

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MOMBASA
ELCC NO. 256 OF 2018

FRANSCISCA THINGA KALU (As the legal representative of the
estate of JUMWA KALU alia JUMWA THINGA KALU
..... PLAINTIFF

VERSUS

MORIN LEAH AKECH AUMA 1ST
DEFENDANT

MICHAEL ARINA KNIGHT 2ND
DEFENDANT

N. J. MAGIYA ADVOCATE 3RD
DEFENDANT

REGISTRAR OF LANDS, MOMBASA 4TH
DEFENDANT

THE HONOURABLE ATTORNEY GENERAL 5TH
DEFENDANT

AND

PETER OMWENGA ADVOCATE 1ST THIRD
PARTY

FRANCIS KADIMA ADVOCATE 2ND THIRD
PARTY

JUDGEMENT

1. This suit was commenced by Jumwa Tinga Kalu, hereinafter referred to as the deceased, through the plaint dated 29th October 2018, and after her death on 6th March 2020, Francisca Thinga Kalu, her daughter, replaced her as the legal representative of her estate, and the amended plaint dated 7th

February 2022 was filed. The amended plaint was further amended on 18th December 2023 to incorporate the two third parties. The plaintiff inter alia avers that the deceased was the registered proprietor of plot Subdivision No. 2767 (Original No. 408/4) Section 111 Mainland North, measuring 5.820 hectares, original plot, that she subdivided into several plots and some were transferred to third parties, leaving plot Subdivision No. 4372/3, Section 111/MN measuring 3.5 acres; that the deceased then sold one acre out Subdivision No. 4372/3, Section 111/MN to Eddah Dzame Albert, who was represented by Ms. Kenga & Company Advocates, to whom she handed the original certificate to have the one acre subdivided and transferred to the said purchaser; that the said advocate was to return the original title to her after completion of the transaction but did not do so; that sometimes in 2013 the 2nd defendant approached the deceased's family and proposed to purchase two acres out of Subdivision No. 4372/3, Section 111/MN, and the deceased agreed; that the 2nd defendant's advocate prepared an agreement for sale dated 28th June 2013, that was signed by the 2nd defendant and the deceased's three children, including the plaintiff, as witnesses

but when it was taken to the deceased, she declined to sign it after noticing the deed plan indicated the sale was for 2.43 acres instead of 2 acres; that the agreement was rescinded, and 2nd defendant's advocates wrote demanding refund of the Kshs.500,000 paid as deposit; that deceased later came to learn that the 2nd defendant had proceeded to process a subdivision of plot Subdivision No. 4372/3, Section 111/MN, without her knowledge, and got Subdivision No. 5136 (Original No. 4372/3) of Section 111/MN, the suit property, in the name of deceased; that the 2nd defendant then filed a caveat dated 28^h June 2013, against the suit property claiming purchaser's interest, and when asked to remove it he responded through the letter dated 10th December 2013, inter alia demanding payment of Kshs.4,004,250 first; that 1st defendant went to the deceased's home on 15th June 2013 and offered to buy the suit property for Kshs.15million but deceased declined the offer; that sometimes in 2016, the deceased learnt that the suit property had been sold to the 1st defendant, and together with her children they reported to Mtwapa Police Station; that the 1st defendant was arrested and charged in Shanzu C. M. Criminal Case No. 1180 of 2016, Republic versus Leah Morine

Aketch; that from the documents the deceased obtained from the investigating officer, she learnt of among others a transfer and sale agreement dated 18th June 2015, for the suit property for Kshs.18million, that she allegedly signed before 3rd defendant. The plaintiff has set out the particulars of fraud, misrepresentation and illegalities attributed to the 1st to 3rd defendants, 1st & 2nd third parties and 4th defendant at paragraphs 22 & 28 of the further amended plaint, and prays for the following:

- a. *“A declaration that the suit property Plot L. R. No. 5136 (Original No. 4372/3) of Section 111 Mainland North belongs to the deceased, Jumwa Thinga Kalu, and that she never transferred the same to either the 1st defendant or the 2nd defendant or anyone at all.*
- b. *A declaration that the 1st defendant acquired Plot L. R. No. 5136 (Original No. 4372/3) of Section 111 Mainland North fraudulently.*
- c. *A declaration that the 1st defendant never acquired a good title over Plot L. R. No. 5136 (Original No. 4372/3) of Section 111 Mainland North.*

- d. A declaration that the 1st defendant did not pass a good title to the 2nd defendant over Plot L. R. No. 5136 (Original No. 4372/3) of Section 111 Mainland North.
- e. A declaration that the agreement of sale and a transfer both dated 18th June 2015 between the deceased, Jumwa Thinga Kalu and the 1st defendant are null and void.
- f. A declaration of sale dated 22nd June 2015 and transfer dated 23rd June 2015 between the 1st and 2nd defendants are null and void.
- g. A declaration that the 1st and 2nd defendants have committed the illegal acts of trespass on the deceased's property known as Plot L. R. No. 5136 (Original No. 4372/3) of Section 111 Mainland North.
- h. A mandatory order do issue against the 1st and/or the 2nd defendants to surrender to the plaintiff the original certificate of title CR, No. 60270/1.
- i. An order directed to the Registrar of Lands Mombasa to cancel entry Nos. 4 and 5 on the original certificate of title CR. No. 60270/1.
- j. An order for damages for loss of use of Plot L. R. No. 5136 (Original No. 4372/3) of Section 111 Mainland North.

k. A permanent injunction restraining the defendants by themselves, their servants, employees, assignees and/or agents or any other person acting through from disposing of, transferring, trespassing onto, constructing, advertising for sale or interfering in any way with the suit property known as Plot L. R. No. 5136 (Original No. 4372/3) of Section 111 Mainland North.

l. Interest on (j) above.

m. Costs of the suit.”

2. The 1st defendant filed her statement of defence dated 14th December 2018 opposing the plaintiff's claim, and inter alia averred that it was the deceased and her family who briefed her about their engagement in respect of the suit property with the 2nd defendant, and her involvement was on invitation to help resolve the dispute; that the deceased and her family offered to sell the suit property to her as they did not want to deal directly with 2nd defendant, and the sale agreement dated 18th June 2015 that they entered into is lawful, and deceased signed it before an advocate; that the transfer of the suit property to her and thereafter to 2nd defendant were lawfully done, and the entries made by 4th defendant on Title No. C.R.

No. 60270 were necessary for completion of the registration exercise and therefore lawful; that she was facing criminal charges before the Shanzu court and the plaintiff has obtained documents subject matter of her averments at paragraphs 18 to 21 of the plaint from that case, that was still pending in court; that the deceased has not suffered any loss as she sold the suit property lawfully and willingly, and her claim should be dismissed with costs.

3. The 2nd defendant opposed the plaintiff's suit though the statement of defence dated 4th December 2018, inter alia averring that he was aware of the sale agreement in respect of Subdivision No. 5136/111/MN, but was a stranger about it being rescinded; that the particulars of fraud attributed to him are not true, and was a stranger to the sale agreement between the plaintiff and 1st defendant; that he denied any fraud on his part averring that he was represented by an advocate who transacted the sale of the suit property to him, received payments and processed the transfer; that he complied with the terms of the sale agreement and paid the purchase price, and any claim the plaintiff may have regarding

the accounts should be directed to her advocates and not him, and the suit should be dismissed with costs.

4. The 4th & 5th defendants filed their statement of defence dated 4th July 2019, inter alia averring that they were not parties to the sale agreements between the plaintiff and 1st & 2nd defendants; that a caveat dated 16th September 2013 was registered by the 2nd defendant, and that the required procedure was followed in registering the transfer upon the necessary documents being presented; that they are not privy to the pleaded particulars of fraud, and illegalities, did not participate in any fraudulent activities or collude with other defendants to defraud the plaintiff; that if any mistake occurred in the transactions and or entries made by the 4th defendant, then it was as a result of the 1st to 3rd defendants misrepresentations, and the suit should be dismissed with costs.

5. The 1st defendant sought for the court's leave to issue third party notices through the notice of motion dated 7th March 2023 to Peter M. Omwenga and Francis Kadima to indemnify the 1st defendant. The application was heard on merit and allowed through the ruling delivered on 6th December 2023,

inter alia directing the two third parties to file and serve their response in 14 days, and that the third parties liability to indemnify the 1st defendant be tried together with the main suit.

6. The 3rd defendant filed the statement of defence dated 15th January 2024 in opposition to the plaintiff's claim, inter alia averring that he was not aware of the rescission of agreement or change in size of property being sold; that he witnessed the deceased, assisted by her daughter, thumb print the sale agreement and transfer both dated 18th June 2015, and handed them to 1st defendant after executing the same; that he denied the particulars of fraud and illegality, insisting that if any fraud and illegality occurred, then those to blame were the deceased's daughter, her cronies and one Karama, who were present who did the interpretation for the deceased in mother tongue that he does not understand; that the agreement he commissioned had been drawn by 1st third party and the plaintiff was acting in person; that the suit against him is misconceived, bad in law incompetent, a gross abuse of the process of the court, unmaintainable and should be dismissed with costs.

7. The plaintiff responded to the 3rd defendant's defence through the reply dated 26th January 2024, inter alia averring that deceased did not sign or thumb print the sale agreement and transfer dated 18th June 2015, and did not seek for 3rd defendant services or appeared before him, and in any case clause 1.1 (g) of the agreement indicated the deceased was to act in person until the release of the funds; that the deceased did not know the agreement had been drawn by the 1st third party as she did not see it.
8. The 1st third party filed his defence dated the 16th April 2024, inter alia averring that the 1st defendant's claim being based on professional negligence was time barred, as the sale agreement and transfer were of 18th June 2015, and the claim should have been filed by 17th June 2021; that 1st defendant engaged him in the purchase of L.R. No. 5236/111/MN from deceased at Kshs.18million; that he prepared the sale agreement and transfer dated 18th June 2015 that were signed by the deceased and her signature on the agreement was witnessed by 3rd defendant; that the 1st defendant also signed the agreement and he witnessed her signature; that the transfer was registered at the lands office on 23rd June 2015

and the property was transferred to 1st defendant; that on 25th June 2015, the 2nd third party wrote to him indicating that they were acting for the deceased and provided the account details to remit the purchase price to, and he complied; that the 1st & 2nd defendants then engaged him in the transaction of the former selling to the latter the suit property for Kshs.20million and he prepared the sale agreement dated 22nd June 2015, which they signed and he witnessed their signatures; that the 1st & 2nd defendants signed the transfer dated 23rd June 2015, which was registered on the same date and the property was transferred to 2nd defendant; that the 1st defendant signed the acknowledgement dated 25th June 2015 confirming she had received the entire purchase price; that he had exercised reasonable care and diligence while representing the 1st defendant in the two transactions and is therefore not liable to indemnify the 1st defendant; that he did not owe any contractual duty or other duty of care of any nature to the plaintiff or 3rd to 5th defendants, and that the 1st defendant's claim against him should be dismissed with costs.

9. During the hearing, Franscisca Thinga Kalu, the plaintiff, Beatrice Thinga Kalu, sister to plaintiff, Maureen Leah Akech

Auma, 1st defendant, Michael Arina Knight, 2nd defendant, John Magiya, 3rd defendant, and Peter Omwenga, 1st third party, testified as PW1, PW2, DW1, DW2, DW3, and DW4 respectively, which testimonies the court has considered.

10. The learned counsel for the plaintiff filed their submissions 10th November 2025 and response to 1st & 2nd defendants' and 1st third party's submissions dated 27th November 2025, while that for 1st & 2nd defendants and 1st third party filed theirs dated 20th November 2025, 11th November 2025 and 18th November 2025 respectively, which the court has considered.

11. From the parties' pleadings and evidence tendered, the issues for the court's determinations are as follows:

a. Whether the agreement of sale dated 18th June 2015 is valid, and what payment was received by the plaintiff under the said agreement.

b. Whether the transfer of Plot L. R. No. 5136 (Original No. 4372/3) of Section 111 Mainland North to the 1st defendant was lawfully, and legally done.

c. Whether the 1st defendant passed good title over the suit property to the 2nd defendant.

- d. Whether the 2nd defendant is a bona fide purchaser for value without notice of any defect in the title.*
- e. Whether the 1st defendant claim against the 1st third party is time barred.*
- f. Whether the 1st defendant has established professional negligence on the part of third parties.*
- g. Who pays the costs?*

12. The court has carefully considered the parties' pleadings, oral and documentary evidence presented by PW1 & PW2, DW1 to DW4, submissions by the learned counsel, superior court decisions cited thereon, and come to the following findings:

- a. From the evidence presented to the court by PW1 & PW2 their mother, deceased, had subdivided her land, originally about 15 acres, and sold some of the portions, and transferred the titles to third parties, leaving her with Subdivision No. 4372/3, Section 111/MN measuring 3.5 acres. It is also their evidence that the deceased then sold one acre out Subdivision No. 4372/3, Section 111/MN to Eddah Dzame Albert, who was represented by Ms. Kenga & Company Advocates. That the deceased gave

the original title document for Subdivision No. 4372/3, Section 111/MN to Ms. Kenga & Company Advocates, to have the one acre subdivided and transferred to the their client and thereafter return the original title to her after completion of the transaction but the advocate is yet to do so. The existence of Plot L. R. No. 5136 (Original No. 4372/3) of Section 111 Mainland North, suit property, has not been disputed by any of the parties, which is evidence that Subdivision No. 4372/3, Section 111/MN, was subdivided and get one acre deceased sold to Eddah Dzame Albert, who was represented by Ms. Kenga & Company Advocates. It follows therefore that the suit property is the remainder after the one acre was curved out of Subdivision No. 4372/3, Section 111/MN. The deceased appear not to have been concerned about the failure or delay by Ms. Kenga & Company Advocates in returning to her the original title document, as there is no evidence presented of her or the plaintiff making a follow up with the said counsel that has been presented to the court. As Ms. Kenga & Company Advocates are not a

party in this suit, and no relief has been sought against them the court will leave that issue at this point.

- b. The testimonies by PW1 & PW2 show clearly that there was some attempt to sell some land to the 2nd defendant, DW2, which however became a cropper after the deceased reportedly declined to sign the sale agreement dated 28th June 2013 due to the difference in acreage indicated. It appears the deceased believed she was selling only 2 acres while 2nd defendant position was the whole portion of 2.43 acres. It is a documented fact that after the rescission of that agreement, the 2nd defendant started pursuing the deceased for refund of the Kshs.500,000 deposit through his advocates. Fast forward to 15th June 2015, when according to the plaintiff the 1st defendant went to the deceased's home and offered to purchase the suit property at Kshs.15million, which offer was rejected. The 1st defendant version is somehow different, as she stated it was the deceased and her children who invited her to buy the suit property as they did not want to deal with the 2nd defendant due to their previous experience. It is 1st defendant's evidence

that the invitation lead to the sale agreement dated 18th June 2015 under which the deceased agreed to sell the suit property to her at Kshs.18million, that she in turn sold to the 2nd defendant vide the sale agreement dated 22nd June 2015. The plaintiff denied that the deceased had thumb printed the sale agreement and transfer document dated 18th June 2015 that was used to transfer the suit property from the name of deceased to 1st defendant.

- c. *Section 3(3)* of the Law of Contract chapter 23 of Laws of Kenya requires any contract for disposition of an interest in land to be in writing, signed by all parties, and the signatures attested by a witness. Though there is no doubt that the 1st defendant traces her interest to the suit property to the sale agreement dated the 18th June 2015, where she is the purchaser and deceased the vendor, the deceased has through this suit and the testimony given by PW1 and PW2 denied thumb printing that sale agreement and the transfer document of the same date. The 1st defendant position is that she was a broker for the 2nd defendant in the transactions relating to the suit

property, but was not present when the deceased signed the sale agreement and transfer document, that was witnessed by the 3rd defendant. However, when she was cross-examined she stated that she could not tell who thumb printed the sale agreement as she was not present when it was done, and that she had been told by her advocate, the 1st third party, that he would send the documents to the deceased to sign. The 3rd defendant who attested to deceased thumb print on the said sale agreement said she did not see the deceased affix the thumb print as he was outside at the doorway, and the deceased's daughter, Karama and 1st defendant were the ones inside helping in interpreting it to her in mother tongue that he did not understand. In the absence of a handwriting/fingerprint expert report confirming that the contested thumb print on the sale agreement and transfer document dated 18th June 2015, were by the deceased, the court has no difficulty in coming to the conclusion that the said sale agreement and transfer document were not signed by the deceased and are therefore invalid.

d. It follows therefore, that as the registration by the 4th defendant of the invalid transfer document in favour of the 1st defendant, and the registration of the 1st defendant as proprietor of the suit property on 23rd June 2015, was a nullity and void ab initio. The 1st defendant did not acquire a good title by the said registration that she could pass to the 2nd defendant or any other person. Though the 2nd defendant took the position that he was an innocent purchaser of the suit property from the 1st defendant for value and without notice of any defect in the title, the history of his dealings with the deceased family members culminating to the initial sale agreement dated 28th June 2013, the correspondence over refund of the deposit he had reportedly paid, filing of the caveat in 2013 and lifting it in 2015 just before the transfer in favour of 1st defendant was effected, and the 1st defendant's evidence that she was all along acting as his broker in the transactions leads the court to the inevitable conclusion that the 2nd defendant was not a bona fide purchaser of the suit property for value without notice of any defect in the title. If the 2nd defendant was

not the main architect, he was definitely one of the primary players in the web of deceit through which other players were enlisted to ensure he got his hand on the price, the suit property, that he had failed to get in 2013. Other primary players included the 1st & 3rd defendants and the third parties herein, but as the court findings so far will lead to the title returning to the name of the deceased, I find no need to go to the specific liabilities of each of them.

- e. It is a fact that the plaintiff has been kept out of the suit property since 2015 when the land was transferred to the 1st defendant and the 2nd defendant, and having made a finding that the said transfer was pursuant to an invalid sale agreement and transfer document, it follows that their possession of the suit property was unlawful and illegal and therefore an act of trespass. Trespass is actionable per se and the plaintiff is entitled to damages. It is clear the suit property was quite valuable in view of the purchase price in the sale agreements of 18th June 2015 and 22nd June 2015. In the absence of any other guidance of the amount of loss to attribute to the

trespass, I find Kshs.500,000 (Five hundred thousand) as a reasonable award for damages for trespass per year from 23rd June 2015 to the date of vacant possession.

f. Though the 1st defendant took out third parties notices against the two third parties, she failed to prove actionable professional negligence against them. What is apparent is that the two third parties were willing agents of the 1st and 2nd defendants, and they are lucky the plaintiff did not enjoin them in her claim, as they were as liable as the 3rd defendant. The 1st defendant's indemnity claim against the third parties therefore fails with costs to 1st third party who responded, filed defence and participated in the trial.

g. *Section 27* of the Civil Procedure Act chapter 21 of Laws of Kenya provides that costs follow the events unless where for good reasons the court orders otherwise. In this case the plaintiff has succeeded in her claim against the 1st to 4th defendants, and she is entitled to costs.

13. In view of the foregoing determinations, the court finds the plaintiff has proved her case against the defendants to the standard required by the law. The court therefore enter

judgement for the plaintiff and against the defendants and orders as follows:

- a. *A declaration is hereby issued that the suit property, Plot L. R. No. 5136 (Original No. 4372/3) of Section 111 Mainland North, belongs to the deceased, Jumwa Thinga Kalu, and that she never transferred the same to either the 1st defendant or the 2nd defendant or anyone at all.*
- b. *A declaration is hereby issued that the 1st defendant acquired Plot L. R. No. 5136 (Original No. 4372/3) of Section 111 Mainland North fraudulently.*
- c. *A declaration is hereby issued that the 1st defendant never acquired a good title over Plot L. R. No. 5136 (Original No. 4372/3) of Section 111 Mainland North.*
- d. *A declaration is hereby issued that the 1st defendant did not pass a good title to the 2nd defendant over Plot L. R. No. 5136 (Original No. 4372/3) of Section 111 Mainland North.*
- e. *A declaration is hereby issued that the agreement of sale and a transfer both dated 18th June 2015 between the deceased, Jumwa Thinga Kalu and the 1st defendant are null and void.*

- f. A declaration is hereby issued that the agreement of sale dated 22nd June 2015 and transfer dated 23rd June 2015 between the 1st and 2nd defendants are null and void.
- g. A declaration is hereby issued that the 1st and 2nd defendants have committed illegal acts of trespass on the deceased's property known as Plot L. R. No. 5136 (Original No. 4372/3) of Section 111 Mainland North.
- h. The 1st & 2nd defendants are hereby directed to surrender to the plaintiff the original certificate of title CR, No. 60270/1 within the next ninety (90) days.
- i. That the Registrar of Lands Mombasa to cancel entries Nos. 4 and 5 on the original certificate of title CR. No. 60270/1 upon receipt of a copy of the decree herein.
- j. The 1st & 2nd defendants to pay the plaintiff damages for loss of use of Plot L. R. No. 5136 (Original No. 4372/3) of Section 111 Mainland North assessed at Kshs.500,000 [Five hundred thousand] per year from 23rd June 2015 until vacant possession.
- k. An order of permanent injunction is hereby issued, restraining the defendants by themselves, their servants, employees, assignees and/or agents or any other person

acting through from disposing of, transferring, trespassing onto, constructing, advertising for sale or interfering in any way with the suit property known as Plot L. R. No. 5136 (Original No. 4372/3) of Section 111 Mainland North, otherwise than by giving vacant possession to the plaintiff.

- l. The 1st & 2nd defendants to pay the plaintiff interest on (j) above at courts rates.*
- m. The 1st to 4th defendants to pay the plaintiff's costs in the suit.*
- n. The 1st defendant's claim against the third parties is dismissed with costs to 1st third party.*

Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 17TH DAY OF DECEMBER 2025.

Kibunja, J.

MOMBASA.

S. M.

ELC

IN THE PRESENCE OF:

PLAINTIFF : M/s Chengo for Munyithya

DEFENDANTS : Mr Waweru for 1st Defendant

Mr. Magiya for 3rd Defendant

THIRD PARTIES : M/s Lelu for 1st Third Party

KALEKYE-COURT ASSISTANT.

Kibunja, J.

MOMBASA.

S. M.

ELC

Original