



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. E188 OF 2023

NICOLAS MAKANI

APPELLANT

VERSUS

CLEMENT MASAVIRU

RESPONDENT

***(Being an appeal from the Ruling of Hon. J. J. Masiga (SPM) in
Kakamega CMCC. No. 186 of 2017, delivered on 8th December
2023)***

JUDGEMENT

1. The Appellant entered into an agreement to purchase land from the respondent in the year 1988 at a consideration of KShs. 43,000/=. Despite receiving Kshs. 42,000/=:, the Respondent failed or neglected to transfer the said parcel of land to the Appellant, who then filed a case in the Land Disputes Tribunal.
2. In its decision, the Land Disputes Tribunal granted an order of specific performance, which the court declined

to adopt in Kakamega Miscellaneous Land Award No. 71 of 2002, as it held that it lacked jurisdiction.

3. By Judicial Review No. 39 of 2011, the Respondent successfully sought an order of certiorari to quash the decision of the Western Province Land Disputes Tribunal. In his ruling dated 28/1/2015, Chitembwe J. held that the Appellant (then the Respondent) was at liberty to file a suit before the Environment and Land Court, subject to the rider that he could also seek leave to file his suit, as the dispute had been litigated before the Tribunal, which lacked jurisdiction.
4. On 12/6/2017, the Appellant filed suit against the Respondent, in which he was seeking a refund of Kshs. 43,000/= with interest thereon at court rates from 1988 to the date of filing of suit. The suit was premised on the Respondent's alleged breach of the agreement of sale.
5. It appears that the Appellant was not diligent in following up his suit, as the same was dismissed for want of prosecution on 15/2/2022. His application for review and setting aside of the aforesaid orders of dismissal was dismissed on 8/12/2023.

6. It is these unfortunate turn of events that led the Appellant to file an appeal in this Honourable Court.
7. Without going into the merits of the appeal, I find that it must fail as this court is not seized with jurisdiction to hear and determine the same.
8. By dint of Article 162 (2) and 165 (5) of the Constitution, the High Court's jurisdiction is ousted where the cause of action involves matters reserved for specialized courts.
9. Under Section 13 (2) (d) of the Environment and Land Court Act, disputes involving land transactions should be heard and determined by the Environment and Land Court. The said section provides:-
**“In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—
(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land.”**
10. Notwithstanding the claim for refund, the subject matter herein is land and would require the court's

determination as to whether the prayer for interest from the date of payment to the date of filing suit would be tenable. The prayer, therefore, falls within the purview of Sections 38, 40 and 42 of the Land Act.

11. In **Philip Jalang'o v. Ryan Properties Limited [2020] KEELC 96 (KLR)**, the court held as follows:-

"...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."

12. In **Susanne Achieng Butler & 4 others v. Redhill Heights Investments Limited & Another [2016] KEHC 1313 (KLR)**, the court held that:-

“...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.”

13. Having said that, Justice Chitembwe was clear in his mind. This court lacks jurisdiction and as is settled, jurisdiction is everything. The Court of Appeal in **Owners of the Motor Vessel Lillian “S” v. Caltex Oil Kenya Limited [1989] KECA 48 (KLR)** held that:-
“...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 down tools in respect of

the matter before it the moment it holds the opinion that it is without jurisdiction...”

14. The Appellant has made spirited submissions urging the court not to shut the door of justice. However, he is knocking at the wrong door, and without jurisdiction, this court does not have the keys to open his door. His appeal lacks merit and is struck off.
15. The Appellant is at liberty to file an application for leave before the Environment and Land Court and to proceed with his suit in the proper forum.
16. There shall be no order as to costs.

Dated, signed, and delivered at Kakamega, this 12th day of February 2026.

**A. C. BETT
JUDGE**

In the presence of:

Mr Onyonche for the Appellant

Mr Mukavale for the Respondent

Court Assistant: Polycap

COPY