



**Theuri (Suing as the Guardian and Manager of the Estate of Wilson
Theuri Kimuri) v Lekaram (Environment & Land Case E008 of 2022)
[2025] KEELC 3067 (KLR) (26 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 3067 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI
ENVIRONMENT & LAND CASE E008 OF 2022
AK BOR, J
FEBRUARY 26, 2025**

BETWEEN

**GEORGE KIMURI THEURI PLAINTIFF
SUING AS THE GUARDIAN AND MANAGER OF THE ESTATE OF WILSON
THEURI KIMURI**

AND

EZEKIEL LETEPES LEKARAM DEFENDANT

JUDGMENT

1. The Plaintiff instituted this suit as the legal guardian and manager of the estate of Wilson Theuri Kimuri, pursuant to a guardianship order issued on 7/3/2022. Wilson Theuri Kimuri is the registered proprietor of land reference number (L.R No.) 2787/421 (“the suit property”). Wilson Kimuri entered into an agreement with the Defendant for the sale of 1 1/4 to be excised from the suit property at the agreed consideration of Kshs. 3,500,000/= . He was to pay the initial deposit of Kshs. 350,000/= as stipulated in the sale agreement. Upon payment of the deposit, Wilson Kimuri surrendered the original grant number IR. 29199 to Kiget & Co. Advocates who acted for both parties in the sale transaction.
2. The Plaintiff pleaded that the sale agreement was skewed in favour of the Defendant and was not proper and legal due to several vitiating factors on the formation and performance of the contract. The Plaintiff pleaded that Wilson Kimuri lacked the fitness of mind to bind him as a vendor in the agreement. He contended that his mental incapacity impaired the contract and rendered its performance impossible.
3. Secondly, that clause 14 of the agreement stipulated that 10% of the purchase price would be remitted to the vendor upon successful transfer of the land to the Defendant which is inconsistent with conventional conveyancing practice. Clause 15 of the agreement stated that the Defendant as purchaser



would take occupation of the land on or before the end of June 2010 yet by then he would have paid less than 50% of the purchase price.

4. The Plaintiff contended that Kiget & Co. Advocates who drew the contract failed to give proper independent legal advice to the vendor and took advantage of his mental incapacity and skewed the contract in favour of the Defendant behind the back of Mr. Theuri's immediate family members. Additionally, that the sale agreement provided that completion would be within a period of 90 days which was unrealistic since the suit property had to be subdivided first and titles obtained for the resultant portion which the Defendant was acquiring. He contended that after the lapse of the 90-day completion period parties did not extend the completion period. The Plaintiff contended that the Defendant did not meet his obligation under the contract and that he failed to pay the purchase price for the suit land. He urged that there were overriding family interests in that the suit property was a family home and it was necessary to obtain spousal consent.
5. The Plaintiff contended that the sale transaction was oppressive to the vendor and that it ought to be set aside due to unenforceability in law. The Plaintiff claimed that he discovered in May 2011 that his father, Wilson Kimuri had entered into the sale transaction without disclosing this to his immediate family members and was in the process of parting with the suit property which was occupied by his family as their family home and for which they hold sentimental affiliations to. He contended that the suit property was not capable of being alienated without the Plaintiff's consent and that of his mother Purity Beatrice Njoki Theuri. His mother registered a caveat against the land on 30/6/2011 to protect her matrimonial interest over the land and filed Nyeri ELC Case No. 2 of 2012.
6. Following the demise of his mother, the Plaintiff set out to verify the amount of money Wilson Theuri had received for the sale of the suit property and discovered that through Kiget & Co. Advocates, the Defendant remitted the sum of Kshs. 2,425,000/= into Wilson Kimuri's account held at Barclays Bank of Kenya Limited. The Plaintiff maintained that the Defendant had never occupied 1 ¼ part of the suit property and that Wilson Kimuri retained possession of the entire land which was not subdivided.
7. He claimed that on 21/9/2022, the Defendant hired goons who invaded the suit property and chased away the Plaintiff's workers who were erecting a perimeter fence to secure the suit property. He contended that the Defendant had been using faceless individuals to harass and assert undue pressure on the Plaintiff's father to surrender the 1 ¼ acre piece of land thereby endangering his personal security and wellbeing yet he is elderly and of ill health. The Plaintiff maintained that the sale transaction between the Defendant and his father in relation to a portion of 1 ¼ acre of the suit property was never completed and that the vendor did not place the Defendant in possession of the suit land. He added that the vendor was not paid the remaining balance of the purchase price and no completion notice was issued to the estate of Wilson Theuri Kimuri who was non-compos mentis.
8. The Plaintiff sought a declaration that the sale transaction for part of the suit property pursuant to the sale agreement dated 5/7/2010 aborted and its performance was rendered impossible due to several factors that vitiated the contract and it ought to be set aside for lack of validity and enforceability in law. He sought a permanent injunction to restrain the Defendant or his agents from damaging, subdividing, alienating, transferring or otherwise interfering with the estate of Wilson Kimuri's occupation of the suit property. He also sought to have the resultant subdivision scheme approval issued with respect to L.R No. 2787/421 for Nanyuki Municipality Block 12/13 cancelled. He sought to have the Defendant ordered to deliver up and surrender to the Plaintiff the original Grant No. I.R 29199 for the suit property and in default, for the Chief Land Registrar to issue a duplicate or provisional grant to Wilson Kimuri.



9. In the defence and counterclaim filed in court, the Defendant denied the Plaintiff's claim and clarified that Nyeri ELC Case No. 2 of 2012 which Purity Beatrice Njoki Theuri filed abated by operation of law. He stated that he paid the full purchase price to Wilson Theuri Kimuri and that he even made an overpayment of Kshs. 144,000/=. He denied that L.R No. 2787/421 still existed since the land was subdivided to create Nanyuki Municipality Block 12/148, 149, 150 and 151. He added that the Plaintiff filed Nanyuki CM ELC No. E042 of 2022 on 23/9/2022 and misled the court to issue interim orders. He denied that Purity Beatrice Njoki filed a case against Wilson Theuri to enforce her right to the matrimonial property while contending that the Plaintiff lacked the locus standi to challenge the sale transaction between the Defendant and Wilson Theuri because he entered into a valid sale agreement with the Defendant when Wilson Theuri was in good health and sound mind and that the agreement was therefore valid and binding. He averred that the Plaintiff was a busy body and that there was no privity of contract with the Plaintiff.
10. In the counterclaim, the Defendant sought to have the land known as Nanyuki Municipality Block 12/148 transferred to him and for the guardian or manager of Wilson Theuri to be compelled to execute the transfer, failing which the Deputy Registrar is to sign the documents to facilitate the transfer in his favour. The Defendant asserted that he was a purchaser for valuable consideration protected by the law. Further, he pleaded constructive trust and estoppel with respect to his rights over Nanyuki Municipality Block 12/148 for which he had paid the full purchase price and was granted vacant possession by Wilson Theuri in 2010 and had enjoyed such possession up to the time of filing his defence.
11. The hearing of this suit commenced on 17/9/2024. The Plaintiff gave evidence along the lines set out in the Further Amended Plaint. He contended that the aborted sale agreement was oppressive to the vendor and that its validity and enforceability had been impugned and that it should therefore be set aside. He maintained that his father was not paid the full purchase price for the suit land and that he lacked the legal capacity to enter into the contract. He told the court that the family of Wilson Kimuri had continued to occupy the entire suit property as their family home and had been in exclusive possession of the land until 21/9/2022 when hired goons who claimed to be acting at the behest of the Defendant illegally invaded the suit property intending to forcefully wrestle possession of the land from the estate of Wilson Theuri Kimuri. He reported the incident to the Nanyuki Police station and was issued OB No. OB/22/09/2022. He maintained that the sale transaction between his father and the Defendant was never completed and that his father did not place the Defendant in possession of the land.
12. He produced copies of the sale agreement dated 5/7/2010, title over the suit property, caveat registered by his mother on 1/7/2011 and a copy of the approval which the County Government of Laikipia granted to Wilson Theuri Kimuri to construct a boundary wall on the suit property and photographs of people on the suit land some of whom are armed. He also produced copies of the bank statements for Wilson Theuri and a photograph taken of him on a wheel chair with an amputated leg. He produced the letter dated 19/3/1994 which mentioned that Wilson Theuri suffered injuries as a result of a road accident in 1968 that led to the amputation of his right leg.
13. On cross examination, the Plaintiff told the court that in 2010 he was working in Kakuma while his father was in Nanyuki. He maintained that his father was not of sound mind in 2010. He later learned that his father had gone to a lawyer to sell his land. He told the court that his father said he never sold the land. He found out that Kiget Advocate had deposited some money in his father's account and that his father had spent the money. The title deed over the suit property was with Kiget Advocate who had taken it from his father. He confirmed that the signature on the sale agreement dated 5/7/2010 was his fathers' even though he could not tell if his father signed the agreement willingly or was coerced.



14. He maintained that the caveat registered against the suit property had not been removed. He told the court that his father was paid a total of Kshs. 2,425,000/= but was emphatic that the contract terms were not favourable to the vendor. He referred the court to the letter dated 19/2/1994 from Barclays Bank of Kenya which showed that his father was retired from the bank on medical grounds.
15. Jackson Karitu Kimuri testified for the Plaintiff. He is the younger brother of Wilson Kimuri and had been close to him over the years. He worked with Wilson Theuri at the former Barclays Bank of Kenya and upon retirement in November 2001, he went to stay in the same neighbourhood of Muthaiga Estate, Nanyuki. He told the court that his brother ordinarily confided in him but had never disclosed that he intended to dispose of a portion of his land in Muthaiga estate. Mr. Karitu was emphatic that Mr. Wilson Theuri did not have capacity to enter into the sale transaction since he was elderly and in ill health and was already experiencing failed memory after being retired from the bank on medical grounds. He added that his brother was going through episodes of hallucinations and was withdrawn and rarely interacted with strangers. On cross examination, he told the court that he lived close to Wilson Theuri in Muthaiga.
16. Dr. Joseph Waigi Njau gave evidence and produced the psychiatric report dated 6/10/2021. He told the court that he assessed Wilson Theuri in the company of his sons. The mental status assessment found him to be suffering from age related neurological disorder (Alzheimer's Dementia) characterized by impairment of cognitive functions manifested by difficulty with memory, attention, thinking and comprehension. He was disorientated and his thoughts were distorted. He had flight of ideas. The psychiatrist concluded that Wilson Theuri did not have the ability to make sound judgments. He confirmed on cross examination that his report was based on the assessment done on 6/10/2021. Further, that the person he diagnosed was amputated as could be seen from the photograph which was shown to him.
17. The Defendant testified and told the court that Wilson Theuri sold L.R No. 2787/421 Nanyuki Municipality when he was of good health and sound mind and that he paid the entire purchase price of Kshs. 3,500,000/= and Kshs. 144,000/= in excess. He maintained that the suit property did not exist after Wilson Theuri surrendered the title and it was subdivided to create Nanyuki Municipality Block 12/148, 149, 150 and 151. He reiterated the averments in his defence and counterclaim while asserting that the Plaintiff did not have any overriding interest in the Defendant's land being Nanyuki Municipality Block 12/148. He urged that the suit had been overtaken by events since the subdivision of the suit property was complete. He was emphatic that he was a bona fide purchaser whose rights were protected by law.
18. He explained that his land measured 1 ¼ acres while the rest of the land remained with Wilson Theuri being parcel numbers 149, 150 and 151. He was emphatic that Wilson Theuri was paid Kshs. 3,500,000/= in 2010 and had kept the money for more than 12 years. He implored the court to transfer Nanyuki Municipality Block 12/148 to him. Further, he pleaded a constructive trust and estoppel with regard to his rights over this parcel of land for which he had paid the full purchase price and had been granted vacant possession by Wilson Theuri in 2010. He stated that he had enjoyed possession and occupation of the land until 5/12/2022.
19. The Defendant produced copies of the sale agreement and several cheques drawn by Kiget & Co. including the cheque dated 22/12/2010 for Kshs. 150,000/=; cheque dated 2/12/2010 for Kshs. 130,000/=; cheque dated 17/2/2011 for Kshs. 150,000/=; cheque dated 28/4/2011 for Kshs. 69,000/=; cheque dated 18/5/2011 for Kshs. 50,000/=; cheque dated 4/4/2011 for Kshs. 150,000/=; cheque dated 4/4/2011 for Kshs. 150,000/=; cheque dated 10/5/2011 for Kshs. 100,000/=; and cheque dated 5/7/2011 for Kshs. 20,000/=.



20. He also produced copies of the letters dated 16/7/2010 from the District Land Officer, Laikipia granting approval for the proposed subdivision of Nanyuki Municipality Block 12/13 into four portions. The letter set out the conditions upon which the provisional approval was granted. The letter dated 11/8/2011 is the subdivision scheme approval for parcel numbers 148, 149 and 150 and gave a breakdown of the legal fees and other charges that were to be paid. The notification dated 26/10/2010 from the Municipal Council of Nanyuki communicated approval for subdivision of L.R No. 2787/421 (Block 12/13 Nanyuki Municipality).
21. He produced a summary of the payments made for the suit land. He also produced a copy of the letter dated 13/10/2011 from the Commissioner of Lands to Wilson Theuri requiring him to remit surrender fees to facilitate preparation of the new titles for the subplots. That amount was paid on 19/10/2010. The letters dated 25/2/2021 forwarded the lease documents for Nanyuki Municipality Block 12/148 to the District Land Registrar for registration purposes. The letter dated 11/4/2011 from the Director of Surveys to the Commissioner of Lands confirmed that the registry index map (RIM) for Nanyuki Block 12 had been amended to reflect parcel numbers 148, 149, 150 and 151 in accordance with F/R 510/37. He also produced copies of the pleadings filed by Purity Beatrice Theuri and payment vouchers prepared by Kiget & Co. Advocates on diverse dates between 2010 and 2011.
22. On cross examination, he told the court that he was introduced to Wilson Theuri by Mr. Kiget and that he met him on 5/7/2010 in Mr. Kiget's office in Soghra House in Nanyuki. According to him, Mr. Wilson Theuri was walking with a walking stick. The agreement had already been prepared by Mr. Kiget and they signed it. He never discussed anything with the vendor. He did not give bankers cheques. All the payments made by Mr. Kiget totaled up to Kshs. 3,500,000/= and Mr. Wilson Theuri would collect the money from Mr. Kiget's office. In his view, the agreement was not vitiated. He told the court that he took possession of the land and fenced it but the fence was destroyed. The case filed by Mr. Theuri's wife was dealt with. He maintained that he had paid the full consideration and that the land was subdivided and that he was chased away from the suit property.
23. On being shown the photo of Mr. Wilson Theuri as an amputee on a wheelchair, he stated that he did not enter into an agreement with Mr. Theuri under those circumstances. He signed the sale agreement in the presence of Mr. Kiget and Mr. Wilson Theuri also signed it. He was emphatic that he paid the full purchase price and even overpaid this by Kshs. 144,000/=. No notice was served upon him claiming that the purchase price had not been paid in full. He denied taking advantage of Mr. Wilson Theuri whom he claimed he did not know before. He was shown the land by an agent of Mr. Wilson Theuri. Nobody stopped him from fencing but his fence was later removed and the land cultivated.
24. The Plaintiff was recalled to give evidence and produce a copy of the search done on 20/9/2024 which shows that the caveat registered on 1/7/2011 had not been lifted. He told the court that his mother placed the caveat against the suit property. He started following up the issue after his mother died. He maintained that his father was not of sound mind in 2010 and 2011 and relied on the letter from Barclays Bank.
25. Kiprotich William Kiget, an advocate of the High Court gave evidence for the defence. He was in practice in 2010 under the style of Kiget & Co. Advocates with offices located in Soghra House, 1st Floor Room 19 in Nanyuki. He knew the Plaintiff, Defendant and Wilson Theuri. He drew the sale agreement on instructions from Wilson Kimuri. Mr. Theuri told him that there was a parcel of land to be sold which was to be excised from the mother title. Mr. Wilson Kimuri told him that he had identified a purchaser, the Defendant in this case.
26. On 5/7/2010, Mr. Wilson Theuri went to his office with the purchaser, he had gone to his office before. Mr. Kiget stated that he did not know the Defendant before but was emphatic that it was not true



- that Mr. Wilson Theuri was of unsound mind at that time. When shown the photograph showing Mr. Theuri amputated and on a wheelchair, he told the court that Mr. Wilson Theuri was not like that when he went to his office, that he could walk every time he went to Mr. Kiget's office on 1st Floor. Mr. Kiget had never known that he was on a wheel chair. He stated that Mr. Theuri had a slight limp to his walk.
27. He told the court that the purchase price was fully paid and that there was an overpayment of Kshs. 144,000/=. Further, that the subdivision of the suit property was done under the instructions of Mr. Wilson Theuri who surrendered the mother title to the advocate with all the relevant documents for subdivision. He added that there was no objection from members of Mr. Wilson Theuri's family and that the Plaintiff did not object to the subdivision. When Mr. Kiget met the Plaintiff in Nairobi, the Plaintiff did not have kind words for him.
 28. He told the court that Mr. Wilson Theuri used to go to his office to pick the money which he used to purchase a car. Mr. Kiget could recall that Mr. Wilson Theuri had a car. Mr. Theuri took the purchaser to the land and showed him the beacons. He used to go to Mr. Kiget's office with his agents who were subdividing the land. He told the court that Wilson Theuri granted possession to the purchaser who fenced the 1 ¼ acre which Mr. Theuri had shown him.
 29. On being cross examined by the Plaintiff's advocate, Mr. Kiget told the court that Wilson Theuri approached him for this transaction. He did not know the purchaser before. He was taken through the terms of the sale agreement including the provision for the initial deposit to be paid to the vendor on transfer and completion being 90 days. His response was that the mode of payment was informed by the vendor's need for money. Mr. Kiget did not prepare a deed of variation. He was not aware that Mr. Wilson Theuri had been amputated because he was always in a trouser. Some of the monies were paid to third parties with Wilson Theuri's approval. He hastened to add that h had never complained about those payments.
 30. Mr. Kiget did not bring bank statements to prove the payments made to Mr. Theuri. He maintained that all the cheques were paid to the vendor who had been asked to refund Kshs. 144,000/= but he failed to respond. The advocate was not aware about the caveat. He told the court that the purchaser was to take possession immediately after signing the agreement. He was emphatic that Wilson Theuri took the deposit and had never complained about payment. Mr. Kiget interacted with Mr. Wilson Theuri after the agreement. Mr. Theuri told him that he was not happy with the suit filed by his wife since he had given land to his wife and sons and added that Wilson Theuri was separated from his wife. Mr. Kiget reiterated that Wilson Theuri was of sound mind and that he would meet him the bank while withdrawing money.
 31. He maintained that Wilson Theuri showed them his land and how he wanted it partitioned while being of sound mind. The Plaintiff told Mr. Kiget that he wanted to shoot him for stealing his father's land. He denied stealing the land. He added that the Plaintiff was not a party to the agreement dated 5/7/2010 which according to Mr. Kiget, was binding on the parties. He reiterated that Wilson Theuri surrendered the mother title for purposes of subdivision when he was of sound mind.
 32. After parties had closed their cases, the court directed them to file and exchange written submissions which would be highlighted on 29/10/2024. On 29/10/2024 the court gave a new date for highlighting submissions as 6/11/2024 because the Defendant had not filed his submissions. The Defendant's advocate told the court on 6/11/2024 that they would file their submissions within 14 days and the court gave a new date for the 20/11/2024. The Defendant did not file submissions.
 33. The Plaintiff submitted that he stumbled upon information relating to the sale transaction which had been undertaken without the family members' involvement at the time when they were working



and staying away from home. His family's position was that Wilson Theuri was manipulated to enter into an unconscionable bargain after the Defendant took advantage of their absence from home to conclude unconscionable sale through Mr. Kiget advocate. The Plaintiff submitted that the law of contract recognised and respected the freedom of parties to enter into agreement setting out the parameters within which they were to be covered.

34. The Plaintiff relied on *Abdul Jalil Yafai v Farid Jalil Mohammed* [2015] eKLR on the point that the law placed a high value on ensuring parties had consented to the terms that bind them. He also cited *Wiltshire v Cain* [1958 – 60] 2 Barb. L. R149 in which the Supreme Court of Barbados outlined what must be shown to prove a defendant was suffering from loss of memory, mental debility or senile decay. They are incapacity of a party due to mental illness in one form or another, that the Plaintiff knew of the condition of the Defendant. The court stated that the Defendant must prove that the Plaintiff had knowledge of the Defendant's condition in order to succeed. The Plaintiff submitted that Wilson Theuri lacked the mental capacity to enter into the contract and that the Defendant knew this fact and took advantage of it.
35. The Plaintiff submitted that Wilson Theuri was not *compos mentis* at the time he entered into the sale transaction and that he lacked the requisite mental acuity to drive or negotiate any commercial transaction or enter into a valid contract without the assistance of his immediate family. The Plaintiff relied on the letter dated 19/2/1994 from Wilson Theuri's former employer, Barclays Bank of Kenya Limited which confirmed that he took early retirement on medical grounds since his memory was failing thus affecting his ability to perform his duties. He was retired on medical grounds on 29/3/1994. The Plaintiff also relied on the medical report and evidence of Dr. J. W. Njau who diagnosed Wilson Theuri as suffering from an age related degenerative neurological disorder known as Alzheimer's dementia.
36. According to the Plaintiff, Wilson Theuri's diminished mental capacity compromised his bargaining power in the sale as a result of which he bound himself to unfair terms of the contract both at the formation and performance stage. The Plaintiff argued that Wilson Theuri was incapable of giving intelligent consent and making sound judgment which was the basis for the Plaintiff being appointed one of his legal guardians and managers. The Plaintiff pointed out that the Defendant did not call an expert witness to rebut Dr. Njau's conclusive evidence. He submitted that Wilson Theuri lacked the fitness of mind and full command of his faculties to freely and voluntarily execute the impugned sale contract after understanding its content which impairs the entire contract, its validity and rendered its performance impossible.
37. The Plaintiff submitted that there were contradictions in the testimony of the Defendant and his lawyer William Kiget on how they first came into contact with Wilson Theuri. The Defendant stated that he first met Mr. Wilson Theuri in Mr. Kiget's office and that he found the sale agreement already prepared which he proceeded to sign. On the other hand, Mr. William Kiget stated in his evidence that he had not previously interacted with the Defendant until the Defendant was taken to his office by Wilson Theuri. The Plaintiff faulted the Defendant for not involving Wilson Theuri's family.
38. According to the Plaintiff, no reasonable man in their right frame of mind would have agreed to bind themselves to clause 14 of the sale agreement which stipulated that the deposit of 10% would be remitted to the vendor upon successful registration of the transfer. Secondly, that clause 15 of the agreement stated that the purchaser's occupation of the land was to commence on or before the end of June 2010 yet the agreement was signed on 5/7/2010. That in an ideal setting, no reasonable man would have agreed to part with possession of his land and surrender the original title without receiving a substantial amount of the purchase price. The Plaintiff also pointed out that the payments were made piece meal in a haphazard manner over a prolonged period of time contrary to the terms of the sale



- agreement. He contended that in the end, Mr. Kiget advocate paid Wilson Theuri Kshs. 2,525,000/= which would not have been of economic benefit to him or his family.
39. The Plaintiff noted that Kshs. 1,775,000/= was paid on 12/7/2010, Kshs. 130,000/= on 2/12/2010; Kshs. 150,000/= was paid on 22/12/2010; Kshs. 150,000/= on 17/2/2011, Kshs. 150,000/= on 6/4/2011 and a cheque for Kshs. 69,000/= dated 28/4/2011 bounced and was unpaid. In his view, the cash remittances of Kshs. 100,000/= on 10/5/2011, Kshs. 50,000/= on 18/5/2011 and Kshs. 20,000/= paid on 5/7/2011 demonstrate the intention to take advantage of a vulnerable person. The Plaintiff also questioned why Mr. Kiget advocate paid substantial sums of money to third parties. It was contended that Mr. Kiget did not produce payment vouchers to confirm that he had been authorised by Wilson Theuri to disburse funds on his behalf.
 40. The Plaintiff contended that the sale of the suit property was a predatory sale which the Defendant enticed Wilson Theuri to enter into with the intention of exploiting him and taking advantage of his mental infirmity. The Plaintiff faulted Mr. Kiget advocate who drew the sale agreement and acted for both parties for failing to give proper independent legal advice to Wilson Theuri yet he had a duty to prevent the avoidance of contracts on grounds of undue influence or duress.
 41. The Plaintiff relied on *Lloyds Bank Limited v Bundy* [1975] Q.B. 326, 339 in which Lord Denning stated that English law gave relief to one who without independent advice entered into a contract upon terms which were very unfair or transferred property for a consideration which was grossly inadequate when his bargaining power was grievously impaired by his own desires, ignorance or infirmity coupled with undue influence pressures brought to bear on him for the benefit of the other.
 42. The Plaintiff submitted that the Defendant orchestrated and was a silent participant in the dubious scheme to exploit an ailing senior member of our society and that such conduct was inimical to public policy. The Plaintiff was emphatic that the sale transaction could not be said to have been legal and proper or that parties obtained fairness, certainty and finality in their bargain based on Wilson Theuri's mental capacity. The Plaintiff invited the court to vitiate the unconscionable contract in order to protect vulnerable persons.
 43. The Plaintiff maintained that the sale was void and unenforceable because the Defendant failed to act in accordance with the terms and conditions of the sale agreement and that he failed to pay the purchase price in accordance with the agreement. The Plaintiff argued that Wilson Theuri did not receive the full purchase, that he only received Kshs. 2,525,000/= and that based on this the contract was never completed and was therefore discharged.
 44. The Plaintiff submitted that the sale agreement stipulated that completion would be within 90 days which was untenable in light of the condition precedent that the vendor was to subdivide the suit property and obtain a title for the resultant portion which the Defendant was purchasing. He argued that after the lapse of the 90 days there was no attempt to extend the life of the contract for parties to discharge their obligations in full.
 45. The Plaintiff relied on Section 4 of the Limitations of Actions Act on the position that an action founded on contract could not be brought after the lapse of 6 years while urging that the Defendant had failed to exercise reasonable diligence and take steps to safeguard his interest. The Plaintiff emphasised that the impugned sale contract lapsed and could not be said to be valid, binding and enforceable in law. He was emphatic that the completion period was never extended. The Plaintiff maintained that the Defendant was in clear breach of the contract which he termed as void with the mother title reverting to Wilson Theuri.



46. The Plaintiff submitted that the Defendant illegally and irregularly superintended over the perfecting and issuance of a title for Nanyuki Municipality Block 12/148 on 25/2/2021 despite the fact that Purity Beatrice Njoki Theuri had on 1/7/2011 placed a caveat against the mother title and an order had been issued in Nyeri ELC Case No. 2 of 2012 restraining issuance of titles and the Defendant was a party in that suit. The Plaintiff contended that since the caveat and court order had never been lifted, the Defendant's actions of obtaining a title were null and void because a title should be an end product of a valid process. The Plaintiff emphasised that a party in breach should not be allowed to derive an advantage from his breach.
47. The Plaintiff submitted that he had proved his case and discharged the evidentiary burden. He relied on Article 40 of *the Constitution* and invited the court to dismiss the Defendant's counterclaim for failure to prove his case to the required standard. He argued that no constructive trust could be implied or created in favour of the Defendant since Wilson Kimuri Theuri lacked the legal capacity to enter into the contract. He pointed out that the doctrine of constructive trust could only come to the aid of a person who acted in good faith without taking undue advantage of the other party. The Plaintiff urged the court to award him the costs of the suit and dismiss the Defendant's counterclaim with costs.
48. The issues for determination are whether the court should find that the sale transaction for part of the suit property pursuant to the sale agreement dated 5/7/2010 aborted and that its performance was rendered impossible due to factors that vitiated the contract and it ought to be set aside for lack of validity and enforceability in law as the Plaintiff seeks; or whether the court should allow the Defendant's counterclaim to have the land known as Nanyuki Municipality Block 12/148 transferred to him and for the guardian or manager of Wilson Theuri to be compelled to execute the transfer, failing which the Deputy Registrar is to sign the documents to facilitate the transfer in his favour.
49. The Plaintiff's contention is that his father, Wilson Theuri was manipulated to enter into an unconscionable bargain by the Defendant through Mr. Kiget advocate. He claimed that the Defendant and undertook the sale transaction without the family members' involvement at the time when they were working and staying away from home. The Plaintiff contended that the sale transaction was unconscionable owing to the fact that Wilson Theuri lacked the mental capacity to enter into the contract and that the Defendant knew this fact and took advantage of it.
50. The psychiatric report dated 6/10/2021 and the testimony of Dr. Joseph Waigi Njau was to the effect that Wilson Theuri suffered from age related neurological disorder, or Alzheimer's Dementia characterised by impairment of cognitive functions manifested by difficulty with memory, attention, thinking and comprehension. It was the psychiatrist's expert opinion that Wilson Theuri did not have the ability to make sound judgments, was disorientated, his thoughts were distorted and he had flight of ideas. The evidence of the medical doctor was not challenged by the defence. The doctor confirmed that the person he examined was the one on a wheelchair in the photograph.
51. Jackson Karitu Kimuri, a brother of the vendor told the court that the vendor was elderly, in ill health and was already experiencing failed memory after being retired from the bank on medical grounds. Further, that his brother went through episodes of hallucinations and was withdrawn and rarely interacted with strangers. Since he lived close to his brother in Muthaiga. It was expected that the vendor would have mentioned to his brother or a member of his family that he was selling a portion of the suit property.
52. The Plaintiff asserted that at the time Wilson Theuri entered into the sale transaction with the Defendant he lacked the mental acuity to drive or negotiate any commercial transaction or enter into a valid contract without the assistance of his immediate family. If Wilson Theuri took early retirement on medical grounds from Barclays Bank of Kenya Limited in 1994 due to the fact that his memory



- was failing, which was affecting his ability to perform his duties, then he could not have been in better health 16 years later in 2010 bearing in mind that his leg had been amputated in 1968.
53. The letter dated 19/2/1994 from Barclays Bank indicated that Wilson Theuri had developed complications arising from the accident coupled with his advanced age since he was 51 years old at the time and that his memory was failing. He was experiencing sharp pains walking to the office. The letter which recommended his retirement stated that most of the time during office hours he appeared to be absent minded. The letter spoke to his state of mind in 1994 which in all probability was bound to deteriorate over time. The memo from the Chief Manager Personnel of the Bank mentioned that he had fallen many times due to his unsteady gait and was not able to move freely.
 54. The letter dated 19/2/1994 from Barclays Bank Limited which the Plaintiff produced mentioned that Wilson Theuri suffered injuries as a result of a road accident in 1968 which led to the amputation of his right leg above the knee. A photograph was produced in court of a man seated on a wheelchair and when shown that photograph, both the Defendant and Mr. Kiget advocate who acted for both parties in the sale transaction stated that that was not the person they dealt with. Mr. Kiget's offices were located in Soghra House, 1st Floor, to access this on a wheelchair would have posed a challenge.
 55. There were inconsistencies in the defence case. Mr. Kiget stated that he did not know the Defendant before yet the Defendant told the court that he was introduced to Wilson Theuri by Mr. Kiget and that he met him on 5/7/2010 in Mr. Kiget's office in Soghra House in Nanyuki. He stated that Mr. Wilson Theuri was walking with a walking stick and that the agreement had already been prepared by Mr. Kiget and they signed it. He claimed that they never discussed anything with the vendor. If that were the case, then it means that Mr. Kiget advocate drew the sale agreement in a manner skewed in favour of the Defendant which amounts to an unconscionable sale because Wilson Theuri lacked the legal capacity to enter into the contract. The sale transaction lacked certainty and fairness.
 56. The Defendant stated that he did not enter into an agreement with Mr. Wilson Theuri as an amputee on a wheelchair. Mr. Kiget claimed that Wilson Theuri would go to his office to pick the money which he used to purchase a car. He did not clarify whether the vendor was being driven or if he drove himself, save to mention that he was always in a trouser and walked with a slight limp. The vendor's state would have been quite obviously visible to the Defendant and Mr. Kiget.
 57. The court is inclined to agree that Wilson Theuri's diminished mental capacity compromised his bargaining power in the sale of the suit property. Some of the terms in the agreement are illogical and contrary to the practice in ordinary land sale transactions. Clause 4 of the sale agreement provided that the balance of the purchase price would be paid on the completion date and was to be held by the advocate as stakeholder pending registration of the transfer of the property or rescission of the agreement in accordance with the vendor's undertaking in that respect. The evidence adduced by both parties show that payments were made to Wilson Theuri in instalments before the registration of the transfer in favour of the purchaser. There could not have been any undertaking by the vendor's advocate in light of the fact that Mr. Kiget advocate represented both parties in the sale transaction and is the one who paid the purchase price to Wilson Theuri in instalments between 2010 and 2011.
 58. In *Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited* [2014] KECA 319 (KLR) (1) the Court of Appeal stated that courts have never been shy to interfere with or refuse to enforce contracts which are unconscionable, unfair or oppressive due to a procedural abuse during formation of the contract, or due to contract terms that are unreasonably favourable to one party and would preclude meaningful choice for the other party. The Court defined unconscionable contract as one that was extremely unfair.



59. It is evident that part of the sale proceeds were remitted to third parties. The payment vouchers on the notepaper of show that Kshs. 175,000/= was paid to Stephen Waweru in cash on 10/7/2010 and a similar amount was also paid to him on 24/7/2010. Kshs. 50,000/= was paid to Jacob Kathurima on 18/5/2011 and Muriithi was paid Kshs. 69,000/= on 28//4/2011 and Kshs. 70,000/= on 5/9/2011. If those amounts were paid for purposes of the subdivision of the land, then they were more than the sum agreed on 17/6/2010 as per the agreement between Wilson Theuri and Richard Kahugu Muriithi and Daniel Mukiri who were to survey and subdivide the land at an agreed sum of Kshs. 120,000/=. Curiously, that agreement was also drawn and witnessed by Mr. Kiget advocate the month before he drew the sale agreement with terms which were not favourable to the vendor.
60. The payment voucher at page 85 or 92 at the bottom of the Defendant's documents shows that Wilson Theuri received Kshs. 150,000/= from Kiget & Co. Advocates on 16/2/2011 and that that payment was approved on 16/2/2010 which is not feasible. It is questionable how the approval was given before the sale agreement was drawn. Another voucher by Mr. Kiget's law firm shows that Wilson Theuri was paid Kshs. 350,000/= on 31/3/2010 yet the parties entered into the sale transaction on 5/7/2010.
61. The other point taken up by the parties was whether the suit property still existed in its original form as L.R No. 2787/421 or whether it was subdivided as the Defendant claimed. The Defendant tendered in evidence correspondence from the Ministry of Lands and Settlement dated 16/7/2010, 13/10/2011 and 11/8/2011 on the subdivision scheme approval for the proposed subdivision of the suit property.
62. The letter dated 11/4/2011 from the Director of Surveys to the Commissioner of Lands confirmed that RIM for Nanyuki Block 12 had been amended to reflect parcel numbers 148, 149, 150 and 151 in accordance with F/R 510/37. The leases for Nanyuki Municipality/ Block 12/148 to Nanyuki Municipality/ Block 12/151 were forwarded by the Ministry of Lands and Physical Planning to the District Land Registrar, Nanyuki vide the letter of 25/2/2021 for registration purposes. This confirms that the suit property is now known as Nanyuki Municipality/ Block 12/148 to Nanyuki Municipality/ Block 12/151 and not L.R No. 2787/421 anymore.
63. According to Mr. Kiget, the subdivision of the suit property was done under the instructions of Mr. Wilson Theuri who surrendered the mother title to the advocate with all the relevant documents for subdivision. He claimed that there was no objection from members of Mr. Wilson Theuri's family but could not buttress this argument since Mr. Theuri's family or brother who lived close by do not seem to have been aware that Wilson Theuri was selling part of the suit property.
64. On the claim of an overpayment of Kshs 144,000/=:, it is not clear how this happened and why it was never demanded before. It was expected that as an advocate Mr. Kiget would have kept proper client accounts in relation to the payments made to Wilson Theuri. What is clear is that despite acting for both parties in the sale transaction, Mr. Kiget advocate did not give independent legal advice to Wilson Theuri regarding the transaction and the terms of the contract which he drew and was instrumental in its performance. Mr. Kiget handled the whole transaction and would disburse funds to Wilson Theuri in instalments some of which were cash payments. No explanation was given why the sale proceeds were not transferred directly to Wilson Theuri's bank account.
65. In that case, the Court of Appeal examined the situation obtaining in comparative jurisdictions, and cited the English case of *Strydom v Vendside Limited* [2009] EWHC 2130 (QB) where it was held that before the court considers setting a contract aside as an unconscionable bargain, the three factors which must be demonstrated were that one party had to have been disadvantaged in some relevant way as regards the other party, that other party must have exploited that disadvantage in some morally culpable manner, and the resulting transaction must be overreaching and oppressive. Where



all these requirements were met, the burden then passed to the other party to satisfy the court that the transaction was fair, just and reasonable.

66. Based on the terms of the sale agreement dated 5/7/2020 it is highly probable that Wilson Theuri's diminished mental capacity compromised his bargaining power in the sale and he bound himself to unfair terms in the contract. The clauses that stick out include clause 14 of the sale agreement which stipulated that the deposit of 10% would be remitted to the vendor upon successful registration of the transfer and clause 15 which stated that the purchaser's occupation of the land was to commence on or before the end of June 2010 which would be before the agreement was signed on 5/7/2010.
67. The purchase price was paid over a long period of time and went beyond the completion date. Part of the sale proceeds were paid to third parties without the written authority of the vendor. These clearly show that there was no meeting of minds when the Defendant entered into the agreement dated 5/7/2010 with Wilson Theuri for on the face of it, the terms are unfair to the vendor and unreasonable. It was urged that Mr. Kiget advocate paid Wilson Theuri Kshs. 2,525,000/= which would not have been of economic benefit to him or his family.
68. The suit property having been converted to Nanyuki Municipality/ Block 12/148 to Nanyuki Municipality/ Block 12/151 after subdivision of the suit property, the mother title cannot revert to Wilson Theuri. It is not clear whether the caveat which the Plaintiff's mother had registered against the suit property was ever removed by the Land Registrar or it was to be registered against the new parcel numbers once the new registers for Nanyuki Municipality/ Block 12/148 to Nanyuki Municipality/ Block 12/151 were opened.
69. The conclusion to be drawn from the facts of this case, is that there was there unconscientious conduct by Mr. Kiget advocate and the Defendant who was the stronger party in the impugned sale transaction entered into with Wilson Theuri and which was substantially performed through Mr. Kiget advocate who was acting for both parties. Since it is not in dispute that the Defendant paid some consideration for the suit land, in this court's view his recourse lies in recovering the purchase price that he paid to Wilson Theuri from the manager or guardian of his estate.
70. The Plaintiff has proved his case on a balance of probabilities. The court grants prayers (iii), (iv), (vi) and (vii) of the Further Amended Plaint dated 10/10/2023.
71. The court declines to grant the orders sought in the counterclaim. Each party will bear its costs for the suit and the counterclaim.

DELIVERED VIRTUALLY AT EMBU THIS 26TH DAY OF FEBRUARY 2025.

K. BOR

JUDGE

In the presence of: -

Mr. Anthony Gikaria for the Plaintiff

No appearance for the Defendant

