



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ELC CAUSE NO. 190 OF 2018

ROSE WANGUI WARUI AND IRENE WAITHIRA WARIAHE
as legal representatives of the estate of **SIMON WARUI**
KANOGA

(Deceased).....

..... PLAINTIFFS

VERSUS

1. VARIZONE LIMITED

2. DENNIS ABRAHAM KINARO Practicing as DENNIS
KINARO & CO.

ADVOCATES.....DEFENDANTS

JUDGMENT

1. In his plaint dated October 9, 2018, Simon Warui Kanoga (now deceased), and the amended plaint filed on April 11, 2025, which involved the deceased and later the plaintiffs,

Rose Wangui Warui and Irene Waithira Wariahe, legal representatives of the estate of Simon Warui Kanoga (deceased), sought the following remedies against the defendants.

- a) A declaration that the 1st defendant, having failed or refused to comply with clause 7 of the agreement dated July 26, 2017, which requires constructing a new road and removing the power poles from the suit premises until September 2, 2018, was in breach of the agreement and was not entitled to serve any completion notice, demand letter, or notice of cancellation of the agreement in July and August 2018, and was not entitled to receive the full balance of the purchase price.**
- b) A declaration that the harvesting of all mature trees on the premises was malicious, amounted to theft, decreased the value of the property, and significantly changed its character, and therefore the 1st defendant is not entitled to the full balance of the purchase price.**
- c) Damages for harvesting all mature trees from the suit premises to be paid by the 1st defendant to the deceased's estate through the plaintiffs, from the**

funds held by the 2nd defendant on behalf of the 1st defendant.

- d) Punitive and aggravated damages against the 1st defendant for cutting down and harvesting all the mature trees from the suit premises.**
- e) Punitive and aggravated damages against the 1st defendant for trespass onto the suit premises and for destroying and removing the structure built by the deceased on the premises.**
- f) A mandatory injunction requiring the 1st defendant to move the water pipes from the suit premises and relocate them along the road; if the 1st defendant fails to do so, the plaintiffs, on behalf of the deceased's estate, are authorized to do so at the defendant's expense.**
- g) An order of specific performance against the defendants, jointly and severally, to deliver to the plaintiffs, on behalf of the deceased's estate, all the completion documents.**
- h) A permanent injunction restraining the 1st defendant, its directors, servants, agents, and employees from entering, remaining on, or interfering in any manner with the deceased's estate's ownership and quiet possession of the suit premises.**

- i) General, punitive, and aggravated damages sufficient to punish the defendants for misconduct, the delay in releasing the completion documents, and for withholding the purported letter of cancellation dated August 22, 2018.**
- j) During the pendency of this suit, and to secure the deceased's estate's claim for damages as described, the 2nd defendant is restrained from paying out Kshs. 7,000,000.00 or any part thereof to the 1st defendant from the 2nd Defendant's account number 01148691784701, as described in the Agreement dated July 26, 2017, or account number 7469178471 disclosed in cheque numbers 0000077 and 000008 dated November 22, 2017, at Cooperative Bank of Kenya Limited, Kilifi branch. All funds in these accounts are to be frozen to the extent of Kshs. 7,000,000.00.**
- k) Interest at court rates on all sums found due and payable to the plaintiffs for and on behalf of the deceased's estate.**
- l) Costs of this suit.**

2. The plaint was accompanied by the deceased's Witness Statement and the list & bundle of documents dated October 9, 2018.

- 3.** The 1st defendant submitted its Statement of defense dated 27 February 2024.
- 4.** The 2nd defendant submitted his Statement of defense dated 27 February 2024, supported by his Witness Statement of the same date.
- 5.** The case proceeded to a full hearing on its merits.
- 6.** Wangui Warui, PW1, testified for the plaintiffs and relied on the statements and the list & bundles of documents filed. The plaintiffs closed their case.
- 7.** Mr. Christopher Denis Wilson testified for the 1st defendant as DW1, relied on his statement and the 1st defendant's list & bundle of documents, and the 1st defendant closed its case.
- 8.** The 2nd defendant testified as DW2, relied on his Witness Statement and list & bundle of documents, and closed his case.
- 9.** The court issued instructions for the filing of final submissions: I acknowledge receipt of submissions from counsel for the plaintiffs, Mr. Kinyua, and counsel for the defendants, Mr. Kinaro, with appreciation, as they greatly

assisted the court in deciding on the issues raised in the case.

10. Based on the evidence, materials, and submissions presented before me, the issues I identify for the determination of this suit are: whether the Senior Principal Magistrate, Kilifi, had jurisdiction over this case and, if so, whether this case should have been filed in that court rather than in this one; whether the plaintiffs have a cause of action against the 2nd defendant; whether the 1st defendant was entitled to rescind the contract; whether it served notices rescinding the agreement; whether the deceased paid the full purchase price for the suit premises to the defendants; whether the deceased was entitled to vacant possession of the premises upon payment of the full purchase price, whether he took possession, and whether he was immediately evicted; whether the plaintiffs are entitled to the completion documents from the 2nd defendant to facilitate the registration of the premises in favor of the deceased's estate; whether the plaintiffs are entitled to damages—both punitive and aggravated—against the 1st defendant for cutting down and harvesting mature trees, and

if so, the quantum; whether the plaintiffs are entitled to aggravated, exemplary, and punitive damages payable by the 1st defendant for the destruction and removal of the structure built by the deceased on the premises, and the quantum thereof; whether a mandatory injunction should be issued compelling the 1st defendant to move and relocate the water pipes from the premises; whether a perpetual injunction should be issued against the 1st defendant, its director, employees, servants, and agents, restraining them from entering, remaining upon, or interfering with the deceased's estate's right to ownership and quiet possession of the premises; whether the plaintiffs are entitled to general, punitive, and aggravated damages to punish the defendants for misconduct and delay in releasing the completion documents, and if so, the quantum; and who should bear the costs of this suit.

11. Before I address the issues raised here, it is important to review the findings of a lawsuit between the parties that was heard and decided in **Kilifi SPMCC No. 347 of 2018**, along with the subsequent appeal to this court in **ELC Appeal No. E021 of 2022**, as detailed below.

12. This suit was filed in 2018; however, all proceedings were stayed by this court (Olola J.) through orders issued on September 20, 2019, pending the hearing and determination of **Kilifi SPMCC No. 347 of 2018**.

13. After the dismissal of the first defendant's suit by the Kilifi Magistrate's Court, the plaintiff did not acquire ownership or possession of the disputed premises, nor did it happen after the dismissal of **ELC Appeal No. E021 of 2022** on November 23, 2023.

14. Simon Warui Kanoga (the deceased) entered into a valid Sale Agreement dated July 26, 2017, with the 1st defendant to purchase Plot No. Group V/508/3 in Kilifi, measuring 0.4048 hectares, registered as Title Number C.R. 37174 (the suit premises). The Agreement was drafted by the 2nd defendant, who at that time acted for both parties and attested to its execution. Clause 6 of the Agreement states that, on or before the completion date, the 2nd defendant shall, upon receipt of the purchase price, deliver the completion documents to the plaintiff.

15. Clause 8 of the Agreement required the 1st defendant to deliver vacant possession of the suit premises to the plaintiff

once the full purchase price was paid. The deceased encountered temporary setbacks that delayed the remaining payment of the purchase price and sought an extension from the 1st defendant. The extension was granted after a successful meeting between its sole director and shareholder, Mr. Christopher Wilson, along with its advocate, the 2nd defendant, and the deceased and his advocate, Mr. Kinyua, on the other side.

16. The terms of this extension are outlined in the second defendant's letter dated November 22, 2017, addressed to the deceased and Mr. Wilson. The extension agreement included the deceased's authority for the 2nd defendant to release Kshs. 1,500,000 to the 1st defendant as needed before completion, as well as the handover of the original title deed of the suit premises by the 1st defendant to the 2nd defendant as a stakeholder pending completion.

17. The deceased fulfilled the payment of the entire purchase price through installment payments, with the final installment being deposited into the account of the 2nd defendant around September 13, 2018. The defendants acknowledged receipt of the full payment. Both defendants

admit that the firm, Kinyua Muyaa & Co., advocates represented the deceased during negotiations for the extension and subsequent phases.

18. From November 2017, the defendants knew that the law firm of Kinyua Muyaa & Co., advocates, represented the deceased; therefore, all notices related to the sale agreement and extension, including any alleged rescission notice, should have been addressed or at least copied to the law firm. Correspondence between the deceased, Mr. Wilson, and Mr. Dennis Kinaro, the 2nd defendant, was conducted via email, with all parties having each other's email addresses, and all emails from any of the three were copied to the other two.

19. After the full purchase price was paid, the deceased took possession of the property pursuant to Clause 8 and constructed a temporary structure thereon. The 1st defendant subsequently demolished this structure and filed a civil suit in **Kilifi SPM Court, Civil Suit No. 347 of 2018**, against the deceased. The suit sought and obtained a temporary injunction to prevent the deceased from entering the premises. However, this injunction was ultimately

dismissed with costs, and the *ex parte* orders were discharged; nonetheless, the deceased was not restored to the possession of the property.

20. The 2nd defendant denies demolishing the temporary structure but admits removing it from the premises. On September 21, 2018, a letter was written to the defendants, on behalf of the deceased, demanding the release of the completion documents following the eviction. The 2nd defendant responded with a letter dated September 24, 2018, asserting that the sale agreement was rescinded on August 22, 2018, when a cancellation notice was issued to the purchaser, and referencing his letters dated July 30, 2018, and August 22, 2018, which were directed to the deceased. He claimed that the sale was canceled on August 22, 2018, and that he had warned the deceased against trespassing. The 2nd defendant failed to refund 90% of the purchase price, for a total of Kshs. 7,650,000. To date, they have retained these funds for more than seven years. The 1st defendant pursued **Kilifi SPM Civil Case No. 347 of 2018** against the deceased; however, the case was dismissed with costs on May 31, 2022.

21. In dismissing the matter, Hon J. M. Kituku, then the SPM Kilifi, made several findings: the deceased had paid the full purchase price and was entitled to possession following payment, as the handover was a mere formality; the 1st defendant did not rescind the agreement, as no notice was ever issued; and there was no evidence demonstrating that the 2nd defendant transmitted any letters to the deceased, as there was no proof of mailing, delivery, or electronic transmission.

22. The Court further held that the 1st defendant could not retain both the purchase price and the property, and although the deceased's possession was procedurally irregular, it was nonetheless lawful. Subsequently, the 2nd defendant, in breach of Clause 6 of the agreement, continued to refuse the delivery of the completion documents, and the 1st defendant failed to provide vacant possession despite retaining the entire purchase price.

23. The 1st defendant filed **Malindi ELC Appeal No. E021 of 2022** against the judgment in Kilifi. The appeal was heard by this court, which issued a judgment dated November 23, 2023, dismissing the appeal and affirming the Kilifi

Magistrate's finding that no valid notice of rescission was served. The decision of this court is reported as **Varizone Limited v Kanoga [2023] KEELC 21884 (KLR)**.

Significantly, the court held:

“The wrangling in this appeal then revolves around whether there was proper and legal rescission of the sale agreement and whether the trial Court properly directed its mind in finding that there was no service of notice of rescission and that the respondent paid all purchase monies and should have been given vacant possession of the suit property immediately.

9. The trial Court (Hon Kituku SPM) made a finding that delivery of vacant possession was a mere formality after the respondent had paid the full purchase price because under the terms of the agreement of sale, vacant possession was automatic after full payment. This is what he said in the judgment contained on pages 539 to 559 of the record of appeal, particularly on page 553 of the record of appeal:

“This issue was contested by the defendant and the burden shifted to the plaintiff to prove service. No such evidence was proved, and I hold the defendant was not served with the termination notice. The importance of

service of both the demand and cancellation notice cannot be overemphasized.

The Court of Appeal in the case of Nyangilo Ochieng & Anor. v Kenya Commercial Bank [1996] held that:

“..... Once the chargor alleges non-receipt of the statutory notice, it is for the chargee to prove that such notice was in fact sent....”

10. The trial Court proceeded that once service of both demand notice and cancellation was never proved to have been done, and the appellant proceeded to accept the entire purchase monies from the respondent, the doctrine of estoppel crept into this matter.

11. The trial Court concluded that by paying the entire decretal sum, handing over vacant possession was a mere formality. The trial Court relied on a thread of emails from the appellant, which showed that the appellant, as of 19th September 2018, was still advising the respondent to pay up the balance to complete the transaction. The trial Court concluded that:

“That conduct shows the plaintiff was approbating and reprobating at the same time, and no Court of law can countenance that because the plaintiff made the defendant believe that despite the delay in finalizing the payment the contract was still on.”

12. Having reviewed the entire record and the materials presented to me in this appeal, I conclude that the appeal is lacking in merit. The trial Court correctly directed its mind to the evidence presented to it, as well as the relevant applicable law and precedents, and in giving effect to the parties' sale agreement, the trial Court was correct in dismissing the appellant's claim I will conclude by saying that the appellant cannot have both the purchase money and the land under the circumstances of this case and in its four corners. Nothing has been shown to this Court what efforts were made to refund the purchase price following the appellant's unilateral revocation of the sale agreement in 2018.

13. The appeal is hereby dismissed with costs to the Respondent.

24. This brings me to the framed issues before the court for decision.

25. Regarding the jurisdiction of this court, counsel or the plaintiff argues that the value of the suit premises at the time of filing was Kshs. 8,500,000.00. Counsel argues that the damages sought in this suit amount to Kshs. 20,395,000.00. Therefore, the total value of the subject matter in this case is Kshs—28,895,000.00, which exceeds

the jurisdiction of any magistrate. There was no Chief Magistrate's Court in Kilifi until 2024. The pecuniary jurisdiction of the SPM was and remains Kshs. 15,000,000.00. The pecuniary jurisdiction of the Chief Magistrate was and remains capped at Kshs. 20,000,000.00.

26. Since those are the prayers sought by the plaintiff and there is nothing to the contrary, I find that the suit is properly filed in this court as the prayers sought exceeded the jurisdiction of the Kilifi SPM's Court.

27. On whether a cause of action is disclosed against the 2nd defendant, who acted on behalf of the 2nd defendant, Mr. Kinaro, citing judicial precedents such as **National Bank Limited v Insurance Experts (K) Ltd (Civil Appeal 226 of 2016, 2022 KESCA 141 (KLR), 18th February 2022 Judgment)**, and **Agricultural Finance Corporation v Lentetia Limited & Jack Mwangi (1985 eKLR)**, and **Savings & Loan (K) Limited v Kanyenje Karangaita Geakombe & Another (2015 eKLR)**, He asserts that he was not a party to the contract between the parties and, therefore, should not be held liable.

28. Meanwhile, Mr. Kinyua, representing the plaintiff, argues that since the 2nd defendant acted on behalf of the 1st defendant in both the Kilifi matter on appeal and the current suit, and since he holds the transfer documents, he should be held liable.

29. It has not been established that the 2nd defendant, while acting on behalf of the 1st defendant, was not operating under the instructions of the 1st defendant, as his role was that of counsel and not a party to the agreement. Since there were ongoing litigation matters in court involving the subject matter, I do not believe there is a cause of action by the plaintiff against the 2ⁿ defendant who was acting at the behest of the 1st defendant.

30. The only misfeasance that can be identified in the Kilifi case, and in this case, was his failure to relay the rescission notice to the plaintiffs and counsel, and perhaps his failure to provide appropriate legal counsel to his client, the 1st defendant, which significantly contributed to the Kilifi lawsuit and the current suit. However, he cannot be held liable for this, as such conduct would be detrimental to his client.

- 31.** Regarding whether the 1st defendant was entitled to rescind the contract, if so, whether it served notices rescinding the agreement, and whether the deceased paid the full purchase price for the suit premises to the defendants, the answer is as held in the Kilifi matter that was appealed to this court: the notice of rescission was not proper, and the plaintiff paid all the purchase price.
- 32.** Regarding whether the plaintiff was entitled to vacant possession, the answer is yes. This was also established in a previous suit, and a judgment states that the plaintiff should not have been evicted after taking possession and that vacant possession should be granted.
- 33.** Are the plaintiffs entitled to the completion documents from the 2nd defendant to facilitate the registration of the suit premises in favor of the estate of the deceased? Yes, as this has also been determined in the previous suit.
- 34.** Are the plaintiffs entitled to the various reliefs sought, whether punitive, aggravated, or compensatory, as pleaded in the plaint?
- 35.** For both punitive and aggravated damages against the 1st defendant for cutting down and harvesting mature trees? If

so, what is the amount? The plaintiffs admit this is difficult to determine, as the felled trees were never counted, nor can the amount be accurately assessed; therefore, I will have difficulty making an award under this head.

36. Are the plaintiffs entitled to recover aggravated, exemplary, punitive, and compensatory damages from the 1st defendant for the destruction and removal of the structure built by the deceased on the suit premises? If so, what is the amount? The destroyed structure was not specifically identified, nor was its monetary value assessed or documented for calculating damages. As a result, no award is evident under this category.

37. Whether the plaintiffs are entitled to a mandatory injunction requiring the 1st defendant to move and relocate the water pipes from the suit premises. The answer to this question is that the sale agreement dated July 26, 2017, did not include provisions for relocating the water pipes from the suit property.

38. Whether a perpetual injunction should be issued against the 1st defendant, its director, employees, servants, and agents, restraining them from entering, remaining on, or

interfering with the deceased's estate's right to ownership and quiet possession of the suit premises, depends on whether all requirements for the purchase of the suit property have been fulfilled. The answer to this question is yes, since all requirements for purchasing the suit property have been met, as decided in the earlier case between the parties.

39. Are the plaintiffs entitled to general, punitive, and aggravated damages of a sufficient amount against the defendants to punish them for their misconduct and for the delay in releasing the completion documents? If so, what is the amount?

40. In Kenyan law, exemplary (punitive) damages penalize outrageous conduct by mostly government officials or profit-driven torts, while aggravated damages compensate for increased mental suffering caused by a defendant's malicious behavior. Exemplary/punitive damages serve as a deterrent, whereas aggravated damages aim to address the plaintiff's greater injury. See **PN Mashru Ltd v Ojenge (Civil Appeal 64 of 2020) [2023] KECA 473 (KLR) (28**

April 2023) (Judgment) on how to assess punitive damages.

41. Compensatory damages are awarded for the violation of one's rights under Article 23 of the Constitution of Kenya 2010, see **Sholei v Judicial Service Commission (Petition 39 of 2013) [2025] KEELRC 960 (KLR)**.

42. Regarding the various heads of award as pleaded by the plaintiff, Mr. Kinaro, representing the defendants, argues that the awards are not permissible because granting awards under different heads would amount to duplication. In this case, Mr. Kinaro contends that the way the plaintiffs' reliefs are expressed could lead to duplication if awarded alongside orders for specific performance and vacant possession.

43. In contrast, Mr. Kinyua, representing the plaintiffs, contends that the defendants violated the plaintiff's right to property under Article 40 of the Constitution. The delay in handing over possession and releasing the completion documents means that the defendants have jointly and severally deprived the plaintiffs of their right to property in an arbitrary manner. The refusal to release the completion documents and hand over possession means that the

deceased and his estate cannot use, borrow against, occupy, or sell the property. The property was purchased at Kshs. 8,500,000.00, which the defendants are still holding onto. If they had invested that money, they would have more than doubled or tripled it in seven years. It is not enough for the defendants to pay interest on the property they have sat on for more than seven years, as that is only compensatory damages. They should be ordered to pay aggravated, exemplary, and punitive damages, which counsel pegs at a court-assessed amount of Kshs. 5,000,000.00 to teach them that impunity does not pay.

44. Looking at the way the reliefs are pleaded, I agree with Mr. Kinaro for the defendants that the reliefs as sought amount to an overkill and perhaps should have been consolidated for a more effective outcome, as will be shown below on each head as pleaded.

45. Examining the litigation history of both the former and current suits, the deceased had completed the purchase of the property in 2018 and was given possession, but was later evicted without lawful court orders. The 1st defendant has possessed the land and received the purchase money

without any valid reason since 2018. As argued by Mr. Kinyua for the plaintiffs, the conduct of withholding both the land and the purchase money constitutes oppressive behavior by the 1st defendant, since the plaintiffs could neither use the land nor the purchase money, both of which are in the 1st defendant's hands.

46. To my mind, given that the 1st defendant unilaterally rescinded the sale agreement in 2018 and has been in possession of both the suit property and the purchase monies, a one-off award of Kshs. 2,000,000/= in exemplary damages, which I find sufficient under the circumstances of the case, will be a germane award, given that the parties have been litigating in court for some time. This is so, considering the 1st defendant's conduct—unilaterally rescinding the agreement and evicting the plaintiffs from the property—smacked of malice and should be abhorred by this court. Besides, the 1st defendant has persisted in failing to refund the purchase monies or hand over vacant possession of the suit property, despite existing court findings directing him to do so. I will make no award under either the aggravated or compensatory head for breach of the right to

own property; such an award under the two heads would be duplicative of the award I have made under the head of exemplary damages.

47. Since costs follow events. The plaintiffs will be entitled to costs and interest at court rates.

48. This then will constitute the final orders of the court:

- a) An order of specific performance is hereby issued against the 1st defendant, directing the delivery to the plaintiffs, on behalf of the deceased's estate, of all the completion documents held by the 2nd defendant on his behalf to fulfill the sale agreement herein.**
- b) A permanent injunction is hereby issued restraining the 1st defendant, its directors, servants, agents, and employees from entering, remaining on, or interfering in any manner with the deceased's estate's ownership and quiet possession of the suit premises.**
- c) The plaintiff is awarded Kshs 2,000,000/= in exemplary damages arising from the wanton unilateral breach of the agreement, to be borne by the 1st defendant.**
- d) Interest at court rates of the payable sum to the plaintiffs for and on behalf of the deceased's estate is hereby awarded against the 1st defendant.**
- e) Costs of this suit to the plaintiff to be incurred by the 1st defendant.**

f) The 1st defendant will bear his own costs in view of his conduct in this matter.

Dated, signed, and delivered electronically in Nyeri on this 9th day of April, 2026, in the absence of the parties and their counsels who had been notified of the judgment date. CA Kendi present.

E. K. MAKORI

JUDGE