REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC APPEAL NO. E011 OF 2025

KEIBUKWO INVESTMENTS LIMITED……

APPELLANT

VERSUS

JOHN KIRWA SAINA
(for the estate of the late Joachim Kipkemboi……RESPONDENT

(Being an appeal from the judgement of Hon Keago (CM) delivered in Nyahururu Law Courts on 5/2/2025 in CMELC No. 327 of 2018)

JUDGMENT

Case before the trial court

1. The appellant herein, former plaintiff instituted proceedings before the trial court vide a plaint dated 8.8.2018 claiming that on 22.5.1996, the

deceased, Joakim Kipkemboi was issued with a letter of allotment for parcel L.R. No. Rumuruti Township Block 3/137. That thereafter, on 20.7.1996, following the issuance of the letter of allotment, the plaintiff covenanted with the Deceased vide an oral agreement, that the plaintiff would facilitate the preparation of all conveyancing documents, payment of all requisite fees and completion of the conveyancing process antecedent to issuance of the Title. The consideration being that upon completion of the conveyancing, the registration process and subsequent issuance of the title, in light of the fact that the Plaintiff would have paid all conveyancing fees including stamp duty therefore, the Deceased would transfer to the Plaintiff half of the suit property, with the option to purchase the other half at a consideration of Kenya shillings one million, five hundred thousand (Kshs 1,500,000/=)

2. That in fulfilment of the aforementioned oral agreement, the plaintiff made the following payments;

i. Acceptance Fee for the allotment at Kenya shillings fifty thousand, nine hundred and ninety five (50,995/=)

ii. Surveyor's fee of Kenya shillings one hundred and twenty thousand (Ksh 120,000/=)

iii. Facilitation of the Conveyancing process at Kenya shillings three hundred thousand (Ksh 300,000/=)

iv. Facilitation of all the labour expenses during the conveyancing process including but not limited to Advocate fees

v. In settlement of outstanding arrears, annual rent and interest accrued as at 7th January 2016, a sum of Kenya shilling one hundred and sixty five thousand, seven hundred and sixty (Ksh 165,760/=)

3. That the plaintiff performed its part of the agreement, the defendants failed to effect the transfer of the property and to sell the other half to the plaintiff and went ahead to subdivide the suit land into smaller portions.

4. The plaintiff therefore sought judgment in the following terms;

a) a permanent injunction restraining the Defendant, whether by himself, agents or any person whosever acting on his behalf or behest from subdividing, offering for sale, selling, charging, leasing, licensing or in any other way howsoever dealing/ disposing of the L.R. No. Rumuruti Township/Block/3/140;

b) specific performance of the oral contract covenanted on or about 20th July 1996, by an Order of Mandatory injunction against the Defendant to

concur and execute all necessary documents for the transfer of half of the acreage or L.R. No. Rumuruti Township/Block/3/140 to the plaintiff.

c) **Specific performance of the oral contract covenanted on or about 20th July 1996, by an Order of Mandatory injunction against the Defendant to concur and execute all necessary documents for the transfer of half of the acreage of L. R. Rumuruti Township/Block/3/140 to the plaintiff for the consideration of Kshs 1.5million.**

5. The initial defendant, Veronica Kipkemboi filed a statement of defence dated 3.9.2018 where she denies that the plaintiff ever entered into an agreement with the deceased and avers that she was not privy to any such agreement. That being the rightful owner of the suit property, she had the

right to subdivide the suit land. She prayed for the dismissal of the suit.

6. The 2nd defendant filed a statement of defence dated 15.9.2021 whose content is similar to that of the 1st defendant save that he identifies the deceased, Joakim as his father.

7. On 28.9.2022, the trial court was informed that the 1st defendant died and the parties agreed to proceed against the 2nd defendant only.

8. After a hiatus of 6 years, the hearing of the case eventually took off on 28.2.2024. The case of the plaintiff was advanced by two witnesses. Pw1 was David Some Barno and he adopted his witness statement dated 8.9.2018 (its actually dated 8.8.2018) as his evidence. He also produced the documents in his lists (several of them) as exhibits 1-19. The contents of his witness statement mirrors their pleadings.

9. On cross examination, Pw1 identified himself as a director of the plaintiff as from 2022-2023, but the current sole director is one Henry Some. He contends that he had an agreement with the deceased in 1996, and by then, the plaintiff company had not been formed. He also had an agreement with the Widow of Joakim, but not the son who came in the picture in year 2014. He contends that before the passing on of Joakim, the suit parcel had not been surveyed into two portions, but he paid sh. 120 000 to the surveyor. He also paid sh 35 000 for plot B, though the letter for allotment was for A. He also paid sh 300 000 as facilitation which was the entire fee. He paid sh. 165 000 to KRA and he also paid for land rates. He cannot recall when instructions were given to the surveyor. He did not use the suit plot.

10. On re-examination, Pw1 stated that he did the agreement with Joachim only, but he met his wife

through a surveyor. He was to get ½ of the suit land after paying sh.400,000, then he was to buy the other portion for sh.400 000. His claim is for the land and not any payments.

11. PW2 is one ONYANGO NJEVA GEORGE, who introduced himself as an assistant surveyor, he adopted his witness statement dated 30.10.2023 as his evidence. He avers that in October 2013, he was given instructions by Pw1 to carry out survey works on several parcels namely plots A, B, C and D in Rumuruti Township and he was given original copies of the allotment letters. That David agreed to meet the survey costs, thus Pw2 proceeded with the survey works on 1.11.2013. Thereafter, he submitted the survey computation file to the Director of Survey Nairobi who approved the survey works on 8.7.2015 and the five parcels were given registration numbers Rumuruti/Block

3/137-141. However, further processes stalled as PW1 came to learn that Joakim had passed on.

12. On cross examination, PW2 stated that the instructing client was not the registered owner of the suit plot, that plot A was registered in the name of Joakim whom he didn't meet and that Pw1 had no document authorizing him to transact on the suit property. He avers that he prepared the beacon certificate for plot A on the basis of the instructions given by Pw1, but the owner of the land is supposed to sign the beacon certificate. He averred that Veronica Kipkemboi didn't instruct him to do survey, but the son did.

13. In re-examination, PW2 stated that for subdivision, he was instructed in year 2016, but the first survey was done in year 2013 and completed in year 2014, of which the initial instructions emanated from PW1.

14. The case for the defendants was advanced by the 2nd defendant, JOHN KIRWA SAINA testifying as DW1. He adopted his witness statement dated 15.9.2021 as his evidence. He produced the documents in his two list as exhibits 1-7. The content of his witness statement mirrors his pleading adding that he is the current registered owner of the suit property Block 137 measuring about 1.020 hectares.

15. On cross examination, Dw1 stated that he doesn't know pw1, and the plaintiff. That he was born in 1966, thus he was 30 years old when his father was allocated the suit land, and if there was any agreement, his father could have disclosed the same to him. He doesn't know if his mother was involved in the land transaction or that she was involved in the agreement of 2016. He has never travelled to Nairobi to meet Some Barno. He avers that his father paid for the allotment letter but he

doesn’t know if Pw1 is the one who paid sh. 30 995. He is aware that there was a request to pay land rates of sh 165 760, but he doesn’t know as to who made the demand. However, it is his mother who made the payments and she was issued with a title deed. He avers that his mother instructed the surveyor to do the survey works and payments were to the tune of sh.720 000, then the lease was issued on July 2016. He doesn’t know who did survey before 2016 and he has not challenged the beacon certificate.

16. On re-examination, DW1 stated that the initial survey work was done by his father.

17. In the judgment delivered on 5.2.2025, the court found that the claim of the plaintiff was anchored on the agreement of year 1996, thus the claim was stale, that the defendants had no capacity to be sued on behalf of the estate of Joakim as they had no letters of administration, that the plaintiff could

not have entered into an agreement with the deceased since it didn't exist in 1996 and had no resolution to that effect, that the alleged original agreement was not witnessed by anybody and that there was no evidence of a valid contract between the parties. In the circumstances, the trial court gave judgment in the following terms;

> **"a) That a permanent order of injunction restraining the defendant whether by himself, agents, or any person whosoever acting on his behalf or behest from sub dividing, offering for sale, selling, charging, leasing, licensing or in any way other way howsoever dealing disposing of LR No. Rumuruti/Township/Block 3/ (137) be and is hereby declined.**
>
> **b) A specific performance of the oral contract covenanted on or about 20th**

July 1996 by an order of mandatory injunction against the defendant to concur and execute all necessary documents for the transfer of half of the acreage of LR No.Rumuruti Township/Block 3/137 to the plaintiff be and is hereby declined.

c) Specific performance of the oral contract covenanted on or about 20th July 1996 by an order of mandatory injunction against the defendant to concur and execute all necessary documents for the transfer of half of the acreage of LR No Rumuruti Township/Block 3/137 to the plaintiff for consideration of Kshs 1.5 million be and is hereby declined.

d) The 2nd defendant and estate will have costs of the suit.

The Appeal

18. Aggrieved by the aforesaid decision, the appellant filed its memorandum of appeal dated 3.3.2025 raising sixteen (16) grounds of appeal summarized as follows; That the learned magistrate erred in law in making a finding that the estate of Joakim was wrongly sued, yet the late Veronica had been sued as the administratix of the said estate and the issue had not been raised during the trial, making a finding that the appellant's claim was stale, ignoring the agreement between the deceased, Joakim and David Some Barno, (Pw1) in which the former assigned his interests to the latter, that Pw1 was in possession of the letter of allotment until the title was processed in year 2016 without any objection from the family of Joakim, that the appellant renegotiated the contract of sale with Veronica Kipkemboi, the wife of Joakim in year

2015, that David Some Barno is the one who facilitated the issuance of the title by meeting the requisite costs including surveyors fees and land rent payments, failing to make a finding that the appellant had a legal right over the suit property and failure to apply the relevant law.

19. The appellant therefore prays for judgment in the following terms;

"a) This appeal be and is hereby allowed

b) The judgment and Decree of the Honourable Learned Magistrate, Hon. E. H. Keago, CM of 5th February 2025 in Nyahururu Chief Magistrate ELC Case No. 327 of 2018 and all other consequential orders be set aside;

c) The Honourable court be pleased to enter judgment for the Appellant as per the plaint dated 8th August 2018 filed in

Nyahururu Chief Magistrate ELC Case No. 327 of 2018;

d) The Honourable court be pleased to issue any other order in the interest of justice,

e) The cost of this Appeal and of those in Nyahururu Chief Magistrate ELC Case No. 327 of 2018 be awarded to the Appellant."

20. This court directed the parties to canvass the appeal through written submissions, of which both parties have duly complied. The submissions of the appellant are dated 13.1.2026 where it has rehashed the evidence and the grounds of appeal. On the issue of a stale claim, it is submitted that crystallization of Section 4 (1) of the Limitation of Actions Act could only have occurred if the respondents failed to honour the agreement and that is what happened after the lease to the suit property was issued on 1.7.2016. Thus, the suit

was not statute barred as the cause of action arose on 1.7.2016.

21. On whether the estate of Joakim was properly sued, it is submitted that the contractual obligations and benefits arising from the agreement did bind the estate of the deceased, which must then fulfil those obligations and that is why the personal representatives (executors or administrators) step into the shoes of the deceased to manage his affairs. To this end, David Barno was not required to engage the estate of the deceased to validate the agreement. Adding that the issue of capacity of Veronica to be sued was never raised at the trial. It is argued that the issue of capacity only arose during submissions, yet submissions cannot replace the pleadings and evidence. The case of **Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another (2014) KECA 642 (KLR)** was cited to buttress this point.

22. On the validity of the agreement, it is argued that pursuant to the provisions of Section 3 (7) of the Law of Contract Act and Section 38 of the Land Act, agreements made before the coming into force of the aforementioned statutes did not have to be in writing, adding that failure to execute the written agreement of 2015-2016 did not invalidate the earlier oral agreement.

23. On the rights and obligations of the parties, it is submitted that the appellant did what was required of it regarding the agreements. That the conduct of the parties herein speak to their intent under the oral agreement of 1996. None of the parties to the agreement should be allowed to defeat the said intent. Thus, the maxim of equity that "Equity deems as done that which ought to be done" is applicable in this case. The appellant relies on the cases of **Clarke v Sodhoni (1963) EA and Benjamin Ayiro Shiraku v Fozia Mohammed**

(2012) eKLR amongst other cases to buttress these points. It adds that this court should not lend its hand to the illegal enterprise of the respondent. Instead, the court should do equity by compelling the estate of Joachim to fulfil the end of their bargain.

24. The submissions of the respondent are dated 28.1.2026. It is argued that the issue as to whether the claim was statute barred was correctly determined as a threshold issue touching on the jurisdiction of the court. Thus, the filing of the suit in year 2018 in respect of the agreement of 1996 was a classic case of laches. To this end, the case of **Gathoni v Kenya Cooperative Creameries Ltd (1982) KLR** was cited amongst other cases.

25. On the capacity to sue the estate, the case of **Muchui & 4 Others v Chokera (ELC Appeal no. E015 OF 2022)** was cited to buttress the point that only persons holding letters of administration

have locus to represent the estate of a deceased person. And by suing persons who had no such letters, the appellant was essentially inviting the court to sanction the intermeddling with the estate contrary to the provisions of Section 45 of the Law of Succession Act, adding that the issue of capacity was a jurisdictional question and the court had the mandate to deal with the said issue.

26. On the validity of the contract, it is submitted that no valid or enforceable contract existed, that prior to the amendment of Section 3 (3) of the Law of Contract in 2003, oral agreements were permissible if there was part performance on the part of the purchaser who had taken possession, or who, having taken possession continued with such possession. That the doctrine of part performance is an equitable shield and not a sword to validate a non- existent contract. To this end, the case of

Nkuchiana Ngara v Joseph Kalunge Ekandi (2021) eKLR has been cited.

27. It is further argued that the appellant cannot introduce the doctrine of constructive or resulting trust as such particulars were not pleaded.

DETERMINATION

28. This being a first appeal, this court reminds itself of its primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the evidence and then determine whether the conclusions reached by the learned magistrate are to stand and give reasons either way. That was the pronouncement of the court in the case of **Abok James Odera t/a A. J Odera & Associates Vs John Patrick Machira t/a Machira & Co. Advocates (2013) eKLR, Selle and another vs. Associated Motor Boat Company Limited & 2 others [1968] EA 123.** The court held that a first

appellate court has a duty to re-evaluate, re-assess and re-analyse the record and make its own conclusions.

29. I have duly considered the record before the trial court as well as the rival submissions. The issues for determination majorly turns on three issues that is; the capacity of the respondents to be sued, whether the claim of the respondent was statute barred and whether the appellant has any legal right over the suit property.

30. On the capacity to sue the respondents, the trial court made a finding that the respondents could not be sued on behalf of the estate as they did not have letters of administration. The appellant has submitted at length on this issue arguing that the same was not raised in the pleadings or in evidence and that the respondents had submitted to the jurisdiction of the trail court. In the case of **Phoenix of E.A. Assurance Company Limited v**

S. M. Thiga t/a Newspaper Service [2019] eKLR, it was stated that;

> **"Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a compliant one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself".**

31. This far, it becomes clear that neither the court, nor parties can confer jurisdiction on the court where non exists, thus the trial court had a legal mandate to interrogate the question of jurisdiction relating to the capacity of the respondents to be sued even if parties were silent on the issue in their pleadings.

32. The appellant has rightly submitted that the personal representatives of the deceased are the once who step in the shoes of the deceased to manage his affairs. However, were the respondents sued as personal representatives of the deceased? Certainly not. In the case cited by the trial court and the respondent, **Muchui & 4 Others V Chokera (ELC Appeal No. E015 of 2022)** only persons who hold letters of administration can represent the estate of a deceased person. This holding is in tandem with the provisions of Section 82 of the law of succession Act where it is stipulated that;

> **" Personal representatives shall, <u>subject only to any limitation imposed by their grant,</u> have the following powers— (a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law,**

survive the deceased or arising out of his death for his personal representative”

33. There is no evidence to indicate that the respondents had grants in respect of the estate of Joakim. The arguments proffered by the appellant that the cause of action survived the deceased does not hold. I am therefore in agreement with the submissions of the respondent that in suing parties who do not have a grant, the appellant is essentially inviting the court to sanction intermeddling of the estate of Joakim in contravention of section 45 of the Law of Succession Act. In the circumstances, the suit filed by the appellant was dead on arrival and the trial court correctly made a finding that the respondents had no capacity to be sued.

34. On whether the claim of the appellant was stale, I make reference to the findings of the trial court at

paragraph 32 of the judgment where it is stated that;

> **“The claim is equally premised on contract which was entered in 1996. The plaintiff having not particularized the date of breach the court will find that the claim became time barred at the expiry of 6 years from the date of demise of the registered proprietor which should be somewhere in 2009. The claim survived the demise of the deceased owner but the same could only be pursued within 6 years. I do find that the claim before court is bad in law and a non-starter”.**

35. A perusal of the plaint reveals that 20.7.1996 is the only date that the appellant mentions as the date of the covenant. Thus, the trial court was again correct in making a finding that the suit was

stale either in contract or in respect of a claim to land.

36. On whether the appellant has a legal right over the suit property, I make reference to the case of **National Bank of Kenya Ltd v Pipeplastic Samkolit (k) Ltd & Another** where it was held that a court of law cannot rewrite a contract between parties**.** In **Housing Company of East Africa Limited v Board of Trustees National Social Security Fund & 2 others [2018] eKLR,** the Court of Appeal stated that;

> **" It is settled law, as correctly submitted by the 1st respondent, that contracts are voluntary undertakings and contracting parties are free to specify the terms and conditions of their agreement, and that when parties do contract, the court does not have the right or ability to substitute its judgment for that of the parties.**

Indeed, when a contract is clear and unambiguous, a court's role is to interpret the contract as written and not rewrite it because, just as with any other contract, a contract for the sale of land can only be changed with the agreement of both parties and not unilaterally"

37. I pose the question; What were the terms of this voluntary undertaking of 20.7.1996 and renegotiated in 2015-2016? The appellant contends that for the agreement of 1996, it was oral in which the appellant was to facilitate conveyancing documents and pay the requisite fees antecedent to the issuance of a title. In return, he was to get half of the suit property with the option of buying the other half. To this end, the appellant avers that it performed its obligations relating to the agreement.

38. Firstly, the appellant did not exist as at 1996. Pw1, David admitted that much during cross examination when he stated that, *"We had an agreement in 1996. By then, the company had not been incorporated. The agreement was between David and Joakim".* This far, the claim by the appellant as having made an agreement with Joakim in 1996 falls on quick sand and must collapse.

39. The appellant seems to be buoyed by the fact that theirs was an oral agreement which is not subject to the provisions of Section 3 (3) of the Law of Contact Act. However, and as rightly submitted by the respondent, the pre-amendment of the aforementioned section provided that;

> **"No suit shall be brought upon a contract for disposition of an interest in land unless the agreement upon which, the suit is founded, or some memorandum or note thereof, is in writing and is signed by the**

party to be charged or by some person authorized by him to sign it; provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract"

1) Has in part performance of the contract taken possession of the property or any part thereof; or

2) Being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract".

40. In his evidence, Pw1 had stated that *"I had not used the plot A during the lifetime of Joakim"*. There is no evidence to indicate that the appellant ever occupied the suit land. Thus, the appellant

cannot bring itself within the ambit of the aforementioned law.

41. The appellant contends that it made various payments towards the fulfilment of its obligation in the agreement. To this end, the appellant allegedly paid sh 50 995 for the allotment, sh.120 000 as survey fees, sh 300 000 conveyancing, sh 165 760 as rate payments as well as other labour expenses. If the appellant made the aforementioned costs, that remains its story.

42. As it were, there is no evidence to indicate that the appellant made the said payments or was authorized to make the said payments by Joakim. To this end, only the document at page 39 (receipt for sh. 15000 dated 12.1.1999) and the one at page 54 of the Record of Appeal (receipt for sh. 50 000 dated 25.7.1996) predate the date of the death of Joakim who passed on in year 2003. That being the case, the question then begging for an answer is,

who was authorizing the appellant to make the said payments, seeing that most payments were made in year 2012. What more, the payments are made in the name of Joakim without any evidence that they were made by the appellant pursuant to an oral agreement of 1996.

43. I must add that possessing the letter of allotment of Joakim did not in any way divests the rights and interests there in in favour of the appellant absent any tangible agreement, oral or otherwise as to why the appellant kept the said document.

44. It is quite peculiar that the appellant did not find it necessary to have the alleged agreement completed during the lifetime of the deceased, but instead pursed his alleged interests after the passing on of Joakim. In the case of Peter **Nyaga Kairu v Esther Wanjiku Njau & 5 others [2019] eKLR,** the court was dealing with a situation where a party (Nyaga) was claiming the land of his

deceased brother (Njau), long after the latter's death. The court stated thus;

> **"If Nyaga at all had a claim against his brother, he had all the time in this world to actualize the same during the lifetime of Njau. I therefore find that this is a suitable case to invoke the doctrine of laches; "Equity aids the vigilant and not the indolent". A key element of this doctrine is in ensuring that legal claims are brought in a reasonable and timely period.**
>
> **Plaintiff is guilty of acquiescence in this situation. Why is it that he never asserted his alleged rights when Kamithi and Njau breathed". Even when he realized that his brother was ailing in 1998, he did nothing. Equity will not lean in his favour……"**

45. Still in the above cited case of **Peter Nyaga**, the court applied the latin aphorism that is; ***"Mortui***

non mordent” which means***; “dead men don’t bite or dead men don’t tell tales”.*** And so, it is that Joakim passed on in year 2003. And during his lifetime, the appellant (who did not even exist!) did nothing to assert and actualize its alleged interests in the suit land in respect of the alleged agreement made 7 years earlier in year 1996.

46. For the averment that the appellant renegotiated the agreement with the family of Joakim in year 2015-2016, again this claim is baseless as neither Veronica, nor John Kirwa had a grant enabling them to step in the shoes of Joakim.

47. This far, I come to the conclusion that there was no valid agreement between the appellant and one Joakim or with his estate capable of being enforced. In essence, the appellant has no legal right or any right at all over the suit property. The trial court therefore arrived at a correct finding that the orders of specific performance were unmerited.

48. In the final analysis, this appeal is found to be unmerited, the same is hereby dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 6TH DAY OF MAY 2026 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:

Bedan – Court Assistant

Mukuha holding brief for Bwire for the Appellant

Waichungo Martin for the Respondent