

REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ELC CASE NO. 898 OF 2017

JOSHUA MIREGWA OPANDE (Suing as the –  
legal representative and/or administrator of the  
Estate of PETER OPANDE, deceased) ..... PLAINTIFF

VERSUS

MUTENKERE OLE NKAKA NGATAIT..... 1ST DEFENDANT

PILASO NKAKA ..... 2ND DEFENDANT

JUDGMENT

Introduction

1. By way of an Amended Originating Summons dated **18th March 2020** and filed in court on the same date, the Plaintiff, **Joshua Miregwa Opande** (suing as the administrator of the Estate of the late Peter Opande), moved this Court under *Order 37 Rules 3 and 7 of the Civil Procedure Rules (2010)* and *Section 3A of the Civil Procedure Act* seeking the following substantive reliefs against the Defendants:

- a) **THAT** a declaration be issued that the Plaintiff is the legal representative and/or administrator of the Estate of **Peter Opande (Deceased)**, who was the lawful purchaser of all that parcel of land measuring approximately **40 Acres** to be hived off from the parcel

of land known as **L.R. No. KAJIADO/KITENGELA 4616** (hereinafter referred to as “the suit property”).

- b) **THAT** the Respondents be ordered to supply the Applicant with the Title Deed for the suit property and sub-division documents for the parcel of land known as **L.R. No. KAJIADO/KITENGELA 4616** and in default, an order do issue authorizing the Deputy Registrar to execute the said documents.
- c) **THAT** without prejudice to the above prayers and/or in the alternative, the Respondents be ordered to refund the entire deposit sum plus interest at Bank rates as from the date of execution of the agreement.
- d) **THAT** costs be provided for.

2. The claim is premised on the grounds set out on the face of the Summons and is supported by the Affidavit of the Plaintiff, **Joshua Miregwa Opande**, sworn on 18th March 2020. The crux of the Plaintiff's case is that the Deceased, **Peter Opande**, entered into a Sale Agreement with the Respondents on **22nd August 2013** for the purchase of the 40-acre portion of land to be excised from **L.R. No. KAJIADO/KITENGELA 4616**.

3. It is the Plaintiff's averment that the Deceased paid an initial deposit of **Kshs. 3,000,000/=** as per the agreement, but the Respondents have since failed to honor their obligations to facilitate the sub-division, furnish completion documents (including the original Title Deed, consents, and transfer forms), or grant possession of the suit property, thereby necessitating this suit.
4. In opposing the suit, the Respondents relied on a Replying Affidavit dated 6th July 2015, in which they challenged the territorial jurisdiction of this Court—arguing the matter ought to have been filed at the High Court at Nakuru—and further defended the claim by denying receipt of the initial Kshs. 3,000,000/- deposit, alleging a defect in lack of spousal consent, and asserting that the suit property had since been sold to third parties.
5. In a swift rejoinder contained in a Further Affidavit sworn on 10th September 2024, the Plaintiff dismissed these grounds, asserting that the jurisdictional challenge was baseless as the land is situated in Kajiado County and that the denial of the deposit was dishonest given that the Sale Agreement, which was duly executed by both Respondents (thereby curing any spousal consent defects), expressly acknowledged receipt of the funds. The Plaintiff further impugned the Respondents' defense by noting it addressed the initial rather than the Amended Originating Summons, and

maintained that any subsequent transfer of the land was a fraudulent maneuver that could not defeat the Estate's interest or pass good title.

6. The Plaintiff reiterates the contents of the Amended Originating Summons and raises the following pertinent issues in rejoinder:
7. The Plaintiff avers that the Respondents' Replying Affidavit dated 6th July 2015 is fatally defective as it responds to the initial Originating Summons dated 2nd May 2015, which has since been superseded by the Amended Originating Summons dated 18th March 2020. The Plaintiff contends that the Respondents failed to file a fresh response addressing the issues raised in the amended pleadings.
8. The Plaintiff terms the denial of the deposit receipt as dishonest, pointing out that **Paragraph 1** of the Sale Agreement dated **22nd August 2013** (Annexure "JO-3") fully acknowledges receipt of the **Kshs. 3,000,000/=** deposit. The Plaintiff emphasizes that this agreement was duly signed by both vendors.
9. The Plaintiff dismisses the objection to jurisdiction as "farcical," asserting that since the subject matter (**Title No. KAJIADO/KITENGELA 4616**) is situated within **Kajiado County**, this Court has the requisite territorial jurisdiction to hear and determine the dispute.

10. In rebuttal to the claim of lacking spousal consent, the Plaintiff avers that the argument is made in bad faith. He points out that the Sale Agreement includes both the **1st and 2nd Respondents** (who are spouses) as vendors, and both parties properly executed the agreement, thereby curing any alleged defect regarding consent.
11. Regarding the Respondents' claim that the land has been sold to third parties, the Plaintiff avers that any transfer effected after the Sale Agreement with the Deceased constitutes a fraudulent scheme. The Plaintiff asserts that such fraudulent transfers cannot pass good title to third parties and pleads with the Court not to entertain the Respondents' attempt to disenfranchise the Estate of its legally acquired property.
12. Finally, the Plaintiff relies on **Clause 4** of the Sale Agreement (Annexure "JO-4"), which explicitly placed the onus of obtaining all relevant consents on the Vendors (Respondents), a duty they failed to discharge.

**Directions**

13. The court directed that the amended Originating summons be canvassed by way of affidavit evidence and written submissions. Only the counsel for the Plaintiff complied and duly filed their submissions within the prescribed

timelines. Despite extension of time to comply, the Respondents did not file any submissions.

### **Analysis of Submissions**

14. The Plaintiff's Written Submissions, are dated 25th July 2025. In identifying the issues for determination, the Plaintiff isolated three key questions being, whether the Sale Agreement dated 22nd August 2013 is valid; whether the Plaintiff was the purchaser of the 40 acres to be excised from L.R. No. KAJIADO/KITENGELA 4616; and whether the Plaintiff is entitled to the reliefs sought.
15. On the first issue regarding the validity of the contract, the Plaintiff submitted that the Sale Agreement met all the statutory requirements set out under Section 3(3) of the Law of Contract Act, namely that the contract was in writing, signed by all the parties, and attested by witnesses. Counsel for the Plaintiff argued that the Respondents' denial of the execution of the agreement was absurd, noting that the document bore both the signature and thumbprint of the 1st Respondent, as well as the signature of the 2nd Respondent, all attested to by Advocates Monica Wanjiru Mburu and Njiru Mburu. To buttress this argument, the Plaintiff relied on the case of **Kunya & 2 Others v Global Trucks Limited (ELC Case 63 of 2021) [2023] KEELC**

18605 (KLR), where the court held that a sale agreement drafted in compliance with the elements of Section 3(3) of the Law of Contract Act is valid and can be relied upon by the court.

16. Regarding the purchase of the suit property, the Plaintiff submitted that the Deceased paid a consideration of Kshs. 3,000,000/= as a deposit, a fact expressly acknowledged in the Sale Agreement signed by the Respondents. Citing the decision in *Ndubi v Gituma (Environment and Land Appeal E005 of 2023) [2024] KEELC 4322 (KLR)*, the Plaintiff argued that parties are bound by the contracts they freely enter into and cannot later deny facts—such as the receipt of the deposit—which they acknowledged by appending their signatures. The Plaintiff contended that having complied with the terms of the agreement, an equitable interest was created in the suit property which could not be defeated by subsequent transfers to third parties.

17. On the issue of third-party rights, the Plaintiff advanced the argument that a Constructive Trust had been created, which acts as an overriding interest under Section 28 of the Land Registration Act, effectively preventing the registration and transfer of valid title to third parties. In support of this proposition, Counsel cited the Supreme Court decision in *Shah & 7 Others vs. Mombasa Bricks & Tiles Limited & 5 Others [2023] KESC 106 (KLR)*,

where it was held that a constructive trust can be imported to defeat a registered title. Consequently, the Plaintiff argued that the Respondents could not pass a clean title to any third party due to this existing overriding interest.

18. Finally, regarding the reliefs sought, the Plaintiff urged the Court to grant an order for Specific Performance, asserting that the agreement was valid and enforceable. Reliance was placed on the Court of Appeal decision in *Gharib Suleman Gharib Vs Abdulrahman Mohammed Agil LLR No. 750 (CAK)*, which expounded that specific performance is the appropriate remedy where a valid contract exists and damages are inadequate. In the alternative, should the court decline to order specific performance, the Plaintiff prayed for a refund of the entire deposit with interest. On this point, the Plaintiff cited *Millicent Perpetua Atieno Vs Louis Onyango Otieno (2013) eKLR*, which quoted Halsbury's Laws of England (4th Ed. Vol 12) to submit that damages for breach by a seller include the return of the deposit with interest and expenses incurred. Further reference was made to the Law Society of Kenya Conditions of Sale (1989), which entitles a purchaser to a refund of the deposit upon rescission of a contract.

### Issues for Determination

19. This court finds that the following issues arise for determination:

- a. *Whether the Environment and Land Court at Kajiado possesses the requisite jurisdiction to determine the dispute relating to L.R. No. KAJIADO/KITENGELA 4616.*
- b. *Whether a valid and enforceable Sale Agreement existed between the late Peter Opande and the Respondents, and whether the Respondents were in breach thereof.*
- c. *Whether, having regard to the principles of equity, the Plaintiff's claim is best remedied by an order for Specific Performance or by an award of the deposit sum, accrued interest, and costs of the suit.*

#### Analysis and Determination

20. The Respondents, through their Replying Affidavit, challenged the “territorial jurisdiction” of this Court, contending that the matter ought to have been filed before the High Court at Nakuru. This Court finds this objection to be without merit. The suit property, L.R. No. KAJIADO/KITENGELA 4616, is physically situated within the confines of Kajiado County. In any event this court has jurisdiction all over the territory of Kenya. Given that the dispute concerns the ownership and title to this

land, this Court, established under the Environment and Land Court Act, is vested with the requisite territorial and subject matter jurisdiction to hear and determine the matter. Accordingly, the objection to jurisdiction is hereby dismissed.

21. The evidence presented by the Plaintiff, specifically the annexed Sale Agreement dated 22nd August 2013, unequivocally establishes the existence of a valid contract pursuant to the provisions of **Section 3(3) of the Law of Contract Act**. The agreement was executed by both the late Peter Opande (as purchaser) and the Respondents (the 1st and 2nd Defendants) as vendors.
22. The agreement's own terms explicitly acknowledge the receipt of the deposit sum of **Kenya Shillings Three Million (Kshs. 3,000,000/=)**. The Respondents' subsequent denial of receiving this deposit is a contradiction of the clear written terms of the document they signed and is therefore rejected by this Court.
23. Furthermore, the defense of lack of spousal consent is not tenable, as the 1st and 2nd Respondents, being both signatories to the agreement, rendered the requirement of consent moot. By failing to effect the subdivision of the 40 acres, neglecting to furnish the completion documents, and allegedly

disposing of the property to third parties, the Respondents acted in fundamental breach and repudiation of the Sale Agreement dated 22nd August 2013. The Court thus finds that a valid contract existed and that the Respondents are in breach thereof.

24. The Plaintiff's primary prayer was for the equitable remedy of Specific Performance. The Court is mindful that this is a discretionary relief, to be exercised judiciously and not arbitrarily.

25. In the case of *Reliable Electrical Engineers Ltd vs Mantrac Kenya Limited (2006) eKLR*, Maraga J (as he then was) illuminated the applicable principles, stating:

*“Specific performance like any other equitable remedy is discretionary and the Court will only grant it on well laid principles...The jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or unenforceable. Even when a contract is valid and enforceable, specific performance will however not be ordered where there is an adequate alternative*

*remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even when damages is an adequate remedy, specific performance may still be refused on the ground of undue influence or where it will cause severe hardship to the defendant.”*

26. Further guidance is found in *Amina Abdul Kadir Hawa Vs. Rabinder Nath Anand & Anor [2012] eKLR*, where the Court held that:

*“(d) Even if the facts of the case demonstrate that a specific performance is a proper remedy to grant in the circumstances, it may none the less be withheld in circumstances where it is likely to cause hardship to the defendant even if circumstance giving rise to the hardship to be suffered by the defendant were not contributed to by the contracting parties and may have arisen even after the conclusion of the contract.”*

27. Applying the above principles, the Court notes that the contract in question dates back to 2013, over 12 years ago, and the Respondents have alleged that the suit property has since been sold to third parties. Attempting to

enforce the subdivision and transfer under these circumstances, many years after the breach and amidst allegations of third-party interests, would result to a decree that is difficult, if not impossible, to execute and would cause undue **hardship** and **inconvenience** to the Respondents. Moreover, it would risk prejudicing the rights of subsequent purchasers who are not party to these proceedings.

28. Therefore, Specific Performance is hereby decline, as **damages** in the form of a refund constitute an **adequate alternative remedy** that can compensate the Plaintiff's Estate for the breach. The Court finds that the alternative prayer for a refund is the most equitable and appropriate relief in the circumstances of this case.

29. I note that the Plaintiff prays for refund of the deposit paid with interest **at bank rates from the date of execution of the agreement**. Whereas a trial court has the discretion to award and fix the rate of interest under **Section 26 of the Civil Procedure Act**, the extent of the court's jurisdiction covers two stages only, that is to say the period from the date the suit is filed to the date when the court gives its judgment and the period from the date of the judgment to the date of the payment of the sum adjudged or such earlier date as the court may in its discretion fix.

30. When it comes to the period before the filing of the suit, ***Section 26 of the Civil Procedure Act*** has no application. Interest prior to the date of the suit is a matter of substantive law and is only claimable where under an agreement there is stipulation for the rate of interest (contractual rate of interest) or where there is no stipulation, but interest is allowed by mercantile usage (which must be pleaded and proved) or where there is statutory right to interest or where an agreement to pay interest can be implied from the course of dealing between the parties.
31. In this case, the Plaintiff did not satisfy the above criteria with regard to the prayer for interest at bank rates and interest prior to the filing of the suit. The court can therefore only award him interest from the date of filing suit until payment of the adjudicated amount in full at court rates.
32. In light of the foregoing analysis, judgment is hereby entered for the Plaintiff against the Respondents as follows:
- a) ***The Respondents, jointly and severally, shall refund the Plaintiff the deposit sum of Kenya Shillings Three Million (Kshs. 3,000,000/=).***

- b) The said sum of Kshs. 3,000,000/= shall attract interest at court rates calculated from the date of date of filing suit until the date of payment in full.*
- c) The Plaintiff is awarded the costs of the suit to be paid by the against the Defendants jointly and severally.*

Dated Signed and Delivered at Kajiado Virtually this 3<sup>rd</sup> Day of March 2026.

M.D. MWANGI

JUDGE

In the virtual presence of:

Ms. Esami h/b for Mr. Nyamu for the Plaintiff

Mr. Mengich for the Defendants

Court Assistant: Mpoye

M.D. MWANGI

JUDGE