Act](#) which provides thus;

43. It is my considered opinion that there was a valid contract between the parties except the entire amount of the purchase price was not paid in full. The Plaintiff's suit is founded on trespass however, the act of trespass earlier discovered in 1989 changed in 2000 when the parties entered into a sale agreement. This court was not called to determine who between the plaintiff or the defendant was in breach of the contract as no evidence was led in this respect. I say so because the Plaintiff averred that the monies he received were for payment of rent arrears yet in paragraph 13 of the plaint he had pleaded to entering into an agreement of sale. In the circumstances where the Plaintiff received payments from the Defendant, this court is unable to declare the Defendant as a trespasser or a tenant.

44. On whether the suit was irregularly filed, Order 9 Rule 2(a) of the Civil Procedure Rules provides that the recognized agents of parties by whom such appearances, applications and acts may be made or done are subject to approval by the court in any particular suit persons holding powers of attorney or an affidavit sworn by the party authorizing them to make such appearances and applications and do such acts on behalf of parties.



45. The defendant has pointed out that the plaintiff's agent, Edward M. M. Mwangi, only held a power of attorney hence he could not draw pleadings therefore the plaint as filed was irregular and should be struck out. The said General Power of Attorney dated 15<sup>th</sup> October 2009 was registered on 19<sup>th</sup> November 2009. The defendant said that the said Edward M. M. Mwangi did not apply for approval of the court to file the suit in the name and on behalf of the plaintiff and he did not have express powers in the purported Power of Attorney to file the suit in the name and on behalf of the plaintiff. My understanding of Order 9 Rule 2(a) is that court approval is required when a party sues through power of attorney. In *Jack J. Khanjira & Another v Safaricom Limited* [2012] eKLR, where the court held as follows in regard to Order 9 Rule 2(a) of the Civil Procedure Rules;

“

“22. The above provision is important because by the very nature of the instrument of their appointment, it may donate to them powers which are, in law, untenable. So that, it appears to me that when exercising their functions in court, they must periodically obtain the approval of the court to do such acts. It is for the court to oversee the scope and extent of the functions of a recognised agent, and to assure itself that they are not overstepping the bounds of the law. In my view, it is not the fact of being an agent that renders a donee of a power as recognised; it is the extent or scope of their agency that is recognised. That is to say, a recognised agent can perform only that which he is recognised or authorised to do in law.

In this regard, I would go as far as to say that, for orderly representation in court, every appearance, act or application by a recognised agent should be subjected to the approval of the court as and when sought to be done.”

46. In the plaint dated 2<sup>nd</sup> March 2010 is indicated to have been drawn by Mwangi as an agent of the Plaintiff and the POA donated to him allowed the donee to “submit any matters to arbitration and to sign, seal and execute the necessary acts for the purpose of defend an action, suit at law or equity...” The powers given allowed Mr Mwangi to bring a suit on behalf of the Plaintiff so I find no anomaly with the pleadings as drawn. In any event, the objection did not go into the root of the dispute and could have been easily cured by amendment if raised on time.

47. In conclusion, I find that the plaintiff has not made out a case to warrant the grant of the reliefs sought. He is not entitled to the suit plots having sold the same to Mr Stephen Wasilwa-deceased. He did not pray for payment of any outstanding balance probably because of his stance that there was no sale. The court will therefore make no orders of payment of the balance conceded to by the Defendant's witness. The suit is dismissed with costs to the Defendant.

**DATED, SIGNED AND DELIVERED AT BUSIA THIS 27<sup>TH</sup> DAY OF APRIL 2023.**

**A. OMOLLO**

**JUDGE**

**In the Presence of**

**Miss Waceke advocate for the Plaintiff**

**Mr Isindu advocate for the Defendant**

