

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

COMMERCIAL & TAX DIVISION

COMMERCIAL APPEAL NO E071 OF 2025

SARABJEET SINGH SETHI.....1ST APPELLANT

FURZANA ARBI ISMAIL.....2ND APPELLANT

~VERSUS~

ENDLESS AFRICA LIMITEDRESPONDENT

JUDGMENT

1. The appeal before this Court emanates from the ruling of **Hon. Mercy Malingu** delivered on **20th February 2025 in MCOMMSU E1012 of 2023**, by which the learned Magistrate upheld a jurisdictional objection and transferred the suit to the Environment and Land Court (ELC) on the basis that the predominant issue concerned land, being the transfer/assignment of leases over parcels known as **Cismara/Ololulunga/5032** and **Cismara/Ololulunga/5033**.

2. The Appellants, being dissatisfied with the said ruling, appealed against the whole of it on the following grounds: -

“a) The Learned Magistrate arrived at a wrong conclusion in failing to ascertain that the predominant cause of action in this suit is commercial in nature and involves contractual obligations under a share purchase agreement between the parties;

b) The Learned Magistrate arrived at a wrong conclusion by holding that the principal subject matter of this suit involves land;

c) The Learned Magistrate erred in fact and law by establishing that this matter falls within the purview of the Jurisdiction of the Environment and Land Court; and

d) The Learned Magistrate erred in law by transferring this suit to the Environment & Land Court while she was not seized of the Jurisdiction to act as such."

3. Based on the foregoing, the Appellants prayed to have the trial magistrate's finding reversed, and have the suit heard and determined in the commercial decision of the Milimani Chief Magistrate's Court, by a magistrate other than Honourable Mercy Malingu. Further, the Appellants prayed for the costs of the present appeal.

4. In support of the appeal, counsel for the Appellants filed written submissions dated 30th May 2025. It was submitted that the learned magistrate erred in failing to recognise that the predominant cause of action was commercial and arose from contractual obligations under the share purchase agreement (SPA). They contended that the SPA primarily concerned the sale of shares and assets of Sunny Farms Limited, and not land, and was therefore governed by contract and company law. The Appellants referred the Complaint, which pleaded a structured payment arrangement and alleged breach arising from non-payment of the final instalment, with the reliefs sought being purely monetary.

5. The Appellants maintained that the Environment and Land Court's jurisdiction is limited to disputes connected to the use, occupation, or title to land, and does not extend to contractual disputes whose gravamen lies in financial or commercial obligations.

6. On the issue of transfer, the Appellants contended that a court lacking jurisdiction has no power to transfer a suit. They argued that a suit filed without jurisdiction is a nullity and cannot be cured by transfer. They therefore urged the court to allow the appeal and restore the suit to the Commercial Division.
7. The Respondent opposed the appeal through written submissions dated 4th July 2025. The Respondent supported the trial magistrate's finding that the predominant issue in the dispute arose from the share and assets purchase agreement involving the transfer of shares and the lease over **Cismara/Ololulunga/5033**, and that the matter therefore fell within the jurisdiction of the Environment and Land Court (ELC).
8. The Respondents submitted that the share purchase agreement expressly provided for the sale of the entire share capital and assets of Sunny Farms Limited, including the lease over **Cismara/Ololulunga/5032 and 5033**, as set out in clauses B, E, and F and the schedules to the agreement.
9. The Respondent submitted that although the plaint referred generally to the sale of shares and assets, the defence clarified that the assets included **Cismara/Ololulunga/5033**, which was the primary location of the company's operations. On that basis, the Respondent maintained that the ELC had jurisdiction to determine the dispute.
10. On whether the trial court had jurisdiction to transfer the suit, the Respondent pointed out that, contrary to its argument in the present appeal, the Appellants had previously in the trial court submitted that the trial court had jurisdiction and ought not to transfer the matter, and the Appellants were now taking an inconsistent position.

11. Regarding whether the trial court was right to transfer the suit after upholding the preliminary objection, the Respondent submitted that once a court finds that it lacks jurisdiction, it must down its tools as stated in **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd.** Relying on among others, Phoenix of East Africa Assurance Co. Ltd V S M Thiga T/A Newspaper Service (2019) eKLR, the Respondent asserted that a suit filed without jurisdiction is a nullity and is not capable of being transferred to a competent court.
12. The Respondent consequently agreed that the transfer of the suit to the ELC was erroneous and urged the court to strike out the suit for want of jurisdiction.

Analysis and determination.

13. I have duly considered the record of appeal and the submissions filed in support and against the appeal. In my view, the primary issue for determination is whether the lower court erred in finding that the suit fell within the jurisdiction of the ELC.
14. It is settled that jurisdiction is everything, and where a court lacks it, it must "down its tools". This long-settled principle from **Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd [1989] eKLR**, guides that the Court's first duty is to satisfy itself on jurisdiction before doing anything else.
15. The constitutional and statutory architecture is equally not in doubt. Article 162(2)(b) contemplates courts of equal status with the High Court to determine disputes relating to "the environment and the use and occupation of, and title to, land." Parliament gave effect to this through the ELC Act, whose Section 13(2) itemises, inter alia, disputes on land use planning, title, tenure, rents, rates, valuations, and "any other dispute relating to environment and land."

16. Conversely, Article 165(3) preserves the High Court's unlimited original jurisdiction in civil and criminal matters, save for the express exclusions in Article 165(5), including matters falling within the jurisdiction of the Article 162(2) courts.
17. The dispute in the present case is where this claim sits within the statutory and constitutional framework.
18. The record reveals that the Appellants instituted a suit against the Respondent (MCCOMMSU E1012/2023) vide a plaint dated 30th November 2023, which is produced on pages 4-7 of the record of appeal.
19. In the plaint, the Appellants pleaded that they entered into a **Share and Assets Purchase Agreement dated 26th May 2022** with the Respondent whereby they sold to the Respondent shares in Sunny Farm Limited and certain assets for a total sum of Kshs.14,000,000. It was the Appellants' case that the purchase price was paid in installments; however, the Respondent failed to remit the final installment of Kshs. 4,800,000 as agreed under the SPA. The Appellants, therefore, instituted the suit in the lower court – Commercial Division against the Respondent seeking recovery of the said sum.
20. Having analyzed the SPA as produced in the record of appeal, the Court notes that one of the assets that were to be purchased and transferred under the agreement was the lease in the parcel of land known as CISMARA/OLOLULUNGA/5032.
21. The Respondent rightly pointed out that the SPA's recitals and schedules include the company's leasehold interests over the identified parcels and that the transaction contemplated assignment/novation of leases. That, however, is not disputed. The question is whether that lease aspect transforms the dispute into one "relating to the environment and the use and occupation of, and title to,

land” (to be a matter for ELC), as opposed to a commercial performance dispute (to be a matter for the Commercial Court).

22. In the case of **Suzanne Achieng Butler & 4 others v. Redhill Heights Investments Limited & another [2016] eKLR**, the court upheld the Predominant Purpose Test and stated 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.”

23. Further in **Bank of Africa Kenya Limited v Chief Land Registrar & another TSS Investments Limited (Intended Interested Party) (Miscellaneous Application E119 of 2022) [2024] KEHC 1081 (KLR)** the court stated:

“In my view, the following factors are significant in determining the nature of the contract: a. The language of the contract; b. The nature of the business of the vendor; c. If the contract is mixed, the intrinsic worth of the two parts – land acquisition and other services or provision of materials; d. The gravamen of the dispute - whether rooted in contests about ownership, deficiency in title, occupation or use of the land or whether the genesis of the dispute is something else like the quality of services offered, construction, works, and so forth; and the remedies sought by the Plaintiff.”

24. The Court of Appeal in [Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others \[2017\] KECA 79 \(KLR\)](#), explained that a charge is a disposition

distinct from land “use”, and that contracts not incidental to land “use” such as mortgages, charges, collection of dues and rent, fall within the civil jurisdiction of the High Court, not the ELC. The Court stated that:

“Furthermore, the jurisdiction of the ELC to deal with disputes relating to contracts under **Section 13** of the **ELC Act** ought to be understood within the context of the court’s jurisdiction to deal with disputes connected to ‘use’ of land as discussed herein above. Such contracts, in our view, ought to be incidental to the ‘use’ of land; they do not include mortgages, charges, collection of dues and rents which fall within the civil jurisdiction of the High Court.....

By parity of reasoning, the dominant issue in this case was the settlement of amounts owing from the respondents to the appellant on account of a contractual relationship of a banker and lender.”

25. The ratio emphasises that one must look to the dominant issue. If the heart of the matter is accounting or debt recovery as between lender and borrower (or, by extension, landlord and former tenant where possession and occupancy are no longer live issues), the High Court’s jurisdiction is engaged.

26. Additionally, the same approach was taken by the Court of Appeal in [Joel Kyatha Mbaluka t/a Mbaluka & Associates Advocates v Daniel Ochieng Ogola t/a Ogola Okello & Co Advocates \[2019\] KECA 504 \(KLR\)](#), where the Court stated that: -

“[12] We reiterate the position taken in ***Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna*** (supra), that in construing whether the ELC had jurisdiction in a matter, the consideration must be the dominant issue in the dispute and whether that issue relates to the environment and the use and occupation of, and title to, land. The dispute

between the appellant and the respondent related to the professional undertaking given by the appellant to facilitate the land transaction between his client and the respondent's client."

27. In this case, the SPA was drafted as a mechanism for the sale of shares and assets as listed in the schedule thereto. The Appellants are selling their shares in *Sunny Farms Limited* and the assets held by the company. Further, the Appellants are transferring the lease interest held by the company to the Respondent. In my view, therefore, the predominant purpose is the sale of shares and assets and not the transfer of land.

28. In any case, the gravamen of the dispute is not about ownership, deficiency in title, occupation, or use of the land, but the non-payment of the balance of the purchase price by the Respondent. The Appellants pleaded that the Respondent had breached the terms of the SPA by failing to pay the last instalment of Kshs.4,800,000/- from the completion date. There is therefore no doubt that this is a contractual dispute.

29. The Suit was therefore properly filed in the magistrates' commercial court, and the lower court erred in finding that it ought to have been filed in the ELC.

30. Before I conclude, it is critical to mention that the Court recognizes that parties made considerable arguments on whether a court lacking jurisdiction can transfer a suit. However, having found that the present suit is commercial and that the Magistrate's Court (Commercial) was the proper forum for the claim as framed, that argument becomes an academic exercise for present purposes. I will therefore not delve into the same.

31. Consequently, I find the present appeal meritorious, and hereby grant an order restoring the suit to the commercial division to be heard and determined by a magistrate other than Hon. Mercy Malingu.

32. Costs of the appeal awarded to the Appellants.

33. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH JANUARY 2026.

A handwritten signature in blue ink, appearing to read 'Moses Ado', is written over a horizontal line. The signature is stylized and somewhat illegible.

HON. JUSTICE MOSES ADO
JUDGE

In the presence of: -

C/A - Moses