



REPUBLIC OF KENYA



KENYA LAW
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**Kalibola v Wekesa & another (Civil Appeal E045 of 2021)
[2025] KEHC 15771 (KLR) (9 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 15771 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL E045 OF 2021
REA OUGO, J
OCTOBER 9, 2025**

BETWEEN

WILBERT MUKHAMARI KALIBOLA APPELLANT

AND

ALICE WEKESA 1ST RESPONDENT

FREDRICK SIMIYU 2ND RESPONDENT

(Being an appeal from the judgment of the Honourable C.A.S Mutai, Senior Principal Magistrate – Bungoma, delivered on 13/11/2020 in Bungoma CMCC No 93 of 2010)

JUDGMENT

1. The respondents were the plaintiffs in the lower court. They asserted that they entered into a valid agreement to purchase 2.5 acres of land from the appellant, which was part of Land Parcel No. 1765 Sangalo, for a consideration of Kshs. 310,000/-. They paid the full amount, but the appellant refused to give vacant possession and transfer the land to them. In their suit, the respondents demanded a refund of the purchase price.
2. The appellant denied the claim. In his defence, he stated that the agreement was made solely to assist the 2nd respondent in obtaining a loan from his employer, and no money was handed over to him. The agreement did not grant any legal rights to the respondent because the land had sugarcane and was charged to the Agricultural Finance Corporation [AFC].
3. The trial court, in its judgment, found that the respondents had proved their case on a balance of probabilities.
4. The appellant is challenging the judgment of the trial magistrate and has filed this appeal on the following grounds:



1. That the learned trial magistrate erred in law and in fact when he concluded that there was a valid sale agreement dated 9th May 2005 between the appellant and the respondent herein.
 2. That the learned trial magistrate erred in law and in fact when he ordered the appellant to refund the respondent the sum of Kshs 310,000/- when there was no evidence that any consideration was ever paid and received by the appellant.
 3. That the learned trial magistrate erred in law and in fact when he failed to appreciate that the respondent had not proved their case to the required standards.
 4. That the learned trial magistrate erred in law and in fact when he failed to appreciate that the appellant, who had been charged with the offence of obtaining credit by false pretence and acquitted, was innocent of the claim by the respondents.
 5. That the learned trial magistrate erred in law and in fact in failing to consider the pleadings, evidence and submissions tendered by the appellant's counsel, hence arriving at an erroneous conclusion and hence causing a miscarriage of justice.
 6. That the learned trial magistrate erred in law and in fact when he failed to appreciate that the agreement dated 9th May 2005 was not signed by the appellant hence not binding upon him.
 7. That the learned trial magistrate erred in law and in fact for failing to appreciate that the agreement dated 9th May 2005 was made to enable the 2nd respondent to obtain funds from his co-operative society sacco and no consideration was exchanged.
5. The appellant submits that the respondents did not sign the contract. Furthermore, the names of the respondents were not specified in the agreement. Under the principle of privity of contract, a person who is not a party to an agreement cannot enforce or be held liable under it. In *Agricultural Finance Corporation v Lengetra Limited (1985) KLR*, the court stated that a contract cannot confer rights or impose obligations on a stranger, even if the contract was made for their benefit.
 6. It was submitted that there was no record of an alleged transfer of money; therefore, the respondent failed to prove that a sum of Kshs 310,000/- was paid to the appellant. The respondents did not prove their case to the required standard. In the criminal case brought against the appellant, the charges were dismissed after the 1st respondent failed to meet the burden of proof to the necessary standard.
 7. The respondents, in their submissions, argue that the court lacks jurisdiction to entertain the appeal. The matter before the lower court related to the sale transaction concerning land parcel no. East Bukusu/East Sangalo/1765. It was submitted that, under Article 162(2)(b) of *the Constitution*, the Environment and Land Court has the authority to hear and determine disputes involving public, private, and community land, as well as contracts, choses in action, and other instruments granting any enforceable interest in land. In the case of the *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 Others (2017) eKLR*, the court stated that the jurisdiction of the Environment and Land Court to handle disputes under section 13 of the ELC Act should be understood within the context of the court's jurisdiction to deal with disputes connected to the "use" of land; however, they do not include mortgages, charges, collection of rent, and dues, which fall within the civil jurisdiction of the High Court. In *Suzanne Achieng Butler & 4 Others v Redhill Heights Investments Limited & Another (2016) eKLR*, the court held that in a transaction involving both the sale of land and other services or goods, jurisdiction lies at the ELC.
 8. The respondents submit that the appellant admitted through his defence that there was a sale agreement between the parties, and he is estopped from running away from his pleadings. (See *Adetoun*



Oladeji (NIG) Ltd v Nigeria Breweries PLC S.C 91/2002). They contend that they proved their case to the required standard.

Analysis And Determination

9. The respondents have challenged the jurisdiction of this court to deal with the appeal and submit that the appeal ought to have been filed before the Environment and Land Court.

10. The Supreme Court of Kenya in Samuel Kamau Macharia -v- Kenya Commercial Bank & 2 Others 2012 eKLR eloquently stated that:

“A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction conferred by *the Constitution* or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law.”

11. The main issue on jurisdiction is whether the subject matter of the appeal offends Article 162 (2) of *the Constitution*. This court must therefore look at the predominant issue raised in the suit. In Lydia Nyambura Mbugua vs Diamond Trust Bank Kenya Limited & Another [2018] eKLR the court observed as follows:

“On my part, I would modify the above test, and hold the position that what is important when determining whether the court has jurisdiction, is not so much the purpose of the transaction, but the subject matter or issue before court, for I think that the purpose of the transaction, may at times be different from the issue or subject matter before court. Let us take the transaction of a charge as an example. The predominant purpose of creating a charge is for one to be advanced some financial facilities. However, when it comes to litigation, the predominant issue may not necessary be the money, but the manner in which the chargee, is exercising its statutory power of sale. Here, I trust that you will see the distinction between the predominant purpose of the transaction and the predominant issue before court. That is why I hold the view, that in making a choice of which court to appear before, one needs to find out what the predominant issue in his case is, and not necessarily, the predominant purpose of the transaction. If the litigant’s predominant issue will touch on the use of land, or occupation of land, or a matter that affects in one or another, title to land, then such issue would fall for determination before the ELC.”

12. The Court of Appeal in Co-operative Bank of Kenya -v- Patrick Kangethe Njuguna & 5 Others 2017 eKLR stated:

“To the Appellant, the charge was an instrument granting an interest in the land, hence jurisdiction in the matter lay with the ELC. However, under Section 2 of the said Act, an instrument is a writing or enactment which creates or affects legal or equitable rights and liabilities. Further the purpose of this suit, that instrument was the charge. However, it bears repeating that the cause of action herein was never the charge (instrument) but the amounts due and owing thereunder. Neither the charge instrument nor the creation of an enforceable interest thereunder were disputed. The main question to be determined were the tabulation of the sums owing...”

13. In this case, the subject of the suit concerns the refund of Kshs 310,000/- on the allegation that the appellant failed to meet his obligation. Essentially, it is not about the use of land but the appellant’s indebtedness, if any. Therefore, in the circumstances, I find that this court has the jurisdiction to hear the appeal.



14. This is a first appeal. It is settled law that the duty of the first appellate court is to re-evaluate the evidence which was adduced in the subordinate court, both on points of law and fact and come up with its own findings and conclusions [see *Peters v Sunday Post Limited* [1958] E.A 424].
15. Fredrick Simiyu (Pw1) testified that the appellant was selling land in 2005, and they agreed to purchase land from him worth Kshs 300,000/-, which was to be paid in instalments. He later paid Kshs 10,000/- towards ½ an acre. Pw1 testified that his wife, the 1st respondent, and the appellant signed the agreement, and the consideration was paid in two instalments after he obtained a loan from Harambee Sacco. The appellant did not hand over the land to them, and they later discovered that the title had been charged to AFC. Pw1 testified that he did not sign the agreement and that his name is not in the agreement. On cross-examination, he testified that he sent Kshs 110,000/- to the 1st respondent in an envelope through Coast Bus. He paid Kshs 10,000/- with no agreement indicating that it was for the ½ acre.
16. Alice Nafula Wekesa (Pw2) testified that the appellant was selling an acre of land at Kshs 120,000/-. She had an agreement with the appellant, but did not sign the sale agreement. On cross-examination, she testified that she had no documents to support that she had sent money to the appellant.
17. Zechariah Wanjala Wasike (Pw3) testified that he accompanied Pw2 to the home of the appellant. The appellant wrote the agreement, and the respondent paid Kshs 210,000/-. The appellant signed the sale agreement. Pw3 testified that he was a witness.
18. Wilbert Mukhamaku Kalibola (Dw1) testified that he never got into an agreement with the respondent, nor did he receive money from them. He was charged in Bungoma CRCCR but was acquitted. In his testimony, he stated that, upon the request of the 2nd respondent, who is his relative, he prepared the sale agreement for the purpose of facilitating the latter's application for a loan.
19. What this court has been called to determine is whether there was a valid contract. In *Omar Gorhan vs Municipal Council of Malindi (Council Government of Kilifi) v Overlook Management Kenya Ltd* (2020) eKLR, Nyakundi J. stated as follows:

“.....The appellant was therefore expected to prove on a balance of probabilities the following essential elements to a lease agreement with the respondent:

- a. An offer.
- b. An acceptance.
- c. Any consideration.
- d. Any intention to create legal relations.

The essential components of a contract as was observed by Harris JA in *Garvey v Richards* {2011} JMCA 16 ought to ordinarily reflect the following principles: “It is a well-settled rule that an agreement is not binding as a contract unless it shows an intention by the parties to create a legal relationship. Generally, three basic rules underpin the formation of a contract, namely, an agreement, an intention to enter into contractual relationships and consideration. For a contract to be valid and enforceable an essential term governing the relationship of the parties must be incorporated therein. The subject matter must be certain. There must be positive evidence that a contractual obligation, born out of an oral or written agreement is in existence.”



20. The trial magistrate, in his judgment, held that the appellant, in his testimony, conceded that there was an agreement with the respondents.
21. I note that the contract in question was not signed by the appellant and respondents herein. The names of the purchasers were indicated as Mr. and Mrs. Simiyu, with their respective identification numbers shown as xxxx475 and xxxx250.
22. The respondents argued that, since the appellant did not challenge the existence of the agreement, it remains valid and enforceable. The appellant, in his defence, stated as follows:

“...the defendant admits entering into an agreement for the sale of 2 ½ acres of land known as East Bukusu/East Sangalo/1765...”
23. However, the appellant testified that he drafted the document. He denied receiving any money from the respondents. He stated that the purpose of drafting the document was for the 2nd respondent to obtain a loan.
24. The appellant having denied obtaining any money from the respondents, it was incumbent on the respondents to prove that there was consideration. However, there was no documentary evidence showing that Kshs 300,000/- was paid to the appellant. While the respondents were adamant that they paid the purchase price, the appellant denied receiving the money. Therefore, I find that the respondents did not prove, on a balance of probabilities, that they paid Kshs 300,000/- to the appellant. In my view, the respondents failed to prove that there was consideration.
25. Consequently, I find that the trial magistrate erred in awarding damages to the respondents. Therefore, the judgment of the subordinate court is hereby set aside, as the respondents failed to establish their case to the required standard of proof. The appellant is accordingly awarded the costs of this appeal.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 9TH DAY OF OCTOBER 2025.

R.E. OUGO

JUDGE

In the presence of:

Mr. Wekesa .P. h/b for Mr. Wanjala - For the Appellant

Ms Wanyama -For the Respondent

Wilkister -C/A

