



REPUBLIC OF KENYA



Lubano & 2 others v Machuka & 4 others (Environment & Land Case E34 of 2022) [2025] KEELC 427 (KLR) (6 February 2025) (Judgment)

Neutral citation: [2025] KEELC 427 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE E34 OF 2022
FM NJOROGE, J
FEBRUARY 6, 2025**

BETWEEN

**GODFRED MASINDE LUBANO 1ST PLAINTIFF
JOSEPH WAKOLI WEKESA 2ND PLAINTIFF
KIZITO MABISI LUBANO 3RD PLAINTIFF**

AND

**JUDY WANJIRU MACHUKA 1ST DEFENDANT
DAUDI MACHUKA 2ND DEFENDANT
REHEMA MACHUKA 3RD DEFENDANT
MARGARET NGINA MUIRU 4TH DEFENDANT
LEONARD MACHUKA 5TH DEFENDANT**

JUDGMENT

Plaint

1. In the plaint dated 31/5/2022, the following prayers are sought:
 - a. A permanent injunction restraining the defendants, their servants and /or agents from interfering in any manner whatsoever with the plaintiffs' quiet enjoyment working and stay on LR No 1705/233/6 and Kilifi/Mtondia/499, 500 and 501;
 - b. An order declaring that the late Jessee Simiyu Machuka sold LR No 1705/233/6 to the 1st and 2nd plaintiffs and Kilifi/Mtondia/499, 500 and 501 to the 3rd plaintiff;
 - c. An order that the 1st 2nd and 3rd defendants transfer LR No 1705/233/6 to the 1st and 2nd plaintiffs and Kilifi/Mtondia/499, 500 and 501 to the 3rd plaintiff;



- d. Costs and interest.
2. The plaintiffs' claim is that the 1st defendant is the widow of the late Jese Simiyu Machuka (Jesse) who together with the 4th defendant were granted letters of administration intestate for the deceased's estate. The 2nd and 3rd defendants are the children of Jesse while the 5th defendant is Jesse's brother.
 3. On 17/2/2002, Jesse offered the 1st and 2nd plaintiffs a two-acre parcel of land known as LR NO 1705/233/6 at a cost of 14,000 dollars. As each of the two plaintiffs was taking one acre, each paid 7000 dollars separately.
 4. As for the finer details as to payments, the 1st plaintiff paid Jesse 2000 dollars in cash while in Kenya on 31/10/2009. On 2/12/2003 Jesse confirmed payment of the full purchase price of 7000 dollars by the 2nd plaintiff and declined transfer LR No 1705/233/6 till the 1st plaintiff paid the balance of 2200 dollars.
 5. In respect of the 1st plaintiff, on 12/7/2010, Jesse confirmed that he had completed payment and asked for Kshs 60,000/= for fencing the 2 acres which was paid and fencing done.
 6. On 31/10/2009 while at Kilifi, Jesse offered the 3rd defendant Kilifi/Mtondia/499, 500 and 501 at a price to be later agreed; the mode of payment was contained in various emails dated 24th November 2009, 26th November 2009, and 29th November 2009.
 7. The 3rd plaintiff paid a total of Kshs 2,500,000/- using 5 bankers cheques receipt of which Jesse acknowledged by email. Jesse also advised the 3rd plaintiff to take care of the plots.
 8. Later, on 15/1/2010 Jesse confirmed that the 3rd plaintiff had completed payment of the agreed purchase price for 2 parcels and granted him possession thereof on 30/1/2010, of which the 3rd plaintiff has been in exclusive use since and on which he has carried out several developments.
 9. The 3rd plaintiff also paid for Parcel Nos 501 by way of 3 bankers cheques the sum of Kshs 1,500,000/= between 4/9/2010 and 30/12/2012. He has also been in exclusive possession of that parcel.
 10. However, before Jesse could complete the transfers, he passed away on 9/5/2013 and was laid to rest in Kilifi allegedly as per his wishes.
 11. Fresh beacons appeared on the suit land and on 16th May 2022 the 3rd plaintiff was informed by workers that the 1st defendant and some Police officers had visited the land and on enquiry from the police he was informed that the 1st defendant had reported a case of trespass. On 20/5/2022 the 1st defendant visited the suit land with surveyors to subdivide it. A search on the titles of the suit plots revealed that the police were in the process of conducting some kind of investigations.
 12. It is pleaded that the 1st and 4th defendants connived and with the contributory negligence of the 5th defendant wilfully distributed the suit parcels of land to the 1st, 2nd and 3rd defendants instead of the plaintiffs. It is alleged that though there was a will by the deceased the succession cause was conducted as an intestacy.
 13. An affidavit of service filed on 21/6/2022 showed service of summons upon the 1st, 2nd, 3rd and 4th defendants. The 1st -4th defendants entered appearance on 20/6/2022. On 3/10/2023, interlocutory judgment was entered against the 5th defendant who never filed appearance or defence. On 24/10/2023 interlocutory judgment was entered against the 1st -4th defendants for default of defence.
 14. Hearing of the three plaintiffs' evidence took place on 16/1/2024 when they testified orally and adopted their filed witness statements and on the same day the plaintiffs' case was marked as closed.



15. The 1st plaintiff testified as PW1 and his evidence is that he was a friend to Jesse from 1983. In 2001, he and Jesse spoke of buying land in Kilifi and retirement plans. In 2002 Jesse offered PW1 2 acres and PW1 invited the 2nd plaintiff to take one of the 2 acres. Jesse shared his bank details with PW1 and the latter wired the first instalment of 1500 dollars. After that, he wired another amount of 1000 dollars; he also later paid Jesse 800 dollars in cash when he visited PW1 in California. Finally, he paid to Jesse 2000 dollars in cash on 31/10/2009 as the last instalment for his one acre. On that last date mentioned, PW1 and the 2nd plaintiff and Jesse were together in Kilifi and Jesse introduced his family and informed them of intent to offer land to the 3rd plaintiff. Later after PW1 had gone abroad Jesse asked for Kshs 60,000/= to fence the land and he and the 3rd plaintiff supervised the task.
16. PW1 took possession of his one acre when Jesse was alive. According to information from a source he did not state Jesse had a will which provided for his burial in Kilifi as opposed to his ancestral home in Bungoma, which requirement was followed. The suit lands herein were not mentioned as part of his estate in that will. His widow, the 1st defendant, also incorporated someone other than the 5th defendant to become a co-administrator of the deceased's estate which according to PW1 is contrary to the norm. Subsequently the suit lands were distributed to the family members as part of Jesse's estate despite sale to the plaintiffs.
17. The 2nd plaintiff testified as PW2. His evidence is that he knew Jesse from university days; PW1 informed PW2 of a 2-acre parcel of land in Kilifi offered for sale by Jesse. He agreed to take one acre. PW1 informed him that the land was known as LR NO 1705/233/6. PW1 also forwarded the details of the bank account into which he was to wire funds. PW2 also exchanged some electronic mail with Jesse directly in respect of the alleged sale and in that correspondence, Jesse intimated possession of the suit land would be given to the 1st and 2nd plaintiffs upon payment of first instalment.
18. PW2 wired 1500 dollars as first instalment on 1st March 2002 which Jesse acknowledged. In September 2002, he wired a further 800 dollars to Jesse. He also made some other unspecified payment which Jesse acknowledged. On 29th February 2003 he visited Jesse's Kilifi home and paid Jesse 900 dollars "in cash in Kenya shillings." On 10th July 2003 PW2 wired 1600 dollars to Jesse. On 25th November 2003 PW2 paid the last instalment of 2200 dollars.
19. On 21/6/2009 PW2 was in Kenya and met Jesse and his family. On 12/7/2010, PW1 was informed of the fence issue. On 16/12/2010 PW2 drove to Kilifi and took possession of his one-acre piece of land while it was still part of the undivided 2-acre parcel. In March 2014, PW2 was again in Kenya and visited the 1st defendant and it was agreed that evidence of the purchase be provided to her and the buyers await the succession cause. To date the 1st defendant has never transferred the land to PW2. The rest of PW2's evidence on the succession issue resembled that given by PW1.
20. The 3rd Plaintiff testified as PW3. His evidence is that his brother, the 1st plaintiff, sent him an electronic mail on 1/10/2009; and asked him to find Jesse and ask him to accompany PW1 and PW3 to visit the plot he had sold the 1st plaintiff. On 31/10/2009 PW1 and PW3 met with Jesse in Kilifi and they visited the suit lands where Jesse showed the beacons. PW3 was impressed by what he saw and sought to know if he could also get land nearby, and Jesse offered a portion of 3 acres near his home at Bofa.
21. Jesse informed his wife that PW3 was interested in purchasing land adjoining his home and they viewed that land, which was a five-minute walk away from the home. The land was identified as Kilifi/Mtondia/499, 500 and 501. They agreed on the price.



22. PW3 secured a loan from Afya Sacco amounting to Kshs 2,500,000/- and Afya Sacco raised 5 cheques all dated 7/1/2010 in the name of Jesse for the total sum of Kshs 2,500,000/-. PW3 then handed over the cheques to Jesse at Kenyatta University on 7/1/2010.
23. On 15/1/2010 Jesse acknowledged receipt of the funds and gave PW3 possession of two plots of land and he has been in possession since. Later on in July 2010 PW3 and Jesse agreed on the price for the remaining parcel and PW3 asked for time till September to secure further funding. He secured a KCB loan “through Afya Sacco” and raised 3 bankers cheques totalling to Kshs 1,130,000/-. (he does not state the fate of those cheques). He also paid Kshs 40,000/- to Jesse through mobile money. The total sum he paid Jesse for the suit plots was approximately Kshs 4,200,000/-.
24. After payment the 3rd plaintiff took possession of the suit plots in January 2010 and developed the suit plots during Jesse’s lifetime, employing his own caretaker. He deposited construction materials thereon.
25. On 12th July 2010 Jesse requested from the three plaintiffs for Kshs 60,000/- by email for fencing the parcels he had sold to PW1 and PW2. PW3 oversaw the fencing of the Bofa plots. Jesse also introduced PW3 to the neighbours, one of whom provided him with 10,000 construction stone blocks, a welder who fabricated for him the gate, and a hardware supplier.
26. Jesse passed away in May 2013 and the three plaintiffs allowed the family to grieve and later on continued with communications with the 1st defendant. However, the 1st defendant ended up being evasive and avoided his calls altogether.
27. In March 2022, PW3 got information that activity had been noted at the Bofa plots and he visited them and witnessed new beacons on Jesse’s side but not on the other side of the two other plaintiffs. Upon conferring with his co-plaintiffs they instructed him to clear the bushes on their side of the land and erect a temporary structure with a caretaker on site. He also planted maize on the cleared field to avoid encroachment and put a worker on the land.
28. When PW3 carried out a search at the lands office, it showed the plots were still registered in Jesse’s name but were under investigation by police. On 16th May 2022 a farm worker informed him that the 1st defendant had visited the land in the company of the police which report he confirmed with the police to be true. On return from abroad he secured a copy of Jesse’s purported will from the person who had allegedly witnessed it. He noted that the will had excluded the suit plots.
29. On 20th May 2022 surveyors installed new beacons on LR NO 1705/233/6. He later learnt on 21/5/2022 that the 1st defendant had reported a case of trespass by the plaintiffs onto the estate property. The rest of PW3’s evidence on the succession cause issue relating to Jesse’s estate was the same as that of the other plaintiffs.

Submissions.

33. The plaintiffs filed submissions dated 31/1/2024 while no submissions were filed for the defendants.

Determination.

34. The main question arising for determination in the present suit is whether Jesse Simiyu Machuka (Jesse) sold the suit lands to Godfred Lubano Masinde (Godfred), Joseph Wakoli Wekesa (Joseph) and Kizito Mabisi Lubano (Kizito) (the 1st -3rd plaintiffs respectively) as claimed by the plaintiffs. This court must therefore examine the following issues:
 - i. Is there an express written contract for the sale of the suit lands to the plaintiffs?



- ii. If the answer to (a) is in the negative, were there any terms of a contract incorporated, or set out by reference, in any other document that is before court as provided for in Section 3(5) of the Act which could be interpreted as creating a contract between Jesse and the plaintiffs?
35. There is no defence filed to the claim. As per the holding in *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* [2014] eKLR case, it is upon a claimant to establish his case to the required standard by way of evidence notwithstanding absence of a filed defence. In that case it was held as follows:
- “It is a firmly settled procedure that even where a defendant has not denied the claim by filing of defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of a rebuttal by the other side.”
36. A contract for the sale of land should comply with the provisions of Section 3(1) of the *Law of Contract Act* which provides as follows:
- “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.”
37. No formal written agreement in this case, signed between the deceased and the plaintiffs and attested to by a witness who was present when the contract was signed, has been produced by any of the plaintiffs at the hearing. That appears to answer the first issue quite early in this inquisition but the evidence is there to support that. First, the plaintiffs never produced any such agreement and it is clear from their own evidence that it was never made as is seen hereunder.
38. Notably, the plaint reads that on 31/10/2009, while in Kilifi Jesse offered the 3rd plaintiff Kilifi/Mtondia/499, 500 and 501 at a price to be later agreed and during the hearing, no such agreement was shown to have been reached. If there existed an agreement that clearly set out the consideration, the 3rd plaintiff would have simply produced the original in proof of the fact.
39. The dearth of evidence of what had transpired between the plaintiffs and the deceased can be seen in the copy of mail dated 8/1/2010 (copied to the 1st and 2nd plaintiffs) in which the 3rd plaintiff is perceived to be pressing the deceased for acknowledgments regarding “commitments, process, tentative timelines and the material exchanges we have already accomplished as of yesterday January 7, 2010.” Clearly, Kizito did not consider the electronic mail as sufficient evidence of the plaintiff’s agreement with the



deceased, if any, and wanted some express evidence of the existence of contractual relations, a “record/documentation of the transactions for posterity” as he phrased it.

40. By a mail 19/2/2002 purportedly from Jesse to Godfred, he apparently gives the latter the details of the two-acre plot, and he seeks that Godfred do mail a sale agreement for his execution, but there is no evidence that that was ever subsequently done.
41. This court concludes that there was no formal agreement between Jesse and any of the plaintiffs.
42. There being no agreement, this court must examine the evidence of the writings presented before it, to establish if the terms of a contract were incorporated, or set out in any other document by reference as provided for in Section 3(5) of the Act.
43. Regarding the 1st plaintiff, this court has found no copy of electronic mail or other document that stated expressly that there is a contract between the deceased and any or the 1st plaintiff, or which is expressed to be one. The copies of purported communications between the 1st plaintiff and Jesse leave a lot of gaps as to whether there was any sale agreement over the LR No 1705/233/6. The 1st plaintiff’s documentary evidence does not identify the land reference number of any land and it is not possible for this court to assume that any mention of land therein is in reference to LR No 1705/233/6.
44. Regarding the 2nd plaintiff, the electronic mail dated 19/2/2002 purportedly from Jesse to Godfred, he apparently informs the latter that the details for the two-acre plot are as follows: “Land Title No CR 28612, LR No 1705/233/6; Land Survey No 207029; size 2 acres (0.7133 hectares).” No specific terms of any agreement are evident in that communication also. By that mail Jesse seeks that Godfred do mail the sale agreement for his execution, but there is no evidence that that was ever subsequently done. Inclusion of what he wanted to be the terms of the proposed agreement would have aided the court and the plaintiffs greatly. However, it is also obvious that the said mail does not purport to offer LR No 1705/233/6 for sale to Joseph, and there is no other mail in his bundle of documents that purports to do so. Joseph indeed expresses his doubts when in an electronic mail dated 3/3/2002 he indicates that he would be drawing up a contract for the transaction, forward it to Jesse for execution. In the same mail he seeks the answer to the question as to what instruments would be used to guarantee the interests of the parties to the purported transaction. There is evidently too much uncertainty regarding what the intention of the parties were, especially now that the only evidence available is that of the plaintiffs, Jesse having met his demise long ago.
45. This court can not presume the existence of an agreement or its terms. It is for the parties to establish by means of oral and documentary evidence that there was a contract. It is not possible in the circumstances to hold that the purported communications between Jesse and the 1st and 2nd plaintiff analyzed above amount to a contract between them for the sale of LR No 1705/233/6.
46. In Kizito’s case, there is not even a single mention in his bundle of documents of any of the parcels that he claims to have purchased, that is Kilifi/Mtondia/499, 500 and 501; It is also not possible in the circumstances to hold that the purported communications between Jesse and the Kizito amount to a contract between them for the sale of Kilifi/Mtondia/499, 500 and 501.
47. It is unfortunate for the plaintiffs that in the only documents they have presented before court, perchance they were to deemed be admissible as evidence, there are numerous references to transmissions of funds which do not effectively state that payment was consideration for the sale of any land sold to them by Jesse. In this court’s view, the mere transmission of those funds can not, without proof of a sale agreement, be presumed to be consideration for the sale of the suit plots. Subject to what this court will state herein below regarding proof of payment, it would be too much of a presumption to hold that the funds were remitted as consideration for any of the suit plots.



48. The plaintiffs missed out on the opportunity to formalize their transaction with the deceased if there was any, when they failed to secure an agreement executed between them and Jesse.
49. Even if the copies of electronic mail were to be relied on in evidence there is cause to believe that the plaintiffs were not content with electronic mail as the basis of the contract, and they intended to have a written agreement as expressed in the copy dated 15/2/2002 purportedly written by the Godfred to Jesse. The copies of electronic mail purportedly exchanged between them and the deceased, due to their secondary nature and owing to lack of a certificate under Section 106B of the Evidence Act, are also of no evidential value in their case.
50. This court holds that the correspondence between the parties and all other documents produced by the plaintiffs are insufficient to establish that there was a contract or contracts between them and Jesse for the sale of any of the suit parcels of land.
51. Lastly even if the holding herein above that the correspondence between the parties do not amount to evidence of a contract between them were deemed to be the incorrect position, proof of payment of full consideration coupled with possession is vital to establish that the terms of an agreement have been complied with devoid of any vitiating breach. It has not been established by way of evidence that money changed hands between the plaintiff and Jesse.
52. This court has already indicated that the copies of electronic mail, being electronic records, have not been proved by way of production of a certificate as required by Section 106B of the Evidence Act. The 2nd plaintiff's documents W-9, W14 and W16 are not certified electronic fund transfers and their evidential value in this case is non-existent. It is also not understood why Joseph's bank statement showing that the funds left the 2nd plaintiff's account and were transmitted to Jesse's account was not produced. Neither is it clear why the 1st and 3rd Plaintiffs never presented their bank statements showing transmission of funds to Jesse's account. A court can not merely believe it to be true that a payment has been effected simply because the purported payer states he has remitted money. In many instances in the electronic mail if the contents therein are anything to rely on, Jesse himself appeared unsure of whether any funds had been remitted or how much.
53. In totality the mails produced by the plaintiff as evidence depict a situation of utter confusion where the accounts of all the payments allegedly made by the plaintiffs can not lead to a reasonable conclusion by this court as to what amount each ever paid to Jesse or for what purpose. Furthermore, it can also not be understood why Jesse's purported account was abroad while the suit land is situate here in Kenya, or why even while the consideration was purportedly set in Kenyan currency for the 3rd plaintiff he still had to purport to pay in terms of dollars. Without a bank statement showing whose account was credited with the loan proceed funds by way of the bankers cheques exhibited by the 3rd plaintiff, the fact that he has laid before this court documents showing that he took out two loans is insufficient evidence to prove that he paid the proceeds to Jesse at all or as consideration in respect of the parcels he purports to have purchased from him.
54. The lack of evidence to prove payment of consideration renders any claim of possession not to be of any value to the plaintiffs or any of them. The remedies of injunction and specific performance that they seek are equitable remedies and they are predicated on a party coming to court with clean hands. In this dispute, the court is unable to state unequivocally that the plaintiffs' have established their claim in that there is neither any written sale agreement for the suit parcels of land or any other documentary evidence that carries the terms of agreement between them, or proof of payment of consideration for the suit lands.



55. It matters not that the plaintiffs point to Jesse's purported will as having excluded the suit properties out of the ostensible knowledge on his part that he had sold them. How that purported last will came into being is not known to this court as it has not been proved at the proper forum and it must be summarily rejected.
56. For the foregoing reasons the interlocutory judgment entered against all the defendants in this suit as well as the orders of injunction issued against them are hereby vacated and the plaintiffs' claim is dismissed, but as no defence had been filed against it, there shall be no orders as to costs.

JUDGMENT DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 6TH DAY OF FEBRUARY 2025.

MWANGI NJOROGE

JUDGE, ELC MALINDI

