



**Mogeni v Njenga & another (Environment & Land Case 577 of 2017)
[2023] KEELC 16910 (KLR) (20 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 16910 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 577 OF 2017**

OA ANGOTE, J

APRIL 20, 2023

BETWEEN

KELVIN TOM MOGENI PLAINTIFF

AND

SAMSON KARIUKI NJENGA 1ST DEFENDANT

SUSAN WAITHERERO KARIUKI 2ND DEFENDANT

JUDGMENT

Background.

1. This suit was filed by the Plaintiff, an Advocate by profession, vide a Plaint dated September 12, 2017. The Plaintiff has sought the following reliefs:
 - a. An injunction to restrain the Defendants whether by themselves or through their agents and servants from entering on the 1 acre belonging to the Plaintiff being part of Land Reference No 2259/601 now renumbered as LR No 2259/682.
 - b. An order for specific performance do issue to the Defendants to complete the transfer of 1-acre part of Land Reference no 2259/601 now renumbered as LR No 2259/682.
 - c. General damages for trespass.
 - d. Costs of the suit and interest.
 - e. Such further or other orders as to this court may deem just to grant.



2. It is the Plaintiff's case that the Defendants are registered proprietors of all that property known as Land Reference No 2259/601 measuring 1.900 ha (Original 2259/171/6) (the suit land), a subdivision of Land Reference No 2259/171 and that the Plaintiff, on the strength of a Power of Attorney donated to him by the Defendants on March 18, 2009, sub-divided LR No 2259/601, for purposes of having one acre hived off, sold and transferred the proceeds thereof in satisfaction of the decree in HCCC No 188 of 2003.
3. The Plaintiff averred that the Defendants approached him to represent them in ELC No 1238 of 2014 to protect LR No 2259/171 and that the Plaintiff and that the Defendants entered into a Sale Agreement on September 19, 2014 for one acre out of LR No 2259/601 as consideration for all legal fees due and pending.
4. According to the Plaintiff, the Defendants filed a suit, OS No 170 of 2017 against the Plaintiff demanding release of the title documents of LR No 2259/601 by purporting to have revoked the Power of Attorney and that the Defendants have started fencing off the one acre sold to him and are now committing an act of breach and trespass.
5. The Defendants opposed the suit vide an Amended Statement of Defence. The 1st Defendant averred that he and the 2nd Defendant (now deceased) are the registered proprietors of Land Reference No 2259/601 situated in Karen and that they donated a Power of Attorney to the Plaintiff as they were both ailing and undergoing treatment in India and Kenya.
6. It was averred that the said Power of Attorney was specifically to allow the Plaintiff to act on their behalf in a transaction for the subdivision and sale of a part of LR No 2259/601, for settlement of the decree in HCCC No 188 of 2003, and that consequently, the Defendants released the original title instrument of the suit property to the Plaintiff.
7. It is the Defendant's case that that the Plaintiff sold the one acre in two portions measuring approximately 0.5 acres, with one part sold to Benson Kairichi Marima for consideration of Kshs 7,500,000/- and the other part sold to Alexander Muthee Muriuki for KShs 7,500,000 and that these transactions remain incomplete.
8. It is the Defendants' case that the Plaintiff did not seek approval or consent from the Defendants relating to the consideration or terms in the agreement and that they sold another portion of the suit property to Mr David Kihang'a Macharia directly, who paid the purchase price directly to them, without involving the Plaintiff.
9. It was averred by the Defendants that sometime in September 2014, the Plaintiff acted on their behalf in ELC No 1238 of 2014 which resulted into a fence erected by third parties removed, and that they took back possession of the remaining portion of the suit property, which they have had to date.
10. According to the Defendants, they thereafter instructed the firm of MN Kanyara & Co Advocates to pursue revocation of the Power of Attorney, which was revoked on December 3, 2012 and that they subsequently engaged the firm of Muriu Mungai & Co Advocates to pursue the release of all documents from the Plaintiff, including the original title.
11. Following the Plaintiff's failure to respond, it was averred, the Defendants instituted HCCC No 170 of 2017 (OS) against the Plaintiff, seeking delivery of accounts and release of funds held by the Plaintiff and that vide a Judgment dated April 29, 2020, the Plaintiff was ordered to pay the Defendants Kshs 3,184,00 in respect of the balance of the purchase price proceeds due to the Defendants.



12. It was the Defendants' averment that the Plaintiff had a fiduciary and professional duty as an advocate to render accounts to the Defendants on all the funds received from the sale of portions of the suit property, which he failed to uphold.
13. The Defendants denied that they knowingly executed the alleged sale agreement in relation to one acre of the suit property and averred that the said agreement was obtained through misrepresentation and fraud, and is void; that the Plaintiff misrepresented to the Defendants that they were signing court documents and that the Plaintiff fraudulently mixed the execution pages of the purported sale agreement with the court documents in respect of ELC No 1238 of 2014, without disclosing the same.
14. According to the Defendants, it is false that the sale agreement was purportedly signed in the presence of Purity Makori Advocate; that the Plaintiff took advantage of their advanced age and illness; that the purported agreement was in breach of Section 46(a) of the Advocates Act, which disallows advocates from engaging in transactions relating to disputed properties in matters they are handling and that the said agreement is null, void and unenforceable.
15. The Defendants further averred that the purported sale agreement was unenforceable as no agreed purchase price has been disclosed; that no valid consideration was discussed or agreed upon and no valid consideration was paid at all and that the purported sale agreement is not binding in any way.
16. In a Reply to the Amended Defence, the Plaintiff averred that the Defendants willingly executed the sale agreement on September 19, 2014 in the presence of Purity Makori Advocate being aware of the sale agreement and its contents; that the agreement was in consideration of all legal fees owed and not paid and that the Defendant delivered vacant possession of the 1 acre of land and allowed him to take possession by fencing before negating on the agreement.
17. The Plaintiff's averment is that Section 46(a) of the Advocates Act is not applicable in this case and that the consideration of the legal fees was the 1 acre as per the agreement.

Hearing and Evidence

18. PW1, the Plaintiff, relied on his witness statement dated September 17, 2017 as his evidence in chief. In his statement, PW1 averred that he acted on behalf of the Defendants in HCCC No 188 of 2003; that summary judgement was entered against the Defendants for the sum of Kshs 6,117,137.30 from April 27, 2008 with interests and costs and that he gave a professional undertaking for the payment of Kshs 10,442,981.30 being the decretal sum.
19. According to the Plaintiff, he acceded to the Defendants' request to source for buyers of one acre out of the suit property for purposes of liquidating the decretal sum amount in HCCC No 188 of 2003 and that the Defendants donated to him a special Power of Attorney to allow him to undertake the subdivision and sale of the said one acre to liquidate the decretal sum owed.
20. PW1 informed the court that he sold the one acre in two portions to two different buyers, being Alexander Muriuki and Benson Marimba for a consideration of Kshs 7,500,000/- each; that Benson Marimba paid Kshs 6,650,000/- of the purchase price while Alex Muriuki paid Kshs 4,847,500/-, and that despite being ready to complete the payments, the balances remain unpaid as they are awaiting completion documents.
21. PW1 informed the court that the delay in completion was occasioned by double registration/ allocation of title as advised by the Director of Surveys in 2003 and that other than the decretal sum which he settled on behalf of the Defendants, he spent money on the filing of the suits, and on the surveyors who conducted subdivision of the land and on land rates.



22. It was the evidence of PW1 that he therefore does not hold any money paid to him as an Advocate of the Defendants; that he used his own money to pay the debts that the Defendants were owing in respect of the suit and to facilitate subdivision of the land and that the Defendants have never paid him his legal fees.
23. PW1 averred that the Defendants engaged his services to represent their interests in September 2014; that they agreed to enter into a sale agreement with him for one acre in the suit land to act as a lien for monies owed and to enable him to proceed with the filing of a fresh suit at that time and that he took possession of the one acre of the suit land in 2014 and has since fenced off the land.
24. In cross-examination, PW1 testified that the sale agreement between himself and the Defendants dated September 19, 2014 was not signed together with court documents as alleged but after the suit was filed and that the agreement indicated the value of the services rendered, without indicating the figures.
25. PW1 stated that as there was an agreement between himself and the Defendants, there was no need for him to issue a fee note; that in selling the one acre to the two buyers, he represented both the seller and the purchaser, and thus held money on behalf of both the purchaser and the seller, until he transferred the property and that pursuant to the order of the court, he transmitted the purchase price to the Defendants although the transaction has never been completed to date due to problems with the documentation.
26. PW1 produced a bundle of documents as PEXB1, which included the sale agreement dated September 19, 2014 between the himself and the Defendants; the decree in HCCC No 188 of 2003 dated June 16, 2003; the professional undertaking dated March 26, 2009 and the Power of Attorney dated March 18, 2009.
27. PW1 also produced in evidence the copy of the title for LR No 2259/601; the sale agreements between himself, Benson Marimba and Alex Muriuki; the pleadings under certificate of urgency dated September 19, 2014; The Ruling dated December 18, 2015; the sale agreement between the Defendants and Hon Stephen Kipkiyeny Tarus and the revocation of the Power of Attorney of September 3, 2012.
28. PW2, Purity Makori, who is an advocate, relied on her statement dated June 18, 2021, which she adopted as her evidence in chief. PW1 testified that she is a Senior Associate in the Plaintiff's firm of Mogeni & Co Advocates which she joined in 2012. PW1 stated that on September 19, 2014, she was called by the Plaintiff to his office where she met the Defendants and that the Plaintiff informed her that he had agreed with the Defendants to enter into an agreement for the sale of one acre of the suit land as consideration for all legal fees owed to the firm.
29. PW2 testified that she prepared the sale agreement as requested and presented it to the Plaintiff and the Defendants who signed at their respective places; that she witnessed the Defendants sign the sale agreement on September 19, 2014 and that she attested the signing of the agreement with her stamp which appears on the sale agreement.
30. During cross-examination, PW2 asserted that she was not sure whether she or the Plaintiff was around when the Defendants signed the pleadings; that while she witnessed the signing of the agreement, she was not part of the discussion in which the Plaintiff and the Defendants agreed on the contents of the agreement and that the terms of the agreement were discussed while the pleadings were being filed in court, which explains why the agreement contains the case number.
31. The 1st Defendant, DW1, relied on two witness statements dated September 30, 2017 and October 16, 2020 as his evidence in chief. DW1 informed the court that judgement was entered against him



in HCCC No 188 of 2003 on October 15, 2008 for Kshs 6,117,137.70; that as he was ailing, he had to travel to India for treatment and that on the advise of the Plaintiff, he gave the Plaintiff a Power of Attorney to proceed with the suit and offer one acre of the suit property for sale to settle the decretal sum in HCCC No 188 of 2003.

32. DW1 testified that he later learnt that the Plaintiff had signed two sale agreements without his consent and sold 0.5 acres to Benson Kairichi Marimba and another 0.5 acres to Alexander Muthee Muriuki for consideration of Kshs. 7,500,000/- each; that while he does not dispute both sales, both purchasers are yet to pay the entire purchase price and that the sale transactions are yet to be completed.
33. It was DW1's averment that the Plaintiff failed to provide to him and the 2nd Defendant (his deceased wife) an account of the sums received and that him and the deceased engaged the Plaintiff's services in a separate suit, being ELC No 1238 of 2014. DW1 stated that he was unaware of the outcome of the suit but was grateful that the fence put up by third parties was later removed through the Plaintiff's effort.
34. DW1's testimony was that he made several visits to the Plaintiff's offices seeking completion of the sub-division process, some of which he was accompanied by both Mr Marimba and Mr Muriuki; that during the said meetings, the Plaintiff refused to show him the original title of the suit property and that he later filed HCCC No 170 of 2017 (OS) against the Plaintiff which led to negotiations and signing of a consent for the release of the original title.
35. DW1 stated that he did not sign a sale agreement with the Plaintiff and that the sale agreement the Plaintiff is alluding to was a forgery. In his further statement dated October 16, 2020, DW1 stated that he was given an opportunity to inspect the original sale agreement and recognized his signature and that of his deceased wife and that the agreement was signed on September 19, 2014, the same date on which he signed documents in relation to ELC No 1238 of 2014.
36. According to DW1, the Plaintiff gave them several copies of court documents which they were to sign and that they never agreed to sign the last page of the purported sale agreement nor did they knowingly do so. DW1 denied that Purity Makori advocate was present at the time they were signing the court documents together with the purported sale agreement.
37. During cross-examination, DW1 stated that the Kshs 10 million owed as a decretal sum was paid by the Plaintiff and the balance of the proceeds of the sale of a portion of his land was to be paid to him; that this was a gentleman's agreement; that he never paid the Plaintiff any fees because he never sent him any fee note and that there is a judgement in HCCC No 171 of 2017 which settled the issue of accounts between himself and the Plaintiff.

Submissions

38. The Plaintiff submitted that there was a client-advocate relationship between himself and the Defendants; that he offered legal services to the Defendants in various matters, which were listed in the Special Conditions of the Sale Agreement between them, and that he was entitled to such fees which the Defendant offered to pay by way of an agreement for sale of land.
39. The Plaintiff relied on the case of [*Abmednasir Abdikadir & Company Advocates vs National Bank of Kenya Ltd \[2006\] eKLR*](#) where the court held that an agreement in respect of remuneration would be valid provided it was in writing and signed by the client.
40. With respect to the Defendant's reliance on Section 46(a) of the [*Advocates Act*](#) to void the transaction, counsel urged the court to consider the circumstances of the transaction; that the Plaintiff was not buying the interest in the suit land but was being paid for legal fees owed; that the agreement was



binding, and the Defendant has not proved misrepresentation or fraud on the Plaintiff's part and that no legal fees has ever been paid for the services rendered.

41. The Plaintiff relied on the case of [*Mamta Peeush Mahajan \[Suing on behalf of the estate of the late Peeush Premal Mahajan\] vs Yashwant Kumari Mahaan \[Sued personally and as Executrix of the estate and beneficiary of the estate of the late Krishan Lal Mahajan \[2017\] eKLR.*](#)
42. The Plaintiff submitted that the agreement dated September 19, 2014 is enforceable by way an order of specific performance because he has established that the agreement was valid as it was duly executed and witnessed in accordance with Section 3(3) of the [*Law of Contract Act*](#) and that Defendants acknowledge that they signed the agreement, claiming that they did so on mistaken belief.
43. It was submitted by the Plaintiff that this court ought to issue a permanent injunction restraining the Defendants from entering on the suit parcel and that general damages for trespass should be awarded. The Plaintiff relied on the case of [*Park Towers Limited vs John Mithamo Nika & 7 Others \[2014\] eKLR*](#) and [*Philip Aluchio v Crispinus Ngayo \[2014\] eKLR.*](#)
44. Counsel for the Defendant, submitted that the impugned agreement is an agreement for sale of land and not an agreement for legal fees, as claimed by the Plaintiff and that the sale agreement offends Section 46 of the [*Advocates Act*](#) which declares invalid any agreement for purchase by an advocate of the interest or any part of the interest of his client in any suit.
45. This, they submit, is to avoid instances where advocates' personal interests conflict with those of the client, with whom they have a fiduciary relationship.
46. Counsel relied on the case of [*Mothew \(T/A Stapley & Co\) vs Bristol and West Building Society \[1996\] EWCA Civ 533*](#) which considered the nature of and principles guiding the fiduciary relationship. They also relied on the cases of [*Serve in Love Africa \(Sila\) Trust v David Kipsang Kipyego & 7 Others \[2017\] eKLR*](#), [*Kim Jong Kyu v Housing Finance Company Ltd & 2 Others \[2015\] eKLR*](#) and [*Rose Wakanyi Karanja & 3 Others v Geoffrey Chege Kirundi & Another \[2016\] eKLR.*](#)
47. The Defendants' counsel submitted that the sale agreement is void ab initio and incapable of enforcement. Counsel relied on the cases of [*Holman vs Johnson \[1775-1802\] All ER Rep 98*](#), [*Archbolds \(Freightage\) Ltd vs S Spanglett Ltd \[1961\] 1 QB 374*](#) and [*Njogu & Company Advocates vs National Bank of Kenya Limited \[2016\] eKLR.*](#)
48. The Defendant's Counsel urged this court to find that the Defendants were not given a counterpart of the Sale Agreement, which they ought to have had as a matter of practice; that this necessitated the Defendant to seek to inspect the original Sale Agreement; and that this casts doubts as to whether he and the deceased knowingly signed the agreement.
49. Counsel sought to rely on the common law principle of non est factum which operates to shield persons from liability arising from documents mistakenly executed by them and that such a mistake voids a written agreement.
50. The Defendant's counsel submitted that specific performance cannot issue where a contract is invalid. Counsel relied on the case of [*Reliable Electrical Engineers Ltd vs Mantrac Kenya Limited \[2006\] eKLR*](#); that the Plaintiff failed to tender any evidence as to why he could not file a bill of costs for the court to determine the amount owed, and that the Plaintiff admitted having not issued any fee note.
51. It was urged by counsel that until a bill of costs is taxed, the Defendants cannot be said to be indebted to the Plaintiff on account of fees; that the agreement is ambiguous and that in applying the contra proferentem rule, such ambiguity should be construed against the drafter of the contract, which is the Plaintiff. Counsel relied on the cases of [*Kenneth Kasemo Karisa vs Kenya Bureau of Standards*](#)



52. Counsel submitted that the Plaintiff's submissions have deviated from his pleadings by introducing the argument that the agreement was for fees under Section 45 of the Advocates Act; that the Plaintiff filed this matter in the Environment and Land Court to enforce a sale agreement and not a fees agreement and that if the subject matter of this suit is a fees agreement under Section 45 of the Advocates Act, then this court would not have jurisdiction.

Analysis and Determination

53. It is not disputed that an advocate-client relationship once subsisted between the Plaintiff and the Defendants, dating back to 2006, when the Plaintiff was engaged to represent the Defendants in HCCC No 188 of 2003. In HCCC No 188 of 2003, Manjit Singh Sethi & 2 Others vs Samson Kariuki Njengi and Susan Waitherero Kariuki, it is an undisputed fact that the matter was heard to its completion and judgement rendered against the Defendants herein.
54. The Defendants, who at the time the Judgment was entered against them were in poor health and were travelling to India for treatment. Consequently, the Defendants gave the Plaintiff a Special Power of Attorney to sale one acre out of the suit land to cater for the decretal sum that was due.
55. It is not disputed that the Plaintiff indeed carried out this obligation and sold the one acre in two portions to Benson Marimba and Alexander Muriuki at Kshs 7,500,000/- each. The Defendant has however opposed the manner in which the Plaintiff carried out his duties under the Power of Attorney, particularly with respect to the failure to render accounts.
56. The issue of accounts in respect of the sale of the said one acre to Benson Marimba and Alexander Muriuki led to the filing in the Commercial and Tax Division of the High Court HCCC No 170 of 2017, Samson Kariuki Njengi & Susan Waitherero Kariuki vs Tom Kelvin Mogeni t/a Mogeni & Co Advocates.
57. It is apparent that before the final determination of that suit, a consent was entered into between the parties for the release to the Defendants herein the original title to the suit land. The Court also conclusively dealt with the matter of rendering accounts, and found that the Plaintiff herein owed the Defendants Kshs 3,184,000 being the balance of the sums received from Benson Marimba and Alexander Muriuki on the Defendant's behalf.
58. In ELC No 1238 of 2014, Samson Kariuki Njenga & 4 Others vs Manjit Singh Sethi & 2 Others, the Plaintiff in this suit was engaged to represent the interests of the Defendants herein together with Alex Muriuki, Benson Marimba and David Kihang'a Macharia, who had an interest in the suit land.
59. This suit was filed against Manjit Singh, Perminder Singh and Ruaha Concrete Co Ltd, who had trespassed on the suit land. The Ruling in ELC No 1238 of 2014, Samson Kariuki Njenga & 4 others vs Manjit Singh Sethi & 2 Others dated December 18, 2015 shows that the matter was withdrawn by the Plaintiffs following an out of court negotiations between the parties.
60. The Plaintiff's contention is that this agreement is valid, having been duly signed and witnessed in accordance with Section 3(3) of the Law of Contract Act and that it is an agreement in consideration of all legal fees due and pending with respect to rendering legal services in two matters, HCCC No 188 of 2003 and ELC No 1238 of 2014, for which he has never received payment.
61. While the Defendant initially denied knowledge and execution of the alleged sale agreement, after inspecting the original said agreement and acknowledging his signature, the 1st Defendant now avers



that they did not knowingly execute the alleged agreement and avers that the said agreement was obtained through misrepresentation and fraud.

62. The Defendants have also impugned the validity of the sale agreement on grounds that it is contrary to Section 46 (a) of the Advocates Act, that it was not duly witnessed in accordance with Section 3(3) of the Law of Contract Act, and that it is vague, as it does not state the agreed purchase price and no valid consideration was paid.
63. The Plaintiff's contention is that the Defendants approached him to represent them in ELC No 1238 of 2014 to protect their interest in LR No 2259/171 and that he entered into a Sale Agreement on September 19, 2014 with the Defendants for one acre out of LR No 2259/601 as consideration for all legal fees due and owing.
64. Although the 1st Defendant admitted that he indeed signed the sale agreement alongside his wife, it is his contention that they were tricked by the Plaintiff into signing the same and that all along, they believed they were signing Verifying Affidavits and Supporting Affidavits in respect of the pleadings in HCCC No 1238 of 2014, which was filed under a certificate urgency on the same day the sale agreement was purportedly signed.
65. Section 3 (3) of the Law of Contract Act prescribes elements of a valid sale agreement as follows:

- ' (3) No suit shall be brought upon a contract for the disposition of an interest in land unless—
- (a) The contract upon which the suit is founded—
 - (i) Is in writing;
 - (ii) Is signed by all the parties thereto; and
 - (b) The signature of each party signing has been attested by a witness who is present when the contract was signed by such party:
Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.'

66. In this matter, it is not disputed that the agreement is in writing and that it was signed by the parties. The 1st Defendant has however denied that the witness who attested the agreement, Purity K Makori, was present when the agreement was signed. The 1st Defendant has claimed that the Plaintiff fraudulently mixed the execution of the sale agreement with the court documents in respect of ELC No 1238 of 2014 thus inducing them to sign the said documents unwittingly.
67. Indeed, the Sale Agreement and the pleadings which instituted ELC No 1238 of 2014 are both dated September 19, 2014. During cross-examination, the Plaintiff testified that the Defendanta were always keen to read any document before they signed it. On that particular day, the Plaintiff's testimony was that the pleadings to institute ELC No 1238 of 2014 were signed in the morning and the suit was filed immediately thereafter under a certificate of urgency and that the agreement was signed after the suit was filed.
68. PW2, Purity Makori, in her written statement dated June 18, 2021, and testimony stated that she received instructions from the Plaintiff and proceeded to prepare the agreement. She thereafter



presented the document to the Plaintiff and the Defendants who signed it in her presence, which she attested by signing and stamping.

69. In cross-examination, Purity Makori Advocate stated that she was not present when the Defendants signed the pleadings for ELC No 1238 of 2014. She was also categorical that she was not a party to the discussions on the contents of the agreement, but did witness the signing of the agreement. She also testified that the agreement was signed after the suit was filed as the case number was captured in the agreement.

70. From the evidence, this court is not convinced that the signatures of the Defendants were obtained fraudulently or by mistake or misrepresentation. It is trite that claims of fraud have a higher standard of proof than a mere balance of probability. The Court of Appeal in [Urmila w/o Mahendra Shab vs Barclays Bank International Ltd & Another \[1979\] eKLR](#) quoted with approval *Ratilal Gordhanbhai Patel vs Lalji Makanji [1957] EA 314, 317* as follows:

' There is one preliminary observation which we must take on the learned judge's treatment of this evidence: he does not anywhere expressly direct himself on the burden of proof or on the standard of proof required. Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required. There is no specific indication that the learned judge had this in mind: there are some indications which suggest he had not.'

71. With respect to the elements of a valid sale agreement set out in Section 3(3) of the [law of Contract Act](#), this court must find, which it does, that the sale agreement satisfied the said elements. Indeed, the Defendants did not present any evidence to show that they signed the sale agreement in which they agreed for the transfer of one acre of LR No 2259/601 to the Plaintiff in lieu of legal fees by mistake or misrepresentation.

72. The Defendants are literate people, as exhibited by the 1st Defendant who testified in English. That being so, the Defendants must have known that they were signing a sale agreement and not pleadings as alleged. In fact, the contents of the last page of the agreement are different from the contents of the pleadings that the Defendants signed, and no amount of confusion could have arisen as to which document the Defendants were signing.

73. Section 46(a) of the [Advocates Act](#) invalidates an agreement in which an advocate obtains a client's interest or part of a client's interest in any suit or other contentious proceeding. Section 46 (a) of the Act provides as follows:

' Nothing in this Act shall give validity to-

- a. Any purchase by an advocate of the interest, or any part of the interest, of his client in any suit or other contentious proceeding;

74. The Court of Appeal in [Abok James Odera T/A AJ Odera & Associates vs John Patrick Machira T/A Machira & Co Advocates \[2013\] eKLR](#) interpreted Section 46(a) of the [Advocates Act](#) as follows:

' Our interpretation of this provision, (section 46(a) of the [Advocates Act](#) (Supra) when read in conjunction with the definition of 'suit' in the [Civil Procedure Act](#) (Supra) is that, it means that in order for the caveat in section 46(a) to hold to defeat the intention of the parties in the agreement of March 4, 1996, the said agreement ought to have been made during the



pendence of a 'suit' in which the amount on the basis of which the said agreement was made formed the subject claim.'

75. The impugned agreement was signed on the same day ELC No 1238 of 2014 was filed. By this date, it is clear that HCCC No 188 of 2003 had already been concluded, including many other transactions that the Plaintiff had conducted on behalf of the Defendants without being paid legal fees.
76. In a nutshell, the agreement between the parties was not confined to the payable fees in respect ELC No 1238 of 2014 alone, but for all the legal services that the Plaintiff had rendered. As was held by the Court of Appeal in *Abok James Odera T/A AJ Odera & Associates (supra)*, in order for the caveat in section 46(a) to hold to defeat the intention of the parties in the agreement, the said agreement ought to have been made during the pendency of a 'suit' in which the amount on the basis of which the said agreement was made formed the subject claim. That was not the case herein.
77. Indeed, the sale agreement in respect to one acre of LR No 2259/601 cannot be equated to 'purchase by an advocate of the interest, or any part of the interest, of his client in an ongoing suit' contemplated under section 46 (a) of the *Advocates Act*.
78. The Plaintiff was not buying the interest in the suit land but was being paid for legal fees owed in the form of land, and not money. The agreement is clear that the said land was to be transferred to the Plaintiff for fees pertaining to not only the pending suit, but other works, including the suits that had been completed.
79. The legal fees that was to be paid in the form of land was for the following services: legal fees in HCCC No 188 of 2003; preparation and registration of the Power of Attorney in regard to LR No 2259/601; legal fees on the professional undertaking to pay the sum of Kshs 10,442,981; legal fees for the removal of the prohibition placed on LR No 2259/601; legal fees for ELC Number 1238 of 2014; legal fees in preparation and handling the sale transactions of Alexander Muriuki and Benson Marimba; demand and preparation to sue Hon Stephen Tarus; and survey and subdivision of 2259/601.
80. The 1st Defendant agreed that he had never paid the Plaintiff the legal fees for the works enumerated in the agreement, the filing of ELC No 1238 of 2014, being just one of the many services the Plaintiff had rendered to him. It is on that basis that he agreed to sell the one acre of the suit property to the Plaintiff in lieu of legal fees.
81. That being so, the agreement cannot be said to be contrary to the provisions of Section 46 (a) of the *Advocates Act* because it was not in respect of an ongoing contentious proceedings. The agreement was in respect of many services rendered by the Plaintiff, including one matter that was filed on the same day the agreement was filed. The Defendants cannot now run away from that agreement on the ground that the same is illegal.
82. In the circumstances, it is the finding of this court that the Plaintiff has proved his case on a balance of probabilities, and is entitled to the prayers in the Plaint, other than the prayer for damages for trespass, which I allow as follows:
 - a. An injunction be and is hereby issued restraining the Defendants whether by themselves or through their agents and servants from entering the 1 acre belonging to the Plaintiff being part of Land Reference No 2259/601 now renumbered as LR No 2259/682.
 - b. An order for specific performance is hereby issued to the Defendants to complete the transfer to the Plaintiff of 1 acre being part of Land Reference no 2259/601 now renumbered as LR No 2259/682.



c. The Defendants to pay the costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 20TH DAY OF APRIL, 2023.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Anyoka for Plaintiff

Mr. Musyoka for Defendant

Court Assistant - June

