



Cooperative Bank of Kenya Limited v Koi & 3 others (Civil Appeal E025 of 2024) [2025] KEELC 4295 (KLR) (4 June 2025) (Judgment)

Neutral citation: [2025] KEELC 4295 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
CIVIL APPEAL E025 OF 2024**

EK MAKORI, J

JUNE 4, 2025

BETWEEN

COOPERATIVE BANK OF KENYA LIMITED APPELLANT

AND

DANIEL TETTEH KOI 1ST RESPONDENT

DAVID MANGI KITHUNGA 2ND RESPONDENT

THE LAND REGISTRAR KILIFI 3RD RESPONDENT

CASH CROP AUCTIONEERS 4TH RESPONDENT

(Being an appeal from the judgment and resulting decree of the Chief Magistrate's Court in Malindi (Hon. J. Ong'ondo SPM), dated April 24, 2024, in Malindi CMELC No. 128 of 2019)

JUDGMENT

1. This is an appeal against the judgment rendered by Hon. J. Ong'ondo SPM on April 24, 2024, which granted the suit of the 1st Respondent, as sought in the plaint dated 1st October 2019.
2. The appeal is based on five grounds, as stated in the memorandum of appeal filed and dated May 21, 2024.
3. The appeal was argued through written submissions. Notably, the appeal was refined to focus on the case between the appellant and the 1st respondent, who prevailed in the lower court.
4. In light of the materials and submissions provided by the parties involved, the issues I have identified for the court's resolution are as follows: whether the suit is barred by the limitation period established in Section 4 of the *Limitation of Actions Act* Cap 22 laws of Kenya; whether the 1st respondent had the locus standi to contest the appellant's statutory power of sale; and whether the action against the 1st defendant in the lower court (deceased), having abated by operation of law, renders the entire suit



unmaintainable. Furthermore, it must be determined whether, based on the pleadings and evidence, the 1st respondent is entitled to any of the reliefs sought and who should bear the costs of the appeal.

5. The 1st respondent served as the plaintiff in the lower court, whereas the appellant, Cooperative Bank of Kenya Limited, held the position of the 4th defendant. There were four additional defendants; however, one of them, Francis Kidhongo Chula (the 1st defendant in the lower court), had died long before the trial commenced.
6. This Court's role now is to reassess the evidence and reach an independent conclusion. In the case of *Okeno v Republic* [1972] EA 32 at 36, the East African Court of Appeal articulated the Court's responsibilities in a first appeal as follows:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v. R.*, [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v. R.*, [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v. Sunday Post*, [1958] E. A. 424.”

7. The 1st respondent informed the trial court that between 2001 and 2005, he purchased a parcel measuring 1 $\frac{3}{4}$ acres of Gede/Mida Majaoni/ 366 from the deceased, whom he had sued as the 1st defendant. The 1st respondent stated that he paid Kshs. 75,000. However, for reasons he considered fraudulent, the deceased refused to transfer that portion.
8. Subsequently, the deceased used the entire Suit Property to secure a loan of Kshs. 3,000,000, which was advanced to the 2nd Respondent by the appellant. The 2nd Respondent defaulted on repaying the loan, prompting the Appellant to instruct the Fourth Respondent to sell the Suit Property. The 1st Respondent asserted that upon realizing the deceased's reluctance to finalize the transaction, he engaged a valuer who appraised the 1st Respondent's developments on the property at Kshs. 350,000. The deceased was requested to reimburse this amount; however, he failed to do so.
9. As a result, the 1st respondent argued that he was entitled to the portion he purchased and that the 2nd Respondent is required to repay the loan received from the appellant. Alternatively, the 1st Respondent claimed his right to compensation for the value of his development on the land.
10. The 1st respondent petitioned the trial court to grant a permanent injunction against all the defendants and to order the 2nd respondent to repay the loan from his resources or to sell his property. Furthermore, the 1st respondent requested that the trial court order the deceased and the 2nd respondent to compensate him for the improvements made on the land, at a value to be determined by a valuer.
11. The deceased, along with the 2nd, 3rd, and 4th respondents, did not participate in the trial. However, the appellant participated and submitted a defense dated December 28, 2023, but did not call any witnesses to testify.
12. The learned magistrate did not isolate the issues for determination. However, from the review of the judgment, it can be concluded that the trial court found the sale agreements to be valid; therefore, the property was not available for charging to the appellant. Additionally, the appellant did not present a



- witness to substantiate its defense, and the jurisdictional points had been resolved in an interlocutory ruling.
13. In light of the findings mentioned above, the esteemed magistrate granted the 1st respondent's claims as requested in the plaint; thus, paving the way for the current appeal.
 14. The 1st respondent, in his submissions, affirms the findings of the trial magistrate. In summary, while contesting the grounds of appeal, he asserts that Mr. David Mangi Kithunga, the principal debtor, should be mandated to repay the outstanding loan balance from his properties, as he is the sole beneficiary of the loan. This earnest request is consistent with his letter to the cooperative bank in Malindi, dated April 7, 2012. Mr. David Mangi Kithunga has willfully defaulted on payment, fully cognizant that those residing on the land will face significant hardship.
 15. He insists that this court should uphold the judgment rendered on April 24, 2024, by the Senior Principal Magistrate and order Mr. David Mangi Kithunga to repay the loan, as he is the principal debtor on record and is alive. Additionally, he requests that the court exempt his 1½ piece of land from Plot No. 366 Gede/Mida Majaoni and instruct the Land Registrar to issue a title deed to him. Mr. David Mangi Kithunga should be compelled to reimburse the remaining balance from his assets, as he appears in this case as the principal debtor, being the only individual who benefited from this loan; therefore, the judgment of the lower court delivered on April 24, 2024, should be upheld.
 16. I agree with the appellant that the esteemed magistrate acknowledged a limitation of actions regarding the sale agreement between the 1st respondent and the deceased Francis Kidhongo Chula, but failed to rule on it. In his judgment, the magistrate stated that this issue was already addressed in a prior interlocutory ruling. However, the learned magistrate did not specify which ruling established this jurisdictional objection. This omission suggests that no ruling exists that resolves the matter at hand.
 17. Had the learned magistrate properly directed himself, he would have concluded that the suit was time-barred and that the court lacked jurisdiction to entertain the matter.
 18. From the plaintiff's claim, the 1st defendant sought to enforce contracts executed on November 17, 2001, June 12, 2005, June 13, 2005, and July 9, 2005. Section 4(1) of the *Limitation of Actions Act*, Cap 22, stipulates that such legal actions must be initiated within six years from the date on which the cause of action arose.
 19. The aforementioned position is substantiated by the judicial decision cited by the appellant, with which I agree: *South Nyanza Sugar Company Limited v Francis Koskei Ntuitai* [2021] KEHC 5786 (KLR) states:

“...the right to sue for breach of contract arose when one of the parties failed to meet its obligations under the contract.”
 20. In paragraphs 13 and 14 of the plaint, the 1st respondent indicated that the deceased declined to provide the original title necessary for obtaining the Land Control Board consent. Consequently, the 1st respondent was compelled to register a caution on September 29, 2006. Thus, as of September 29, 2006, the 1st respondent was aware of his entitlement to the original title; however, the deceased refused to furnish it. Therefore, the cause of action accrued no later than September 29, 2006.
 21. Legal action to enforce the mentioned contracts ought to have commenced by 28 September 2012. Instead, it was initiated on 15 October 2019, nearly seven years past the required deadline.
 22. When it comes to contractual claims, it is essential to know that the court does not have the jurisdiction to grant extensions of time for any reason, as highlighted in the case of *Willis Onditi Odhiambo v*



Gateway Insurance Co Ltd [2014] KECA 186 (KLR). Because of this, the explanation from the 1st respondent or any sympathy from the court does not affect the situation.

23. The trial court failed to address the jurisdictional objection sufficiently. Assuming that the jurisdictional objection had been previously adjudicated, as indicated by the learned magistrate, no rationale was presented for his inability to resolve the locus standi of the 1st respondent, a matter raised in paragraph 5(b) of the defense and discussed in paragraphs 21 and 22 of the appellant's submissions.
24. To the extent that the judgment did not address the issues that were submitted for determination, it constitutes a nullity. It ought to be annulled without further consideration, see Godfrey Gatere Kamau v Peter Mwangi Njuguna [2008] KECA 202 (KLR).
25. If the learned magistrate had duly considered the issue of locus standi, he would have determined that the 1st respondent lacked standing to challenge the appellant's execution of the statutory power of sale. This conclusion is corroborated by the principles established in Quantum Petroleum Limited v Co-operative Bank of Kenya Ltd [2021] KEHC 3188 (KLR), which stipulates that an individual who is not the registered proprietor of the encumbered property does not possess locus standi to seek an injunction against the execution of the statutory power of sale. In light of this legal understanding, it was erroneous for the learned magistrate to order, as he did, that the 2nd respondent should repay the loan from his own resources rather than through the realization of the security. Furthermore, in addition to the absence of locus standi, the 1st respondent was not privy to the lending contract between the appellant and the 2nd respondent, and thus could not secure an order for its enforcement.
26. On a different note, the proceedings of October 19, 2021, confirm that Francis Kidhongo Chula, the chargor, passed away. Pursuant to Order 24 rule 3(2) of the Civil Procedure Rules, the suit against the chargor abated by operation of law on October 18, 2022. By January 23, 2024, when the 1st respondent provided testimony, the suit against the chargor had long since abated. The suit of the 1st respondent was predicated on the existence of a claim against the deceased chargor. Only if the 1st respondent was able to sustain his claim against the chargor could he assert an enforceable right against the other defendants. Given that the suit against the chargor had abated, the 1st respondent could not maintain his suit against all the other defendants before the trial court. This conclusion aligns with the findings in Jacob Githinji Kamau v Patrick Rerimoi & another [2019] KEELC 2709 (KLR), in which the court stated:

“ Even the prayer for the eviction of the 2nd defendant cannot stand, for that prayer can only be granted once there is an order in favour of the plaintiff that he is the rightful owner of the suit land, and as I have explained above, the plaintiff cannot get that prayer because the person holding title is deceased and the suit against him has abated.”

27. Therefore, regardless of the merits of the 1st Respondent's suit, once he permitted the suit against the chargor to abate, his prospects for success were irrevocably diminished. Consequently, the entire suit was required to be dismissed.
28. It was universally acknowledged that the appellant possessed a registered charge over the Suit Property, whereas the 1st respondent merely held written agreements with the deceased chargor. In light of these circumstances, the learned magistrate considered it appropriate to issue orders that would attenuate the appellant's registered rights. The only rationale provided by the learned magistrate was that:

“ when the 1st defendant purported to charge the land to the 4th defendant, the one and half portion was not available to the 4th defendant as security for the loan.”



29. This represents a misdirection in law. It is firmly established that an unregistered instrument operates as a contract inter se; however, it can never affect the registered rights held by third parties, as illustrated in *Mega Garment Limited v Mistry Jadva Parbat & Co. (Epz) Limited* [2016] KECA 172 (KLR). Consequently, the mere existence of a sale agreement held by the 1st respondent did not render the Suit Property incapable of being charged. To assert otherwise, as the learned magistrate did, undermines the statutory obligation to register interests in land. All transactions could be invalidated simply because an unregistered sale agreement had been executed some years prior. Furthermore, the learned magistrate failed to recognize that even if the 1st respondent possessed a sale agreement in his favor, that alone was insufficient to negate the appellant's registered interest as a chargee. The only circumstance under which the appellant's interest could be interfered with was if fraud had been pleaded and proven against it. The plaint did not contain any allegations of fraud against the appellant. Thus, there was no basis to challenge the Appellant's title, see *Joseph N.K. Arap Ng'ok v Moijo Ole Keiwua & 4 others* [1997] KECA 1 (KLR).
30. The trial court permitted the assessment of compensation through the engagement of a valuer. Furthermore, the esteemed magistrate sanctioned this alternative form of relief. It is generally atypical for both alternative and primary forms of relief to be considered within the same judgment, even when both may be justifiably warranted. In this instance, the alternative relief was unwarranted, given the absence of evidence presented to the magistrate to establish the value that should be ascribed to the purported developments of the 1st respondent, should they indeed exist. Consequently, the esteemed magistrate rendered a judgment predicated upon conjecture concerning the existence of these developments, without substantiation of the value attributed to such alleged advancements. Enforcement of these post-judgment orders may pose difficulties, as the court, by virtue of its judgment, becomes *functus officio*.
31. In summary, the trial court's decision was fundamentally flawed both legally and factually. Therefore, I allow the appeal in its entirety, with the costs to be borne by the 1st respondent in both this court and the trial court.

DATED, SIGNED, AND DELIVERED ELECTRONICALLY IN MALINDI ON THIS 4TH DAY OF JUNE, 2025.

E. K. MAKORI

JUDGE

In the Presence of:

Ms. Cheruiyot for the Appellant

1st Respondent (in person)

Ms. Ekiru for the 3rd Respondent

Happy: Court Assistant

