



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Nguthi v Mwangi (Civil Appeal 2 of 2018)
[2025] KEHC 2502 (KLR) (20 February 2025) (Judgment)

Neutral citation: [2025] KEHC 2502 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CIVIL APPEAL 2 OF 2018
AK NDUNG'U, J
FEBRUARY 20, 2025

BETWEEN

GERALD WACHIRA NGUTHI APPELLANT

AND

PHILIP MUBURI MWANGI RESPONDENT

*(Appeal from the judgment and decree dated 30/11/2017
in Nanyuki CM Civil Case No. 82 of 2012- L Mutai (CM))*

JUDGMENT

1. The Respondent instituted a suit against the Appellant vide a plaint dated 02/08/2012 seeking for permanent injunction to restrain the defendant (Appellant) for selling, transferring, alienating, damaging, wasting, stepping on, building/constructing or dealing and or interfering with the ownership, use and possession of the suit property known as land parcel title no. Gakawa/Kahurura Block 2/Temu/139, a declaration that the Appellant was entitled to a refund of the part purchase price and agreed liquidated damages, an order to nullify the sale agreement and costs of the suit.
2. In the plaint, the Respondent averred that he was the owner of the suit property and vide an agreement dated 22/02/2012 he agreed to sell the suit property to the Appellant and part of the purchase price was paid as agreed but he was unable to complete the sale due to family misunderstanding and he communicated the same to the Appellant and the Advocate who witnessed the agreement. Further, he was forced to rescind and revoke the agreement vide a letter dated 25/05/2012 and forwarded two cheques for refund of the purchase price and 10% of the agreed liquidated damages but instead of collecting part of the purchase price, the Appellant started electing a fence and to develop the suit land and damaging the structures that were on the suit land.
3. The Appellant filed a defence and averred that there was no room for rescission in the agreement and that the property had passed to him.



4. Vide a judgment dated 30/11/2017, the trial court found in favour of the Respondent herein and gave a declaration that the Appellant was only entitled to a refund of part of the purchase price and agreed liquidated damages and she nullified the sale agreement dated 22/02/2012 and awarded costs to the Plaintiff.
5. Being aggrieved by the trial court's judgment, the Appellant appealed to this court vide a memorandum of appeal dated 15/01/2018 raising the following grounds of appeal;
 - i. The learned magistrate erred by failing to find that the Respondent could not plead lack of consent of the land control board whose responsibility to procure lay with him.
 - ii. The learned magistrate erred in failing to find that there was no evidence tendered by the Respondent tending to show that the transaction between him and the Appellant which was the subject of the suit was a controlled transaction within the relevant provisions of the [Land Control Act](#) and therefore requiring consent of the Land Control Board.
 - iii. The learned magistrate misdirected herself by failing to make an enquiry as to whether the transaction was a controlled one within the meaning of [Land Control Act](#).
 - iv. The learned magistrate erred in misinterpreting the agreement and particularly failing to find that rescission was in the terms of the agreement at the instance of the innocent party and not the defaulting party.
 - v. The learned magistrate misdirected herself by failing to find that the Respondent had no cause of action against the Appellant.
 - vi. The learned magistrate erred in failing to find that the Respondent was not truthful in his allegation that the transaction between him and Appellant was met with objection from the Respondent's wife and failing to find that under the then prevailing legislation, the Respondent's wife had no interest in the transaction.
 - vii. The learned magistrate erred by failing to consider that the Respondent had given the Appellant possession of the suit premises and who had taken such possession and commenced developments on the suit property based on the Respondent's representation.
 - viii. The learned magistrate failed to consider the circumstances of the case in totality and refused to award costs of the suit to the Respondent.
6. The appeal was canvassed by way of written submissions the appeal by way of written submissions. The Appellant's counsel chose not to file written submissions. The Respondent's counsel filed written submissions dated 09/09/2024.
7. I have considered the appeal, the grounds relied on and submissions on record. I have had due regard to the judgement of the court.
8. I have noted that the dispute between the parties was on sale of land known as Gakawa/Kahurura Block 2/Temu/139. The Respondent had sold the said land to the Appellant but due to family misunderstanding, the sale did not go through and the Respondent offered to refund the part of the purchase price paid and 10% liquidated damages as per the agreement. The Appellant declined the refund which necessitated the Respondent to institute the suit before the trial court.
9. A cursory look at the pleadings and evidence on record readily brings to the fore the question whether this court has jurisdiction to entertain the appeal.



10. Article 165(5) of the Constitution provides that the High Court shall not have jurisdiction in respect of matters falling within the jurisdiction of the courts contemplated in Article 162(2). Article 162(2) of the Constitution provides that Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to the environment and use and occupation of, and title to land. Article 162(3) provides that Parliament shall determine the jurisdiction and functions of the courts contemplated in Article 162(2). It was on the basis of this provision that Parliament enacted the Environment and Land Court Act. The object of the Act is stated as follows:

“An Act of Parliament to give effect to Article 162(2)(b) of the Constitution; to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to land, and to make provision for its jurisdiction, functions and powers, and for connected purposes”

11. In Section 13, the Act provides that:

- (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
- (2) In exercise of its jurisdiction under Article 162 (2) (b) of the Constitution, the Court shall have power to hear and determine disputes?
 - a. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - b. relating to compulsory acquisition of land;
 - c. relating to land administration and management;
 - d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - e. any other dispute relating to environment and land......
- (5) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—
 - (a) interim or permanent preservation orders including injunctions;
 - (b) prerogative orders;
 - (c) award of damages;
 - (d) compensation;
 - (e) specific performance;
 - (f) restitution;
 - (g) declaration; or
 - (h) costs.



12. Subsequent to the above section our Courts have identified the correct approach to determine the appropriate court to hear land matters by inquiring what is the most substantial question or issue presented in the controversy. The court in *Suzanne Achieng Butler & 4 others v Redhill Heights Investments Limited & another* [2016] eKLR held that;

“When faced with a controversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the Courts utilize the Pre-dominant Purpose Test: In a transaction involving both a sale of land and other services or goods, jurisdiction lies at the ELC if the transaction is predominantly for land, but the High Court has jurisdiction if the transaction is predominantly for the provision of goods, construction, or works. The Court must first determine whether the pre-dominant purpose of the transaction is the sale of land or construction. Whether the High Court or the ELC has jurisdiction hinges on the predominant purpose of the transaction, that is, whether the contract primarily concerns the sale of land or, in this case, the construction of a townhouse. Ordinarily, the pleadings give the Court sufficient glimpse to examine the transaction to determine whether sale of land or other services was the predominant purpose of the contract. This test accords with what other Courts have done and therefore lends predictability to the issue. (emphasis added).

13. In the instant case, the subject of the dispute is regulated by the [Land Registration Act](#) of 2012 and the [Land Act](#) of 2012. The [Land Registration Act](#) provides for both disposal of interests in land and for transfers. These provisions are in Part III of the Act. The [Land Act](#) also covers the same matters. Section 38 of the [Land Act](#) covers validity of contracts in sale of land, while section 40 provides for damages for breach of a contract of sale of land, Section 41 provides the procedures for possession and Section 42 provides the reliefs against rescission of contract. Sections 43 to 48 of the [Land Act](#) deal with transfer of interests in land.
14. Looking at the memorandum of appeal, the grounds raised therein pertains to failure to procure consent from land control board, failure by the trial court to determine whether the transaction was a controlled one within the meaning of the [Land Control Act](#), whether rescission was a term in the agreement at the instance of an innocent party, and whether the Appellant had taken possession of the land.
15. A determination of the above questions is in my view well outside the jurisdiction of the High Court. A look at the Respondent’s submission before this court, clearly shows that the dispute is purely a land dispute and going by authority of *Suzanne Achieng Butler* (supra), a dispute revolving around a transaction of sale of land falls within the jurisdiction of the Environment and Land Court.
16. This conclusion finds support in our jurisprudence. In *Philip Jalang'o v Ryan Properties Limited* [2020] eKLR where the court held thus;

“William R. Anson in *Principles of the Law of Contract* 362 n. (b) (Arthur L. Corbin ed., 3d Am. ed.1919) expounded that by “rights of property” the court meant to include under the term chose in action rights under a contract and rights of action arising from breach of contract. Based on this definition then the Plaintiff’s claim qualifies as a chose in action under Section 13 of the ELC Act and it would be the ELC and not the High Court to try cases relating to rights under contracts for the sale of land and rights of action arising from breaches of contracts over land.”



17. In Peter Mukhunya Maloba v Dennis Kusinyo [2020] eKLR the court was of the view that;
- “The dispute that was before the trial court related to sale of land, which is regulated by the Land Registration Act and the Land Act. Contracts relating to sale of land are about title, for the agreement concerns conveyance of the title in the land from the vendor to the purchaser. After sale, transfer should follow. All these processes are regulated and governed by the Land Act and the Land Registration Act, and any dispute arising from the same ought to be a matter for resolution by the Environment and Land Court, as envisaged by the Land Act and the Land Registration Act.”
18. The predominant purpose of the alleged contract in the present case was solely the sale and purchase of land. I am therefore satisfied that this Court lacks the requisite jurisdiction to entertain this suit.
19. It is trite law that jurisdiction is at the core of exercise of power by a court. Where there is no jurisdiction the court cannot exercise power without violating the principles of rule of law and legality. The Court of Appeal in in Owners of the Motor Vessel “Lillian S” vs. Caltex Oil (Kenya) Ltd [1989] eKLR, stated:
- “Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
20. I therefore must down my tools. So then, which way this appeal?
21. It is apparent that the filing of this appeal was an administrative lapse in which the court itself cannot be completely absolved. Sending away the parties from the seat of justice would not serve the interests of justice.
22. The order that commends itself is that the appeal herein should be placed before the environment and land court for disposal. Towards that end, I direct that the matter be transferred to the ELC Court for further dealing.
23. The matter shall be mentioned before the Deputy Registrar of that court for directions on when the parties would appear before the Judge ELC.

DATED SIGNED AND DELIVERED THIS 20TH DAY OF FEBRUARY 2025.

A.K. NDUNG’U

JUDGE

