

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT
EMBU

ELC APPEAL NO. E010 OF 2025

RACHAEL MUTHONI NJAGI.....1ST

APPELLANT

RAEL WAWIRA NJAGI.....2ND

APPELLANT

VERSUS

JOHN KATHURI GATUA.....1ST

RESPONDENT

MOSES NYAGA NJAGI.....2ND

RESPONDENT

SAMWEL IRERI NJAGI.....3RD

RESPONDENT

JEREMY NGARI NJAGI.....4TH

RESPONDENT

JUDGMENT

1. This appeal arises from the judgment of Hon Atieno Joan Otieno Senior Principal Magistrate (SRM) delivered on 11/2/2025 in Embu MCELC Case No. E047 of 2024, which the Respondent instituted through a plaint seeking an order for the rescission of a Memorandum of Understanding dated 26/10/2023 (MoU) and in

the alternative, payment of Kshs. 200,000/= to each Respondent in accordance with the MoU.

2. They pleaded that on or about 26/10/2023, parties entered into an MoU over the sale of the land known as Ngandori/Kirigi/4354 (the land). The Respondents averred that clause 1 of the MoU stipulated that the Appellants were to sell the upon conclusion of the succession proceedings relating to their late father, Ibrahim Njagi Gatua, the registered owner. Further, that upon sale of the land, a sum of Kshs. 200,000/= would be deposited into each of their bank accounts. They contended that despite the Appellants selling the land to Douglas Rutere Njure, they failed to pay the agreed sums, thereby breaching the MoU. They set out particulars of the Appellants' breach.
3. The Appellants filed a joint defence and averred that the Respondents were not beneficiaries of the land. They averred that it was a condition in the MoU that the Respondents would scout for buyers for the land who would pay Kshs. 3 million to enable each of the Respondents get a sum of Kshs. 200,000/= which the Respondents failed to fulfil. They averred that upon disposing of the land, out of goodwill and sisterly love, they gave each Respondent sums of money, which the Respondents acknowledged with appreciation. They maintained that the Respondents did not have a claim against them and urged that the suit should be dismissed.
4. At the trial, the 3rd Respondent, Samuel Ireri Njagi, gave evidence and reiterated the averments contained in the plaint. On cross

examination, he confirmed that the Appellants are his sisters and that they inherited the land, and that the sons had already inherited their own parcels. He averred that they wanted the Appellants to pay them because the land belonged to all of them. He conceded that the 1st Appellant paid him some money when his land was almost auctioned but maintained that it was part of the money owed to him. He also stated that the 4th Respondent was paid Kshs. 50,000/= leaving a balance of Kshs. 150,000/= and that there was no other agreement they signed apart from the MoU. On re-examination, he stated that the Appellants signed the MoU but he did not know whether the land had been sold. He produced a demand letter and a copy of the MoU.

5. The 1st Appellant stated that their late father gifted each of the Respondents land. That the 1st Respondent was given 2 acres, the 2nd Respondent 1.5 acres, the 3rd Respondent 1 acre and the 4th Respondent 1.5 acres where they have all settled. She stated that their parents retained a portion of land measuring 1 acre, which is the suit land, which their father made clear belonged to their parents together with the Appellants, his daughters since he had not bequeathed them any land. That upon their father's passing, they filed succession proceedings in respect of his estate and each of the Respondents inherited their respective portions already gifted to them while their late mother, Naomi Wamugo Njagi, was registered as proprietor of the land.

6. She explained that before their father died, the 2nd Appellant had separated from her husband and was living on the land with her children. Their mother died before transferring the land to the Appellants. Upon her demise, the Appellants sat down with the Respondents and agreed to file succession proceedings in respect of their late mother and for the 2nd Appellant to be the administrator. She averred that the Respondents were aware that the Appellants were to inherit the whole of their mother's estate including the land. At the point of confirmation of the grant, the Respondents became difficult and started threatening that they would not attend court.
7. The Appellants caused the Respondents to be summoned by the Area Assistant Chief where the Respondents demanded a share of the sale proceeds from the land since they knew the Appellants intended to sell the land so that they could each purchase land elsewhere.
8. She contended that to avoid a prolonged confrontation, they entered into the MoU with the Respondents, on terms that if they secured a purchaser willing to pay Kshs. 3,000,000/=, the four brothers would each be given Kshs. 200,000/= from the purchase price. She averred that the Respondents did not look for a purchaser and they took the initiative and ultimately settled on a purchaser who was willing to pay Kshs. 2 million since not many people were interested in the land. They informed the Respondents when they sold the land and the Appellants purchased land elsewhere with the proceeds.

9. The 2nd Appellant started constructing her house on her new land but could not complete it due to lack of funds. She added that the Respondents had been hostile towards her and her children since she separated with her husband and came to stay with their parents forcing her to settle on a well-wisher's land with the children and grandchildren. This contributed to the urgency to get a purchaser for the land.
10. On selling the land, they shared the little they had with the Respondents depending on their needs at the time. The 1st and 2nd Respondents were each given Kshs. 20,000/= which was deposited into their bank accounts, the 3rd Respondent was given Kshs. 87,600/= paid to his Sacco to clear loan arrears as his land was to be auctioned due to arrears and he was given Kshs. 5,000/= in cash; the 4th Respondent was given Kshs. 50,000/= cash as his bank account was dormant. She contended that the Respondents took the money and they parted amicably believing the matter was settled.
11. She claimed that the 2nd and 4th Respondents began interfering with the land by demolishing their late mother's house and carting away the building materials, even though they knew that the 2nd Appellant was entitled to those materials, which she intended to use to complete her house on her land. That they destroyed crops belonging to the purchaser, and a complaint was made to the police who were investigating the matter.
12. She contended that the Respondents were not entitled to the orders sought since they were not entitled to the land and did

not assist them in pursuing the succession proceedings. She elaborated that the Appellants paid for their transport and compensated them when they were required to attend court or other offices when they pursued the succession proceedings. They reiterated that the MoU was dependent contingent upon the Respondents finding a purchaser who would pay a specific sum which the Respondents failed to do. On cross examination, she stated that the Respondents forced them to enter into the agreement.

13. The trial court in its judgement examined whether the MoU between the parties was binding. Citing **Eldo City Limited v Corn Products Kenya Ltd & Another (2013) eKLR** where it was held that the binding nature of an MoU depended partly on its construction and partly on legal analysis and that it was a question of fact, with the plaintiff bearing the burden of persuading the court that such agreement existed and was binding.
14. Upon analysis, the trial court found that although the MoU was predicated on a future transaction, its terms were couched in mandatory terms. That it was executed by all parties, and was attested by an advocate. The court found that the Appellant's conduct of giving effect to clause 1 of the MoU after signing it, by selling the land demonstrated a clear intention to be bound. That, by signing the document, the parties created a binding and enforceable contract between them. The court entered judgment in favour of the Respondents for payment of Kshs. 200,000/= to

each of them and directed that each party would bear its own costs.

15. Aggrieved by that decision, the Appellants filed a memorandum of appeal raising six grounds of appeal. They faulted the trial court for failing to consider that the Respondents did not prove on a balance of probabilities that the MoU was legally binding. They contended that the Learned Magistrate contradicted herself by referring to the MoU as a preliminary agreement predicted on a future transaction and holding that the MoU was couched in mandatory terms and was therefore enforceable.
16. The Appellants faulted the trial court for failing to appreciate the fact that the issue between the parties was not the validity of the MoU but whether the MoU was binding between the parties. Further, they faulted the trial court for holding that the MoU was a binding and enforceable contract between the parties yet the document did not fulfil the essential components of a contract.
17. They contended that the trial court disregarded the fact that the 3rd Respondent admitted during cross examination that he received some money from the Appellants after sale of the land. They faulted the trial court for failing to consider that the Respondents sought rescission of the MoU as an alternative prayer, which according to the Appellants was a clear indicator that the Respondents were aware that the document was not binding and was therefore unenforceable. They sought to have the judgment of the trial court set aside and for dismissal of their suit with costs.

18. The appeal was canvassed through written submissions, which the court has read and considered. The Appellants submitted that the MoU was not legally binding, lacked consideration and was at best a non-binding family understanding made out of goodwill and was not enforceable under the law of contract. They contended that the trial court erred by failing to appreciate that the MoU arose from a family arrangement regarding inheritance where the Respondents had already been gifted land by their late father. They submitted that there was no commercial transaction or indication that the parties intended to create legal obligations and as such, the MoU was a gratuitous promise and not enforceable in law.
19. They relied on **Balfour v Balfour (1919) 2 KB 571** where it was held that agreements made within the family are presumed not to give rise to legal obligations unless there is an express indication to the contrary. They argued that even though that decision referred to a husband and wife, the principles apply in this case where the parties are siblings. They argued that the MoU did not contain any indication that the parties intended to create a legal obligation nor did it contain the standard features of a binding contract such as a clear offer, acceptance and consideration.
20. Further, they contended that the Respondents failed to provide consideration for the Appellants' promise. They added that the Respondents received *inter vivos* gifts of land, and therefore the Appellants were under no legal obligation to compensate them

for land the Appellants had inherited. They argued that the Respondents accepted lesser sums without protest, thereby extinguishing any alleged obligation. To support that position, they cited **Hirani v Kassam (1952) 19 EACA**. They maintained that the Respondents' claim amounts to unjust enrichment and urged the court to allow the appeal.

21. The Respondents fully supported the trial court's judgment and the authority it cited when entering judgment in their favour. They emphasised the trial court's finding that the MoU became binding and enforceable upon the sale of the land, while noting the court's observation that the Appellants' claim that the agreement was merely an expression of hope was farfetched. They also emphasized the court's finding that the Appellants gave effect to clause 1 of the MoU by selling the land. They urged the court to dismiss the appeal with costs.
22. The issue for determination is whether the appeal has merit. The central question in this dispute is whether the MoU constituted a binding and enforceable agreement between the parties. In *Kenya Railways Corporation & 2 others versus Okoiti & 3 others* (2023) KESC 38 (KLR), the Supreme Court observed an MoU is preliminary to a contract or agreement between parties and is characterized as non-binding and unintended to create any contractual obligations on either party. It added that that does not mean that courts are not faced with the question of establishing the binding nature of an MoU, and that when that

happens, a court considers the wording and the apparent intention of the parties.

23. This trial court held that the MoU was couched in mandatory terms and that the Appellants acted on it when they sold the land and made part payment to the Respondents. According to the Learned Magistrate, this showed a clear intention to be bound. Clause 1 of the MoU provided that “we Rachael Muthoni Njagi and Rael Wawira Njagi shall give our said “brothers” the sum of Kshs. 200,000/= each after selling our land no. Ngandori/Kirigi/4354 which was left by our late mother and which is now in the process of succession”.
24. It is not in contention and was admitted during trial that after the sale of the land, the Appellants paid certain sums of money to the Respondents pursuant to the MoU. The Appellants’ evidence, which was uncontroverted, was that the 1st and 2nd Respondents were each paid Kshs. 20,000/=, the 3rd Respondent received Kshs. 87,600 paid towards clearing his SACCO loan arrears, and Kshs. 5,000 in cash. The 4th Respondent was given Kshs. 50,000/=. The trial court did not take these payments into account when it found that there was a binding and enforceable contract between the parties.
25. Paragraph 3 of the MoU stated that the brothers accepted to be given the sums of money because their mother left the land to be inherited by the sisters. The brothers were given land by their father during his lifetime. This court is inclined to believe the Appellants contention that they only entered into the MoU when

the Respondents refused to cooperate in the succession proceedings that would pass title over the land to the Appellants. The Appellants contended that the Respondents demanded a share of the sale proceeds from the land since they knew their sisters intended to sell the land so that they could each purchase land elsewhere.

26. The MoU does not contain the standard features of a binding contract comprising offer, acceptance and consideration. No consideration flowed from the Respondents to the Appellants. The fact of the matter is that the Appellants were not under any legal obligation to compensate the brothers for the land which they inherited. The MoU was not legally binding, it simply was a family understanding made out of goodwill and was not binding.
27. The judgment and decree delivered on 11/2/2025 in Embu CMELC Case No. E047 of 2024 is set aside. The Respondents' claim before the trial court is dismissed. Since the parties are siblings, each party will bear its costs for the appeal and of the suit.

Delivered virtually at Bungoma this 16th day of February 2026

**K. BOR
JUDGE**

In the presence of: -

Court Assistant- Diana Kemboi

No appearance for the parties