Machage v Samuel Ngigi Karuri (Sued In His Capacity as The 1st Defendant and as the Legal Representative of the Estate Of Eunice Wariara Ngigi (Deceased) (Environment and Land Case Civil Suit 43B of 2016) [2022] KEELC 3396 (KLR) (25 May 2022) (Judgment)

Neutral citation: [2022] KEELC 3396 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ENVIRONMENT AND LAND CASE CIVIL SUIT 43B OF 2016

DO OHUNGO, J

MAY 25, 2022

BETWEEN

DOUGLAS MUSA MACHAGE ..... PLAINTIFF

AND

SAMUEL NGIGI KARURI (SUED IN HIS CAPACITY AS THE 1ST DEFENDANT AND AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF EUNICE WARIARA NGIGI (DECEASED) ..... DEFENDANT

JUDGMENT

1. Litigation in this matter commenced in the subordinate court as Nakuru CMCC No. 214 of 2016, when the plaintiff filed plaint dated 26th February 2016. The matter was later transferred to this court. At the time of filing the suit, Samuel Ngigi Karuri was the first defendant while Eunice Wariara Ngigi was the second defendant. The second defendant later passed away in the year 2020 and Samuel Ngigi Karuri took over her case in his capacity as the legal representative of her estate. The plaintiff averred that the defendants were registered as joint owners of the land comprised in title No. 49110 otherwise known as Land Reference Number 4815/3 measuring 70.65 hectares and situated to the North East of Njoro Town in Nakuru County.

2. That sometime in February 2011, the plaintiff and a friend met with the defendants in their home to discuss and negotiate over two 5-acre portions of land the defendants had excised from their holding in LR No. 4815/3, and were selling. That the parties agreed verbally that the purchase price would be KShs 600,000 per acre and that all payments for the purchase price were to be deposited in the first defendant's bank account at Kenya Commercial Bank and that a formal agreement would be drawn by the plaintiff's advocates. That pursuant to the agreement, on 3rd March 2011 the plaintiff deposited in first defendant's account the sum of KShs 3,000,000 being the full purchase price for one of the two parcels being sold and that subsequently, on 12th March 2011, the plaintiff and the 1st defendant acting

on his own behalf and ostensibly on behalf of his wife the 2nd defendant converged at the chambers of the plaintiff's advocates where an agreement was drawn and executed. That the agreement provided that payment of the balance of KShs 3,000,000 was to be made subsequently within a reasonable time.

3. The plaintiff further averred that immediately after execution of the agreement, with the defendants' knowledge and consent, he took possession of the two parcels of land which had by then been surveyed and were now known as LR No 4815/5 and LR No 4815/6 (the suit properties), uprooted tree stumps, planted some trees along the boundary and started wheat farming thereon with occasional support of the 1st defendant. That he later paid into the first defendant's account the sum of KShs 3,000,000 being the purchase in respect of the second parcel of land and a further sum of KShs 300,000 which the defendants had requested to facilitate transfer of the land to the plaintiff's name.

4. That on or about 3rd April 2015, the defendants demanded a further KShs I,600,000 which the plaintiff felt was an extortionate demand and on 8th February 2016 when the plaintiff went to the defendants' home regarding the overdue transfer, the 1st defendant declared that he had rescinded the agreement and was waiting for the plaintiff to harvest his wheat for him to retake repossession.

5. The Plaintiff therefore prayed for judgment against the defendants jointly and severally for the following orders:

    a. A permanent injunction to issue to restrain the defendants, their servants and agents from disposing of the said parcels of to any person save the plaintiff and in any manner whatsoever not to interfere with the plaintiff's quiet and peaceful possession of the lands in question and to refrain from committing any acts of waste, obstruction and damage to the plaintiff's property and interests on and in the said parcel of land;

    b. A finding and a declaration that the defendants had failed to deliver title to the plaintiff and an order of specific performance to issue to compel the defendants to deliver title for LR No. 4815/5 and LR No. 4815/6 to the plaintiff unconditionally;

    c. In the alternative, and without prejudice to the foregoing reliefs, an order for refund of the purchase price of shs. 6,000,000 as well as the outgoings amounting to shs. 300,000;

    d. Further and in addition to the refund of shs. 6,300,000 aforesaid, the defendants do pay the plaintiff the sum of shs. 12,000,000 in compensation for the loss of appreciation of the lands in question;

    e. Costs of this suit;

    f. Interest on (c) and (d) above at court rates from the date of filing until payment in full;

    g. Any other or further relief that this Honourable Court may deem fit and just to grant.

6. The defendants opposed the plaintiff's claim vide a statement of defence filed on 24th May 2016 and later amended on 19th November 2020 following demise of the second defendant. The defendants admitted being owners of the suit properties and added that the negotiations with the plaintiff were for lease as opposed to sale of the suit properties and that the payments by the plaintiff were for lease and not sale. They denied the plaintiff's other averments and urged the court to dismiss the suit with costs.

7. At the hearing, the plaintiff testified as PW1 and adopted his witness statement. He stated that sometime in February 2011, together with mzee Christopher Isoe, he met the defendants in their house near Sobea. That the defendants expressed a desire to sell land and he expressed wiliness to buy a 10-acre piece of land known as Title Number LR 49110. They agreed on a purchase price of KShs 600,000 per

acre and further that the plaintiff deposits the purchase price in KCB account number 1118151410 Flamingo Branch, Nakuru. That he deposited a total of KShs 3,000,000 on 3rd March 2011 as agreed.

8. The plaintiff further stated that he and the first defendant proceeded to the offices of Mboga G. G. & Co. Advocates where both of them executed a sale agreement dated 12th March 2011 in the absence of the second defendant who was unwell. That he took immediate possession of the 10 acres comprised in LR No. 4815/5 and LR No. 4815/6 each measuring 5 acres upon execution of the agreement and started utilizing it by planting trees along the boundary. He added that he still remains in possession. That he has since come to know that the defendants have since sold the land to Laban Properties Ltd on 24th February 2016 at KShs 23 million and that the said company is the plaintiff in Nakuru ELC No. 308 of 2018. That he later completed paying the entire balance of the purchase price in the year 2012 without the defendant ever demanding it from him. That he had a relationship of trust with the first defendant who used to call him "son" and who would ask him for money for treatment of the second defendant.

9. The plaintiff further testified that the initial plan was that he would process his own titles and, in that regard, the first defendant gave him copies of the defendants' identity cards, the title deed, consent for sub-division and deed plans. That it was later on discussed and agreed that the first defendant completes the process himself while the plaintiff facilitates him. That the first defendant informed him that the cost of doing the sub-division and transfer was becoming very expensive and asked for help. The plaintiff gave him a total of KShs 300,000 for fast tracking the process and also to carter for payment of stamp duty and registration.

10. The plaintiff went on to state that he continued using the property until the first defendant called him on phone and asked the plaintiff to see him. That he went to see the first defendant at his home accompanied by his friend Mr Muturi who had bought the neighbouring plot whereupon the first defendant told them that he was processing the titles but it was costing him a lot. Through letter dated 3rd April 2015, the first defendant asked for an additional KShs 1,600,000 from the plaintiff and KShs 600,000 from Mr Muturi. The plaintiff further testified that he did not pay the extra KShs 1,600,000 since he had paid the defendants money earlier to process the title and saw no reason for him to pay an additional sum. That Mr Muturi paid the KShs 600,000 and was given his title.

11. The plaintiff also stated that the first defendant then threatened to repossess the land and then went ahead to close the plaintiff's access in January 2016, chased away the plaintiff's workers and back-filled the plaintiff's pit latrine. That on 8th February 2016, the first defendant told him that he would forcefully repossess the land as soon as the plaintiff harvests his wheat. He added that it is not his obligation to pay for survey or subdivision, accumulated land rates and penalties since 1985. That the first defendant's demands to amount to extortion and that the land has since appreciated in value and he stands to lose more than KShs 12,000,000 as well as his investment in the land. He added that he purchased the property and that it was not a lease arrangement.

12. Under cross examination, the plaintiff confirmed that the suit property was owned jointly by the first defendant and his deceased wife who was the second defendant, that the deceased did not execute the sale agreement dated 12th March 2011 and that there was no express statement in the sale agreement that the first defendant was acting in the interest of the deceased. He further stated that completion of the agreement and payment of the balance of the purchase price was to be by 31st December 2011.

13. Christopher Kerage Isoe testified as PW2. He stated that sometime around February 2011, the plaintiff who is his relative asked him if he knew of any land on sale near where PW2 was living in Ngata area. PW2 added that he later learnt that Samuel Ngigi (the first defendant), who was known to him, was selling land. That he took the plaintiff to the first defendant and they found the first defendant with

the deceased and the first defendant told them that he had 10 acres that he was selling in two pieces of 5 acres each at KShs 600,000 per acre.

14. George Gisore Mboga, an advocate of the High Court of Kenya in private practice who is based in Nakuru, testified as PW3. He stated that he did not know Samuel Ngigi Karuri until he went to his office on 12th March 2011 in the company of the plaintiff. That they wanted PW3 to draft for them a sale agreement whose terms they had agreed on. He added that his role was to reduce the parties' agreement into writing and that the parties had even executed part of the terms by the time they went to his office. That Samuel Ngigi Karuri was selling 10 acres of land to the plaintiff at an agreed price of KShs 6,000,00 for the entire 10 acres. The 10 acres were to be excised from Samuel's land Ref. No. 4815/3. That by the time the parties went to him, Samuel had shown the plaintiff the land that was being sold and the plaintiff had already paid a total of KShs 3,000,000 and the parties also confirmed that Samuel had obtained the consent of the Land Control Board. PW3 added that he drew the agreement the same day, both parties executed it, he attested their signatures and gave them their respective copies. That the parties did not mention to him anything to do with leasing of the property.

15. Under cross-examination, PW3 stated that on the date of the agreement, the parties showed him a copy of the certificate of title for the property which showed the registered owners jointly as Samuel and Eunice Wariara Ngigi. He further testified that he was told that Eunice was Samuel's spouse and that she was sick and could not go to his office to execute the agreement. That he did not include Eunice as a vendor owing to the explanation.

16. The plaintiff's case was then closed.

17. Samuel Ngigi Karuri opened the defence case by testifying as DW1. He stated that Eunice Wariara Ngigi was his wife and passed away in October 2020 and that he had therefore amended the defence and replaced her as the administrator of her estate. He stated that the parcel of land known as LR No. 4815/3 belongs to him and his late wife and that the certificate of title shows both of them as the registered owners. He added that he did not sell his parcel to the plaintiff and that he did not sign the sale agreement dated 12th March 2011. That the signature on the agreement is not his, the agreement does not recognize that his wife also owned the land and that his late wife did not sign the agreement. DW1 testified further that he does not know Mr. Mboga Advocate and that he has never gone to his office. That he had seen a Forensic Document Examiner's report dated 28th December 2018 and that the Directorate of Criminal Investigations opened Enquiry No. 19/2018 and took his specimen signatures as well as other documents. That the document examiner formed an opinion that the signatures were made by different authors.

18. DW1 further stated that the payments by the plaintiff were in respect of lease of his 10-acre plot by the plaintiff through a verbal agreement. That he asked the plaintiff that they go to an advocate to prepare a written lease but the plaintiff said it was not necessary. That they initially had a lease over 10 acres for 6 years and that they later agreed on a 10 years lease at the plaintiff's request which would have continued to 2021. That as at 2016 when this case was filed, he wanted to sell the 10 acres to enable him raise funds for his wife's medical bills. That he decided to sell because the plaintiff was not paying rent as agreed and that there were delays. That the sum of KShs 1,600,000 which he demanded through letter dated 3rd April 2015 was not in respect of purchase price. He urged the court to dismiss the plaintiff's case and further to order that the plaintiff be evicted from his land.

19. No. 62946 Corporal Robert Kering, a police officer attached to Directorate of Criminal Investigations in Laikipia County, testified as DW2. He stated that in 2016, when he was based in Nakuru, the first defendant made a complaint regarding fraud on his parcels of land LR 4815/6 and LR 4815/5. That he summoned and met the plaintiff and investigated the matter. That he forwarded the agreement

dated 12th March 2011, the first defendant's known signatures and the first defendant's specimen signatures to the Forensic Department at Directorate of Criminal Investigations headquarters after which a forensic report dated 28th December 2018 was prepared in which it was established that the signatures in the agreement said to be the first defendant's were a forgery. He added that charges against the plaintiff had been approved by the Director of Public Prosecution and that the plaintiff was set to take plea the following day.

20. No. 97178 Police Constable Eli John Mwangi, a Forensic Document Examiner working in the Forensic Document Examination Section of the Directorate of Criminal Investigations, testified as DW3. He stated that the Forensic Department at Directorate of Criminal Investigations headquarters received the agreement dated 12th March 2011, the first defendant's known signatures and the first defendant's specimen signatures and upon examining them, his colleague Inspector Bernard Cheruiyot wrote a report dated 28th December 2018 in which he formed the opinion that the first defendant did not sign the agreement. He produced a copy of the said report and added that he and Inspector Bernard Cheruiyot did the examination together.

21. The defence case was then closed. Parties were then ordered to file and exchange submissions.

22. The plaintiff filed his submission on 24th June 2021 and identified three issues for determination: whether the subject transaction was an agreement for sale of land or a lease; whether the defendants are in breach of the agreement for sale of land; and lastly, what remedies are available to the plaintiff.

23. On the first issue, the plaintiff argued that Sections 40 and 41 of the Registration of Titles Act (repealed) provided that a lease exceeding 12 months must be written and registered. The plaintiff further submitted that the transaction could not therefore be a lease and that it is impossible to say that the plaintiff paid KShs 600,000 per acre as rent in the year 2011.

24. The plaintiff further submitted that his signature and that of the first defendant in the sale agreement were attested by an advocate in compliance with Section 3 (3) of the *Law of Contract Act* and that the letter dated 3rd April 2015 written by the first defendant contains a breakdown which confirms a sale transaction as opposed to a lease. Further relying on the doctrine of estoppel, inter alia the cases of Isabel Chelangat v Samuel Tiro Rotich & 5 others [2012] eKLR and Joyce Chepkemoi Ng'eno v Samuel Kipkorir Ng'eno & 2 others [2016] eKLR, the plaintiff argued that the property was held in joint tenancy and that the deceased knew and approved of the sale transaction.

25. Regarding whether the defendants are in breach of the agreement for sale of land, the plaintiff submitted that he paid the full purchase price of KShs 6,000,000 which the defendants received without any complaint and that the defendants have so far not transferred the suit property to him. That the defendants have not offered any plausible reason to justify their failure to fulfil their obligations under the sale agreement. He therefore urged the court to find that the defendants are in breach.

26. On the issue of what remedies should be granted, the plaintiff relied on the case of Fredrick Korir v Soin Women Group (Sued through Eunice Towett, Jane Mwolomet, Lucio Chebocho [2018] eKLR and argued that he should be granted the reliefs sought since damages will not be an adequate remedy.

27. The defendant filed his submissions on 28th September 2021 and framed the following issues for determination: whether there was a valid land sale agreement between the plaintiff and the defendant capable of being enforced; whether the sale agreement was binding without the consent of the Land Control Board; whether the plaintiff and the first defendant enter into an oral lease agreement; and lastly, what remedies are available to the plaintiff and the defendant.

28. As to whether there was a valid land sale agreement between the plaintiff and the defendant capable of being enforced, the defendant relied on Section 3 (3) of the *Law of Contract Act*, Sections 44 (1) and 91 (4) of the *Land Registration Act* and Section 102 (1) of the Registered *Land Act* (repealed) and argued that since the suit property was jointly owned and considering that the second defendant was not party to the sale agreement, the agreement was void. Reliance was also placed on the cases of Re Hilton (1090) 2 Ch. 548 and Josephat Mwangi Kamunge & Another v Susan Wangeci Njirani [2018] eKLR. Further, relying on the forensic document examination report, the defendant argued that he did not sign the agreement.

29. The defendant also relied on Hirani Ngaithe Githire v Wanjiku Munge [1979] eKLR as well as Section 6 of the *Land Control Act* and argued that the transaction is void for want of consent of the Land Control Board.

30. Regarding whether the parties entered in to a lease agreement, the defendant submitted that the parties entered in to an oral gentleman's lease agreement and added that should the court find that there was a lease agreement, the court should only order for a refund of KShs 6,000,000 the plaintiff paid, without interest, and subject to deduction of rent incurred during the period the plaintiff had been in occupation and use of the land.

31. The defendant further submitted that an order for specific performance is not available to the plaintiff since such an order can only be granted to a party who has fulfilled all the terms of a valid and enforceable contract. That the prayer for compensation of KShs 12,000,000 is not justified because the plaintiff has not tendered evidence to show how the suit land appreciated to that value by the time he was filing the suit and in any case such a prayer was not envisaged in the alleged sale agreement. In conclusion, he urged the court to dismiss the plaintiff's suit with costs.

32. I have carefully considered the parties' pleadings, evidence and submissions. The issues that arise for determination are whether the subject transaction was an agreement for sale or a lease; if a sale agreement, whether it is enforceable; and lastly, whether reliefs sought are available.

33. There is no dispute that the defendants are the registered proprietors of the parcel of land known as Land Reference Number 4815/3 and that their title was issued under the Registration of Titles Act (repealed). The plaintiff contends that on 12th March 2011, he entered into an agreement with the first defendant to purchase 10 acres of the aforesaid parcel, comprised in two 5-acre portions which upon survey became known as LR No 4815/5 and LR No 4815/6. The defendants on the other hand contend that the transaction was a lease as opposed to a sale and that they had an oral lease, initially for a term 6 years from 2011 but which was later changed to a term of 10 years from 2011.

34. As at 12th March 2011, the Registration of Titles Act (repealed) was still in force. Section 40 of the said statute provided:

> When any land is intended to be leased for any term exceeding twelve months, the proprietor, or if the proprietor is a minor or of unsound mind the guardian, next friend or other person appointed by the court to act on behalf of the minor or person of unsound mind in the matter, shall execute a lease in form H in the First Schedule, and every such instrument shall, for description of the land intended to be dealt with, refer to the grant or certificate of title of the land, or shall give such other description as may be necessary to identify the land:
>
> Provided that no lease for the period above specified shall be valid unless registered.

35. It follows therefore that no oral and unregistered lease for a term of 6 or 10 years could have been validly entered into in respect Land Reference Number 4815/3 or any portion thereof. Further, the

defendants, who insist that what they had was a lease as opposed to a sale, have not offered any convincing evidence on the terms of the lease contract, especially the rent due and the frequency thereof. Thus, the transaction between the parties was one of an agreement for sale and not a lease.

36. That, however, is not the end of the matter. The question to be answered next is whether the sale agreement dated 12th March 2011 is enforceable. I am aware that the first defendant has denied ever signing the agreement. I will not preoccupy myself with deciding whether or not the first defendant did indeed sign the agreement since, as will be manifest later in this judgment, it does not matter whether he in fact signed it.

37. The case that the plaintiff has placed before the court is one for the disposition of an interest in land. Section 3 (3) of the *Law of Contract Act* provides:

> 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.

38. It bears repeating that on the face of it, the agreement dated 12th March 2011 concerned sale of a portion of Land Reference Number 4815/3, a property whose joint registered owners were the defendants herein. As such, both defendants were proper parties to the agreement. The plaintiff has conceded that the second defendant did not sign the agreement. In those circumstances, it is inconceivable how the agreement could be enforceable without the participation of the other registered proprietor.

39. A reading of the certificate of title in respect of Land Reference Number 4815/3 shows that the defendants are registered as proprietors of the leasehold interest in the said property "as joint tenants". The law on joint tenancy is that a co-owner cannot exclude the other. See Mukazitoni Josephine v Attorney General Republic of Kenya [2015] eKLR. As at 12th March 2011 when the first defendant entered into the sale agreement, the second defendant was still alive and a co-owner. She could not validly be excluded from any transaction to sell any part of the said property. There is on record herein a witness statement signed by her on 19th May 2017 in which she made it clear that she had no role in the agreement and that as far as she was concerned, the agreement was void.

40. The second defendant's protestations against the agreement, which predate her death, constitute a cause of action which would survive for the benefit of her estate. It matters not that following her death on 17th May 2020, the situation as to ownership of the property may change in view of the joint tenancy. The focus must remain the validity or otherwise of the agreement that was entered into without her participation on 12th March 2011. Her consent cannot be granted posthumously.

41. Further, even though the first defendant is now an administrator of the second defendant's estate, I note that the letters of administration issued to him on 2nd October 2020 are limited for the purposes of prosecuting this case only. In other words, the first defendant does not hold any full grant in respect of the second defendant's estate. Thus, the sale agreement dated 12th March 2011 cannot be enforced

against the second defendant's estate in this case in view of the limited grant. I therefore find and hold that the sale agreement dated 12th March 2011 is not enforceable.

42. In view of the foregoing, the plaintiff's prayers for a permanent injunction to issue to restrain the defendants, a declaration that the defendants failed to deliver title to him and an order of specific performance are not merited and cannot therefore issue. As was held in Reliable Electrical Engineers (K) Ltd v Mantrac Kenya Limited [2006] eKLR, jurisdiction to order specific performance is based on the existence of a valid and enforceable contract. In this case, the agreement dated 12th March 2011 is both invalid and unenforceable. For similar reasons, the prayer for KShs 12,000,000 being compensation for loss of appreciation of suit properties is devoid of merit and will not be granted.

43. The plaintiff also prayed for a refund of the sum of KShs 6,000,000 which he paid to the first defendant. The first defendant has not denied receipt of the said amount and has in fact indicated in his submissions that he is ready to refund the amount without interest and subject to deduction of rent incurred during the period the plaintiff has been in occupation and use of the land. The first defendant neither mounted a counterclaim nor offered evidence as regards the rent due and the quantum thereof. As I held earlier, there was no valid lease. There is thus no valid reason to deduct any amount on account of non-existent rent. Regarding the claim for KShs 300,000 said to be outgoings, no proof of payment of the same has been demonstrated. I will therefore not award it.

44. In his testimony, the first defendant urged the court to order eviction of the plaintiff from his land. Considering that the first defendant did not file any counterclaim, I have agonised over what orders to make. Ultimately, the justice of the situation does not allow the plaintiff to recover the sum of KShs 6,000,000 which he paid to the first defendant and still retain possession of the land. The plaintiff in his own testimony stated that he had been faced with threats of repossession from as far back as 2016. It is an outcome that should not surprise him. Under Article 159 (2) (b) and (d) of *the Constitution* and Section 3 of the *Environment and Land Court Act*, the court has a wide latitude to ensure that substantive justice prevails. The Court of Appeal emphasized that power in the case of Coast Development Authority v Adam Kazungu Mzamba & 49 others [2016] eKLR. I will in the circumstances order vacant possession.

45. In the result, I make the following orders:

    a. I enter judgment in favour of the plaintiff and against the first defendant for KShs 6,000,000 (six million) being refund of the sum paid to the first defendant.

    b. Interest on (a) above at court rates from the date of filing of this suit until payment in full.

    c. The plaintiff, his servants and agents to vacate the parcels of land known as LR No 4815/5 and LR No 4815/6 within 90 (ninety) days from the date of delivery of this judgment. In default, the defendants shall be at liberty to evict them.

    d. Considering that both sides have had a measure of success, I make no order as to costs of the suit.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 25TH DAY OF MAY 2022.

D. O. OHUNGO

JUDGE

Delivered through electronic mail in the presence of:

Court Assistant: E. Juma