



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & TAX DIVISION**

**MILIMANI LAW COURTS**

**HCCC NO. 170 OF 2017**

**SAMSON KARIUKI NJENGI.....1<sup>ST</sup> PLAINTIFF**

**SUSAN WAITHERERO KARIUKI..... 2<sup>ND</sup> PLAINTIFF**

**-VERSUS-**

**TOM KELVIN MOGENI T/A**

**MOGENI & CO. ADVOCATES..... DEFENDANT**

**JUDGMENT**

1. Samson Kariuki Njengi (Samson) and Susan Waittherero Kariuki(**Susan**) commenced this suit by way of Originating Summons against their former advocate Tom Kelvin Mogeni t/a Mogeni & Co. Advocates (the Advocate) for the following orders:-

(a) That the Defendant do delivers an account for all sums received while acting for the Plaintiffs in the transactions relating to the sale of portions of the parcel of land known as land reference No. 2259/601.

(b) The Defendant do release to the Plaintiffs all sums held from the purchase prices received by the firm of Mogeni & Co. Advocates from the transactions of sale of portions of land known as land reference No. 2259/601.

(c) That in default of compliance of (b) above the Plaintiffs do proceed with execution against the Defendant for the sums held on their behalf.

(d) That the Defendant do forthwith deliver to the firm of Muriu, Mungai & Co. Advocates the original title for the property known as land reference No. 2259/601 and all other documents and files relating to the said property and all matters handled on behalf of the Plaintiffs.

2. Since the filing of the Summons two things of some significance have happened. The first is that by way of a consent of 30<sup>th</sup> August 2017, the parties agreed as follows:-

I. The Defendant do release the original title for the property known as Land Reference no.2259/601 to the Plaintiff's Advocates,Muriu, Mungai & Co advocates ,as stakeholders, to undertake subdivision and complete the pending conveyances relating to purchases of portions of Land Reference 2259/601 by Alexander Muthee Muriuki ,Benson Karirichi Marimba and David Kihang'a Macharia, as set out in the Purchasers respective Sale Agreements.

II. The Advocates for the Plaintiffs do deal with the Purchasers Advocates on the pending balances as regard to the balance of the purchase prices, if any.

III. Upon the Advocates for the Plaintiffs undertaking the sub-divisions and conveyances in favour of the purchasers, as set in their respective Sale Agreements, the title for the disputed portion measuring one (1) acre shall be held by Murui, Mungai & co advocates to await the hearing and determination of the dispute between the Plaintiffs and the Defendant and any additional portion shall be released to the Plaintiffs.

3. Second, Susan Waittherero Kariuki, the 2<sup>nd</sup> Defendant passed away on 7<sup>th</sup> October 2019. It is common ground that she has not been

substituted to date.

4. The Advocate takes a view that these two events have given rise to matters of decisive nature to fate of these proceedings. They take on prefatory character and need to be dealt with at once because if I was to uphold either of them then it may well be the end of this matter.

5. Let me start with the issue of the death of the 2<sup>nd</sup> Defendant and her non substitution. The Advocate emphasizes that this suit being a suit for accounts and not limited to the sale of land, the 1<sup>st</sup> Plaintiff cannot on his own account sustain the suit. He points to the provisions of Order 24 Rule 4 of the Civil Procedure Rules which reads:-

**4. (1) Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.**

**(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.**

**(3) Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant.**

6. It is then argued that the suit has abated against as the dead Plaintiff with dire consequences to the cause of action of the 1<sup>st</sup> Plaintiff because of the provisions of Section 60 of the Land Registration Act:-

**“If any of the joint tenants of any land, lease or charge dies, the Registrar shall, upon proof of the death, delete the name of the deceased tenant from the register by registering the death certificate”.**

7. It is submitted that as the 1<sup>st</sup> Defendant has not rectified the register under those provisions, then the interest held by the joint tenants remains the same in extent, nature and duration. For that reason, it is argued, the suit having abated against the 2<sup>nd</sup> Plaintiff it has also abated as against the 1<sup>st</sup> Plaintiff.

8. For the 1<sup>st</sup> Plaintiff, he takes the position that substitution was not necessary because of the joint registration of the subject matter. That in this arrangement, the survivor takes it all and no part of the sale proceeds can be said to have belonged to the Deceased Plaintiff personally. The Court is then asked to give regard to the provisions of Section 91(4) of the Land Registration Act.

9. The starting point in resolving this issue is to understand of the nature of the dispute before the Court. There existed an Advocate – Client relationship between the parties in which the Advocate represented the Plaintiffs in litigation being HCC No. 188 of 2003 **Manjit Singh Sethi & 2 others v Samson Kariuki Njengi & Another**. The Advocate also acted on behalf of the Plaintiff on the sub-division and sale of a portion of land reference No. 2259/601 in which the Plaintiff agreed to donate a Power of Attorney to Advocate Tom Mogeni. It would seem that the primary reason for the sale of the land was to pay off the decretal sum owed by the Defendants on account of the aforesaid litigation.

10. The Advocate also contends that he represented the Plaintiffs in two other matters, one being litigation Nairobi E.L.C No. 1238 of 2014 **Samson Kariuki Njengi & 4 others –vs- Manjit Singh Sethi & 2 others and another** and to seek recovery of Kshs.1,050,000/= from one Hon. Stephen Tarus.

11. Yet reading the prayers in the Summons and the Plaintiffs’ cause of action, generally, the central issue in these summons is that the Plaintiffs sought that the Advocate accounts for monies received in the transactions relating to the sale of the portions. Whether or not fees would be due to the Advocate for the work done by him in respect to the litigation is a secondary point because what the clients sought was an account of how the Advocate applied the monies received from the sale of the land and release of the balance.

12. Once the Court appreciates that to be the true nature of the proceedings then it must ask whether the interests and rights of the two Plaintiffs are severable in respect to the land and also the accounts which the proceedings bespeak. Although the power of attorney was granted on 31<sup>st</sup> March 2009, and although many of the matters in this dispute happened before the coming into force of the Land Registration Act (Act No. 3 of 2010), the law on joint tenancy is much the same in the repealed Registered Titles Act under which the land was registered and the current statute.

13. From the title to the land, Samson and Susan were registered properties as lessors as joint tenants. This is in a certificate of title issued on 31<sup>st</sup> October 2007 under repealed law. Then, and even now, two features of a joint tenancy stand out. One is that each of the joint tenants have an equal share and interest over the entire property. Second, upon the death of a co-owner, the surviving co-owner or co-owners takes the interest of the deceased. In this regard Section 91(4) of the Land Registration Act reads:-

**“If land is occupied jointly, no tenant is entitled to any separate share in the land and, consequently—**

**(a) dispositions may be made only by all the joint tenants;**

**(b) on the death of a joint tenant, that tenant’s interest shall vest in the surviving tenant or tenants jointly; and**

**(c) each joint tenant may transfer their interest inter vivos to all the other tenants but to no other person, and any attempt to**

**so transfer an interest to any other person shall be void”.**

14. It seems to me that if both Samson and Susan had an equal share and interest over the entire property and which interest is not severable, then the two would have similar interest over the proceeds from the sale of the land. If one died before the other and prior to the payment of the proceeds, then the entire proceeds would vest in the survivor. As these proceedings are about the sale proceeds, then Samson alone is entitled to press on with the action without the need for substitution of Susan.

15. So is Section 60 of the Land Registration Act relevant to the issue as proposed by the Advocate. Again I reproduce it:-

**“If any of the joint tenants of any land, lease or charge dies, the Registrar shall, upon proof of the death, delete the name of the deceased tenant from the register by registering the death certificate”.**

16. It does appear to the Court that the provisions simply provides the formal process upon which the right of the surviving tenant is effected in the register. It would be too pedantic to hold that the surviving tenant is not entitled to the entire unpaid proceeds of the sale merely because the formalities of Section 60 have not been attended. Once it is common ground that the co-tenant has indeed died then that is sufficient.

17. I turn now to the question of the effect of the consent entered between the parties.

18. The Advocate takes it the consent took away the jurisdiction of the Court to make an enquiry as to the balances that are due to the Plaintiffs. The Advocates point to the following item of the consent;

**“[2] The Advocates for the Plaintiffs do deal with the purchaser’s Advocates on the pending balances as regard to the balance of the purchase prices, if any”.**

19. It is clear to this Court that the Advocate seeks to misrepresent the true import of that part of the consent. Simply, the agreement was that the Advocates for the Plaintiffs deal with the purchaser’s Advocates on the balance pending on the purchase prices from the purchases. It did not exonerate the Defendant from accounting for that portion of the purchase price it received on account of the sales of portions of land.

20. This Court now turns to the substantive issues. It is common ground that two portions of land were sold to two persons separately. Alexander Muriuki for Kshs.7,500,000/= and Benson Marimba for a similar amount. In both matters the Advocate acted for the Plaintiffs. Yet before examining whether the Advocate has accounted for whatever sums he received from the said transactions, there is one other matter to be noted by the Court.

21. It is the case for the Advocate that in payment of his firm’s legal fees for all work done by the firm on behalf of the Plaintiffs (be it litigation or conveyance or of any other nature), Samson and Susan by a sale agreement dated 19<sup>th</sup> September 2011 agreed to transfer one (1) acre from L.R No. 2259/601. Samson on the other hand, in an affidavit of 24<sup>th</sup> May 2017, alleges that the agreement is a forgery. It is however common ground that the validity and efficacy of that agreement is the subject of E.L.C Case No. 577 of 2017 (**Tom Kelvin Mogeni t/a Mogeni & co Advocates vs Samson Karuiki Njengi and another**).

22. So much for that agreement. The Court now turns to determine how much the Advocate received in respect to the two agreements. The easier one to determine has to be the sale to Benson Marimba. In the agreement, Samson and Susan being the vendors were represented by Kelvin Mogeni Advocates and the purchaser by J. W. Wambua & Co. Advocates. The purchase price is Kshs.7,500,000/=. The Advocate states that in respect to this agreement the purchaser paid a sum of Kshs.6,650,000/=. The veracity of this statement is not questioned by Samson in his supplementary affidavit of 24<sup>th</sup> May 2017. Indeed under cross-examination, Samson said:-

**“Marimba also told me he had paid Kshs.7.5 Million less Kshs.850,000/= to Mogeni”.**

I therefore hold that Defendant received Kshs.6,650,000/= on this transaction.

23. It seems that the balance will be pursued by the new Advocates of Samson from the Advocates of the purchasers in terms of the consent of 18<sup>th</sup> October 2017. If it however turns out that more than Kshs.6,650,000/= was paid to the Defendant then the Plaintiffs would still be entitled to pursue recovery of any monies paid over and above Kshs.6,650,000/= from the Defendants.

24. In respect to the sale to Alexander Muriuki, the sale agreement shows that the Mr. Kevin Mogeni acted for both the vendors and the purchasers. As to the purchase price, it is common cause that it was Kshs.7,500,000/=. On how much he or his firm had received on this account, Mr. Mogeni deponed:-

**“That the purchasers Benson Marimba paid the purchase price of Kshs.6,650,000/= and Alex Muriuki paid the amount of Kshs.4,487,500/= and the balance yet to be paid because the transaction is not complete. The buyers have been ready to complete as the balance of the purchase price is held by the respective Advocates awaiting completion documents”.**

25. It, however, turns out that on enquiry from the new Advocates of Samson, Mr. Alexander Muthee Muriuki stated that he had paid the full purchase price of Kshs.7,500,000/= to the Defendant but added:-

**“If there is any amount withheld, then such amount is held by my advocate on record pending completion”.**

(See Mr. Muriuki's letter of 22<sup>nd</sup> May 2017).

26. At one Mr. Mogeni explained as follows:-

**“The amount was paid to me in full but some is held to await completion on account of the purchaser”.**

Mr. Mogeni was asserting that in his dual capacity as the lawyer for both the vendors and the purchaser he withheld some of the purchase price to await completion documents from the vendors. The Advocate's evidence was that only Kshs.4,847,500/= of the entire purchase price was to the account of the vendors.

27. In the final arguments to Court, counsel for the Plaintiff argues that from both sale agreements, payment of the balance of the purchase price was not conditional on completion and the Court was urged to hold that the entire purchase price was paid to the Plaintiffs' account.

28. The Defendant's response to this as earlier outlined, is that on the basis of the consent order of 18<sup>th</sup> October 2017 the parties entered a binding consent on how to deal with the balances of the purchase price. It was then contended that the Court had no jurisdiction to deal with this issue. But the Court has rejected the argument, the Defendant is not exonerated from accounting on how much he received to the account of the vendors. The only monies to be dealt with in terms of consent are those truly held by the purchasers because completion had not happened.

29. On this aspect the Court agrees with the Plaintiff that payment of the purchase price was not subject to completion. Indeed, although not pointed out by the Plaintiff, this Court could not help but notice special condition (f) of the agreement which reads:-

**“The vendor requires the purchase price herein to liquidate a debt which has been explained to the purchaser who have agreed to release the purchase price to the vendors' Advocate in terms of the Power of Attorney annexed hereto”.**

30. In terms of the sale agreement the purchase price was Kshs.7,500,000/=. The Court's reading of special condition (f) was that the purchaser had agreed to the release of the purchase price (that is Kshs.7,500,000/=) to the vendors' Advocate without any conditions. This further buttresses the case of the Plaintiffs that payment of the entire purchase price was not conditional on completion.

31. This Court holds that the entire sum of Kshs.7,500,000/= paid by Mr. Alexander Muriuki to the Defendants was in the favour of the vendors and to their account and no balance is held back by the purchaser Mr. Muriuki.

32. Emerging from the evaluation of the evidence before Court, the Court holds that the Defendant as advocate for the vendors received the sum of Kshs.14,150,000/= (Kshs.6,650,000/= + Kshs.7,500,000/=). Of this sum it is agreed that Kshs.10,566,000/= was paid towards the decretal sum in HCCC No. 188 of 2003. The Plaintiff also admits receiving Kshs.400,000/= from the Defendant.

33. The Defendant states that other than these two conceded sums, he spent money on the suits, surveyor's fees on subdivision of the property and land rates. In addition, Mr. Mogeni stated that he paid a sum of Kshs.2,000,000/= in cash to Samson. This is vehemently denied by Samson.

34. Let me start with the payments allegedly paid on outgoings. The Defendant produced a statement of account prepared by himself. The statement contains sums allegedly paid out as Court filing fees and service of summons and letters in HCCC 188 of 2003. As is characteristic of the other accounts the Court shall shortly discuss, he produces no receipts or such other document in support. Then it also has items on attendance to the registry and the Court. These would be typically items that feature in an Advocate's Bill of Costs. What is unclear to this Court is why the Defendant seeks to be given credit for these items when it holds that it has a valid agreement (that of 19<sup>th</sup> September 2014) in which all his fees including those for conducting HCCC No. 188 of 2003 have been settled.

35. The Court further notes that the same agreement also purports to settle subdivision fees of LR. Number 2259/601 (See special condition C viii). The Defendant is not a surveyor and survey fees would have to be what was paid out by him to the surveyors. The account presented by the Defendant has various items on surveyor's fees. What needs to be asked is why the Defendant would want to have these amounts deducted from the money he received when the sale agreement whose validity he vouches for provides that the transfer of one acre from Samson and Susan was to settle, amongst other fees, survey and subdivision fees.

36. In addition, and this is true as well of land rates, the Defendant has not produced even one receipt in support of payments said to have been made on behalf of the Plaintiffs. Under cross-examination Mr. Mogeni stated:-

**“All receipts in respect to payments made to City Council and Katunga are not annexed to my affidavit but are annexed on documents before E.L.C Court”.**

It has to be asked why the Defendant did not deem it necessary to produce those receipts here yet it is in these proceedings that he is required to account for the money received.

37. The Court comes to the conclusion that the Advocate has failed to prove the payments allegedly made on behalf of Plaintiff or has, in the alternative, taken the position that those payments are settled vide the sale agreement. In view of that alternative stance, those outgoings do not fall to be discredited from the Plaintiffs' account held by the Advocate.

38. I turn to the sum of Kshs.2,000,000/= allegedly paid to Samson but denied by him. Again the Defendant was unable to prove the

payment by way of receipt or acknowledgment. He sought to explain:-

**“I remember Samson disputed receiving Kshs.2 Million on 25<sup>th</sup> October 2008. He received this in cash. There is no acknowledgement signed by him. It was paid in my office. I had dealt with him for a while and in good faith”.**

39. On his part, Samson stood his ground that he was not paid this sum and was not shaken in cross-examination.

40. What is before Court is nothing more than the word of one person against the other and as the onus fell on the Advocate to provide the account, I have to find that the Advocate has not proved that it made payment of Kshs.2,000,000/= to Samson.

41. As I get to the epilogue of this decision, I need to make an observation on an issue that has featured in the proceedings. The Plaintiff takes the view that the Advocate is entitled to pursue his legal fees through an advocate - client Bill of Costs. The Advocate on the other hand does not think so, and holds that he is not required to file a Bill of Costs as the consideration for his fees was 1 acre out of L. R No. 2259/601.

42. The scope of these proceedings does not require this Court to make a finding on that question one way or other. But it seems to me that if the Land Court upholds the agreement then that will be the end of the matter but if it reaches an opposite outcome then it may be inevitable for the Advocate to pursue his fees through taxation of a Bill of Costs. But I can only observe!

43. So what are the appropriate Orders to make? The Plaintiff submits that the evidence establishes that the Advocate holds a sum of Kshs. 4,034,000.00 to his account and asks the Court to order that the Advocate renders a true and accurate account of the entire sum within a period that the Court deems fit and in default the Advocate be directed to pay the said sum together with interest at Court rates. On the part of the Court I understood the Advocate response by way of the affidavit and his oral testimony to be an answer to the Originating Summons. The Court has understood the answer by the Advocate as a delivery of accounts by him.

44. Having considered the totality of the evidence, I come to the conclusion that Advocate holds the sum of Ksh 3,184,000.00 to the Plaintiff's account. This is arrived at as follows 14,150,000.00 – 10,566,000.00- 400,000.00. The said sum of Ksh 3,184,000.00 attracts interest at Court rates from the date of filing suit until payment in full. The Plaintiff shall also have costs of the suit. The amount ordered herein to be paid within 45(forty five) days of the date of this judgment.

**Dated, Signed and Delivered in Court at Eldoret this 29<sup>th</sup> Day of April 2020**

**F. TUIYOTT**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17<sup>th</sup> April 2020, this Judgment has been delivered to the parties through virtual platform.

**F. TUIYOTT**

**JUDGE**

**PRESENT:**