



Omoke (Suing as a legal representative and administrator of the Estate of the Late Dunstan Omoke Owich) v Koskei (Environment and Land Appeal E005 of 2023) [2026] KEELC 1608 (KLR) (19 March 2026) (Judgment)

Neutral citation: [2026] KEELC 1608 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT AND LAND APPEAL E005 OF 2023
LA OMOLLO, J
MARCH 19, 2026**

BETWEEN

VICTOR OTIENO OMOKE (SUING AS A LEGAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF THE LATE DUNSTAN OMOKE OWICH) APPELLANT

AND

HILLARY KIPLANGAT KOSKEI RESPONDENT

(Being an appeal arising from the judgement of Hon. Charles Obulutsa delivered on 3rd October, 2023 in Kericho CM ELC Case No. 9 of 2018)

JUDGMENT

Introduction.

1. By a Memorandum of Appeal dated 12th October, 2023 the Appellant challenges the decision of Hon. Charles Obulutsa in Kericho CM ELC Case No. 9 of 2018.
2. By a Cross – Appeal dated 1st August, 2025 the Respondent also challenges the decision of Hon. Charles Obulutsa in Kericho CM ELC Case No. 9 of 2018.

Factual Background.

3. In the subordinate Court, the Respondent filed a suit vide a Complaint dated 31st March, 2014. The Complaint was amended on 24th November, 2018. The orders sought in the Amended Complaint are as follows.
 - a. A declaration that the Sale agreement made on 16th April 2007 is void.
 - b. An Order of Permanent Injunction restraining the Defendant, of his own, agents, servants and/or employees from trespassing onto, developing, alienating, disposing off, or in any other



way interfering with the Plaintiff's quiet use and occupation of the suit land herein designated as Kunyak/281 Measuring 2.9 Hectares.

- c. Costs of the suit.
4. The Appellant filed a "Defence to the Amended Plaintiff and Counterclaim" dated 4th March, 2019. He sought the following orders in the Counterclaim;
- a. A permanent injunction do issue restraining Victor Otieno Omoke, Vincent Oluoch Omoko, Gerald Onyango Omoke, Michael Owino Omoke, all beneficiaries of the estate of the late Dunstan Omoke Owich, their agents, servants and all those claiming under them from trespassing, transferring, entering or in any other manner from interfering with the Defendant's (now Plaintiff) peaceful occupation, possession and ownership of land known as Kericho/Kunyak/281.
 - b. The Settlement Funds Trustee (or its Chief Executive Officer) does execute the necessary forms thus transferring land known as Kericho/Kunyak/281 to the Defendant (now Plaintiff) and failure to which, the Executive Officer of this Honourable Court does execute the transfer forms that will confer title ownership of the subject land to the Defendant (now Plaintiff).
 - c. Payment of costs of the suit.
 - d. Any other or further relief that this Honourable Court may deem fit and just to grant.
5. The Respondent gave evidence before the trial Court on 18th July, 2023 on which date he withdrew the Counterclaim.
6. The Learned Trial Magistrate delivered judgement on 3rd October, 2023. The Court observed and held as follows;
- "...As a dispute is presented in Court, it is for the Court under Article 159 (2)(d) of *the Constitution* to justice (sic) to the parties without undue regard to technicalities. Having considered the Plaintiff's case, defence and submissions, the justice of the case not based on the pleadings filed is that since the Defendant is in possession of the land, he should pay the balance of the purchase price which he conceded is 389,000 shillings after which Plaintiff should effect transfer to him after getting all the necessary consents.
- Since it is the Defendant who failed to pay the balance of the purchase price within the agreed time, he shall bear the costs of the suit and interest.
- Right of Appeal 30 days."
7. The Appellant being aggrieved by the said judgement approached this Court by way of appeal.
8. The appeal was admitted for hearing on 24th February, 2025 and the Court issued directions that it be heard by way of written submissions.
9. The matter was mentioned on 25th March, 2025 and 12th May, 2025 to confirm filing of submissions. On 22nd July, 2025 Counsel for the Respondent sought and was granted leave to file a Cross Appeal.
10. Counsel for the Respondent informed the Court that he had also filed a Preliminary Objection. The Court issued directions that parties file submissions to the Appeal, Cross Appeal and Preliminary Objection.



11. On 8th October, 2025, the matter was mentioned to confirm filing of submissions and then reserved for judgement.

The Appeal.

12. The grounds of appeal are as follows;
 - a. The trial magistrate erred in law and fact in failing to declare the agreement dated 16th April 2007 void and therefore incapable of being enforced when the evidence presented before him sufficiently demonstrated that the Respondent was in breach of the same and was therefore not entitle to lay claim upon the land.
 - b. That Trial (sic) Magistrate erred in law and fact in failing to grant the orders for injunction as sought considering that the rights and interests of the Respondent upon the suit parcel of land was extinguished on account of the breach and failure to comply with the law within the prescribed time lines and the only remedy open to him was to claim for refund for the sum already paid as deposit as agreed. (sic)
 - c. The Trial Magistrate erred in law and fact in failing top (sic) determine that the Respondent's occupation and development of the land if at all, was without any basis or right at all and was completely beyond the express terms and dictates of the agreement and the Trial Magistrate would not rewrite the agreement for parties but proceed to enforce it strictly as prescribed and agreed by the parties.
 - d. The Trial Magistrate occasioned a travesty of justice by misapprehending the law and facts placed before him and in failing to take into account the submissions placed before him by the Appellant.
13. The Appellant prays for an order that;

“The appeal be allowed with costs, and the Judgment by the Trial Magistrate be set aside entirely and replaced by a Judgement declaring the agreement dated 16th April 2007 void and proceed to grant the injunctive orders as sought and direct that the only remedy available to the Respondent is a refund of the sums paid as deposit for the purchase of the suit the suit land herein. (sic)”

The Cross Appeal.

14. The grounds of the Cross Appeal are as follows;
 - a. The Learned Trial Magistrate erred in law and in fact in arriving at the decision that is void ab initio as it is based on extraneous issues that did not take into account material facts that were presented in Court.
 - b. The learned trial Magistrate erred in law and in fact by failing to make a finding that land parcel number Kericho/Kunyak/281 neither belonged to the late Dunstan Omoke Owich nor his estate whose succession petition for a Grant of Letters of Administration Intestate were held upon his demise in Nyando SPMSC NO. 69 OF 2017. That the Grant of Letters of Administration Intestate were confirmed on 19.11.2018 wherein all the assets that formed the estate of the late Dunstan Omoke Owich were listed except the subject parcel of land.
 - c. That the appeal has been overtaken by events. The Appellant has already received and utilized Kenya shillings three eighty-nine thousand (Kshs. 389,000/=)(sic).



- d. The Learned Trial Magistrate erred by failing to appreciate that it (sic) lacked jurisdiction to entertain and thereby preside over a purely commercial matter while it sat as an Environment and Land Court. That on appeal this Court equally lacks jurisdiction to entertain the Appellant's appeal.
 - e. The Learned Trial Magistrate erred in law and in fact by failing to make a finding that the Respondent did not prove his case on a balance of probabilities. (sic)
 - f. In respect to the Appellant's appeal, the Court will find it difficult to make to make (sic) a determination on merits when it is apparent that page (36) of the Appellant's bundle of appeal is lacking/incomplete. That pages (15), (18), (40) & (92) are also lacking.
 - g. The Learned Trial Magistrate erred in law and in fact by failing to appreciate that the Applicant's (sic) suit being bad in law, incompetent, incurable and fatally defective ought to have been dismissed with costs to the Appellant.
15. The Cross Appellant seeks for orders that;
- a. The Appellant's appeal be dismissed with costs.
 - b. That Respondent/Cross-Appellant's cross appeal herein, be allowed Ex Debito Justitiae.
 - c. That the trial Magistrate's decision/judgement that was delivered on 3rd October, 2023 be set aside thus dismissing the same in its entirety and as the case may be, this Court makes a finding that it lacks jurisdiction to preside over and make any determination over the Appellant's appeal for being a purely commercial matter.
 - d. Costs of this cross appeal and those incurred in the lower Court be borne by the Appellant.

The Preliminary Objection

16. The Respondent filed a Preliminary Objection dated 21st July, 2025 which is on the following grounds;
- a. The Environment and Land Court as established under Article 162 (2)(b) of *the Constitution* of Kenya 2010 as read along with Section 13 of the Environment and *Land Act*, 2011 lacks jurisdiction to preside over, hear and determine the Applicant's appeal. The 'Appeal' emanated from a purely commercial matter.
 - b. The 'Appeal' offends the provisions of Section 79 of the *Civil Procedure Act* Chapter 21 of the laws of Kenya and as well Order 42 Rules (1) & (2) of the Civil Procedure Rules, 2010. That the Appellant's bundle of appeal lacks a decree of the trial Court and as the case may be in the circumstances, a certified copy of the said Court's Judgement.

Issues For Determination.

17. The Appellant filed submissions on 5th May, 2025 while the Respondent filed submissions on 1st September, 2025.

The Appellant's Submissions.

18. In his submissions, the Appellant sets out a summary of the pleadings filed before the trial Court together with the evidence adduced.



19. It is the Appellant's submissions that it is not disputed that Dunstan Omoke Owich (deceased) entered into an agreement for sale of land parcel No. Kericho/Kunyak/281 with the Respondent on 16th April, 2007.
20. It is also the Appellant's submissions that the Respondent acknowledged that Dunstan Omoke Owich (deceased) was the registered owner of the suit parcel of land only for him to later challenge the said ownership in his Statement of Defence.
21. It is further the Appellant's submissions that the Respondent is mischievous and economical with the truth because there is no way he would have paid Dunstan Omoke Owich (deceased) the purchase price over a parcel of land that does not exist.
22. The Appellant submits that one of the terms of the agreement dated 16th April, 2007 was that the suit parcel of land was being sold at Kshs. 639,000/=.
23. The Appellant also submits that the Respondent paid Kshs. 250,000/= and the balance of kshs. 389,000/= was to be paid on or before 16th June, 2007.
24. The Appellant further submits that the other terms of the agreement were that the Respondent was to take possession of the suit parcel of land upon completion of payment of the purchase price.
25. It is the Appellant's submissions that it was after the completion of the purchase price that the Dunstan Omoke Owich (deceased) was to transfer the suit parcel of land to the Respondent.
26. It is also the Appellant's submissions that the Respondent failed to pay the balance of Kshs. 389,000/= as agreed and he was therefore in breach of an express term of the agreement.
27. It is further the Appellant's submissions that the Respondent contended that he was unable to pay Dunstan Omoke Owich (deceased) the balance of the purchase price because he could not trace his physical address.
28. The Appellant submits that this is not true as this was barely two months after the Respondent paid the initial deposit.
29. The Appellant also submits that Dunstan Omoke Owich (deceased) was in possession of the suit parcel of land and that is why it was expressly stated that the Respondent could only take possession upon payment of the full purchase price.
30. The Appellant further submits that Dunstan Omoke Owich (deceased) did not affect transfer of the suit parcel of land because the Respondent had not paid the entire purchase price and no consent of the Land Control Board had been sought for and/or obtained.
31. It is the Appellant's submissions that Dunstan Omoke Owich (deceased) sent the Respondent a letter dated 15th August, 2007 requesting for the payment of the balance of the purchase price.
32. It is also the Appellant's submissions that the Respondent failed to pay the balance.
33. It is further the Appellant's submissions that his assertions that the Respondent invaded the suit parcel of land and that he failed to pay the entire purchase price has not been controverted nor has it been challenged.
34. The Appellant submits that Dunstan Omoke Owich (deceased) voided the agreement and has always been willing to refund the Respondent the initial deposit of kshs. 250,000/=.



35. The Appellant also submits that in dismissing his suit, the Learned Trial Magistrate ignored the terms of the agreement which were not controverted and instead ventured beyond the agreement and rewrote the terms of the agreement.
36. The Appellant further submits that the Learned Trial Magistrate ignored the evidence placed before him, took into consideration matters that were not in issue and completely misapprehended the law.
37. It is the Appellant's submissions that the judgement delivered by the trial Court was not supported by facts and/or law and instead, it occasioned a serious travesty of justice.
38. It is also the Appellant's submissions that this Court should analyze and evaluate the evidence adduced before the trial Court and find that the Respondent was in breach of the agreement dated 16th April, 2007.
39. The Appellant concludes his submissions by urging the Court to find that the only remedy available to the Respondent is the refund of Kshs. 250,000/= . The Appellant seeks that the appeal be allowed as prayed.

The Respondent's Submissions.

40. The Respondent submits on the following issues;
 - a. Whether land parcel No. Kericho/Kunyak/281 belongs to the late Dunstan Omoke Owich and/or his estate.
 - b. Whether the appeal has been overtaken by events.
 - c. Whether the Appellant proved his case in Kericho CM ELC Case No. 9 of 2018 on a balance of probabilities.
 - d. Whether the Environment and Land Court as well as the Chief Magistrate's Court sitting as a Land Court had jurisdiction to preside over and determine a purely commercial matter.
 - e. Who will bear the costs in the superior Court and the Magistrate's Court.
41. On the first issue, the Respondent submits that land parcel No. Kericho/Kunyak/281 does not belong to either Dunstan Omoke Owich (deceased) or his estate.
42. The Respondent also submits that at paragraphs 23 and 24 of his Record of Appeal, he has attached a copy of the Grant of Letters of Administration Intestate issued in Nyando SPMCC No. 69 of 2017 In the matter of Dunstan Omoke Owich (deceased) to Victor Otieno Omoke on 19th November, 2018.
43. The Respondent also submits that the suit parcel of land is not listed among the properties of Dunstan Omoke Owich (deceased) on the said grant of letters of administration.
44. The Respondent further submits that the Appellant tried to mislead the Court by failing to attach all the pages of the said grant.
45. On the second issue, the Respondent submits that even though the Learned Trial Magistrate determination was based on an unpleaded issue, he paid the Appellant the sum of Kshs. 389,000/= through his advocates on record.
46. The Respondent also submits that the present appeal is therefore a waste of judicial time as the Appellant has already received the sum of money the Learned Trial Magistrate ordered that he be paid.



47. The Respondent further submits that the Appellant did not at any time offer to refund the sum of Kshs. 250,000/= that was paid to Dunstan Omoke Owich (deceased) before the suit was filed.
48. It is the Respondent's submissions that the Appellant has received a total sum of kshs. 389,000/=.
49. It is also the Respondent's submissions that he initially issued two cheques to the Appellant.
50. It is further his submissions that the first cheque was dated 29th July, 2010 and it was for payment of Kshs. 289,000/= while the second cheque was issued on 3rd October, 2010 and it was for payment of Kshs. 289,000/=.
51. The Respondent submits that he also issued another cheque dated 25th January, 2011 that was for the payment of Kshs. 289,000/=.
52. The Respondent also submits that the Appellant has therefore received the sum of Kshs. 639,000/= as was agreed by the parties in the land sale agreement dated 16th April, 2007.
53. The Respondent further submits that the Appellant's claim has always been commercial in nature as it was never a claim of use, ownership or title to land.
54. It is the Respondent's submissions that the Appellant's appeal is frivolous, vexatious and an abuse of the Court process.
55. On the third issue, the Respondent submits that the Appellant did not call any witnesses to corroborate his evidence and neither did he produce a copy of the title deed of the suit parcel of land or a Certificate of Official Search to show that land parcel No. Kericho/Kunyak/281 was registered in the name of Dunstan Omoke Owich (deceased).
56. The Respondent reiterates that the suit parcel of land was not listed in the Grant of Letters of Administration issued in Nyando SPMCC No. 69 of 2017 and submits that in his defence, he called two witnesses.
57. On the fourth issue, the Respondent submits that a cursory look at the pleadings filed in Kericho CM ELC Case No. 9 of 2018 shows that the Appellant's claim was based on alleged breach of contract.
58. The Respondent also submits that the prayers sought in the Plaint were with respect to costs and injunctive orders.
59. The Respondent also submits that the dominant issue in the said pleadings was with regard to a declaration that the sale agreement dated 16th April, 2007 was void.
60. The Respondent relies on Article 165 3 (a) of *the Constitution* of Kenya and submits that the High Court has unlimited jurisdiction in both Civil and Criminal matters and ought to have therefore determined the suit.
61. The Respondent submits that the preliminary objection dated 21st July, 2025 raises issues of jurisdiction and failure by the Appellant to attach a decree and/or a certified copy of the judgement of the trial Court.
62. The Respondent relies on Article 162 (2)(b) of *the Constitution* of Kenya, Section 13 of the *Environment and Land Court Act*, Section 150 of the *Land Act* and reiterates that as per the pleadings filed before the trial Court, the Appellant was alleging breach of the land sale agreement dated 16th April, 2007.



63. The Respondent also reiterates that the said claim does not fall within the purview of Article 162 2 (b) of *the Constitution* as it is a commercial dispute.
64. The Respondent submits that the Appellant's suit was initially filed in Kisumu as ELC Case No. 89 of 2014.
65. The Respondent also submits that the suit was thereafter transferred to Kericho.
66. The Respondent further submits that the Chief Magistrate sitting as an Environment and Land Court did not therefore have jurisdiction to hear and determine the suit.
67. The Respondent refers to ground (d) of his cross-appeal and submits that this Court equally does not have jurisdiction to hear and determine the appeal.
68. The Respondent relies on the judicial decisions of Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others [2017] KECA 79 (KLR), The Law Society of Kenya, Nairobi Branch and Malindi Law Society and 6 Others Consolidated with Civil Appeal No. 3 of 2017, Bank of Africa Kenya Limited & another v TSS Investment Limited & 2 others [2024] KECA 410 (KLR) in support of his submissions.
69. It is the Respondent's submissions that the Appeal is bad in law as the Appellant did not file a decree and/or attach a certified copy of the judgement.
70. It is also the Respondent's submissions that the Appellant erroneously amended his verifying affidavit.
71. It is further the Respondent's submissions that he made a late discovery as to the lack of jurisdiction of the subordinate Court.
72. The Respondent concludes his submissions by urging the Court to strike out the appeal with costs.

Analysis and Determination.

73. The issues that arise for determination are as follows;
 - a. Whether the preliminary Objection dated 21st July, 2025 has merit.
 - b. Whether the Learned Trial Magistrate erred in failing to find that the agreement dated 16th April, 2007 was void.
 - c. Whether an agreement was entered into on or about 14th August, 2010 and the legal effect of the said agreement.
 - d. Whether the Learned Trial Magistrate erred in failing to issue an order of injunction and in failing to find that the Respondent's occupation and development of land parcel No. Kericho/ Kuniyak/281 was without basis.
 - e. Whether the Learned Trial Magistrate erred in not finding that land parcel No. Kericho/ Kuniyak/281 did not belong to either Dunstan Omoke Owich (deceased) and/or his estate.
 - f. Whether the Learned Trial Magistrate erred in not finding that the Appellant did not prove his case on a balance of probabilities.
 - g. Who should bear costs of the appeal and the cross appeal.



74. The role of the Appellate Court was stated by the Court of Appeal in the judicial decision of *Gitobu Imanyara & 2 others Vs Attorney General* [2016] eKLR. It was held as follows;

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.”

75. In *Abok James Odera T/A A.J Odera & Associates Vs John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR the Court held as follows;

“This being a first appeal, we are reminded of our primary role as a first Appellate Court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

A. Whether the preliminary Objection dated 21st July, 2025 has merit.

76. The Respondent filed a Preliminary Objection dated 21st July, 2025 which is on the following grounds;

- a. That the Environment and Land Court lacks jurisdiction to hear and determine the present appeal as it emanates from a commercial matter.
- b. That the Appeal offends the provisions of Section 79 of the *Civil Procedure Act* as neither the decree nor a certified copy of the judgement of the trial Court has been attached.

77. It is important to note that ground (1) of the Preliminary Objection is similar to ground (d) of the Respondent’s Cross Appeal and I will therefore address them jointly.

78. I will first deal with the issue whether the Learned Trial Magistrate sitting as an Environment and Land Court had jurisdiction to hear and determine the suit and whether this Court has jurisdiction to hear the appeal.

79. The Respondent submits that the predominant issue in the pleadings filed before the subordinate Court was whether the land sale agreement dated 16th April, 2007 was void.

80. The Respondent also submits that the said issue was purely a commercial matter as it raised issues of breach of contract and the non-payment of Kshs. 389,000/=.

81. The Respondent therefore contends that the Learned Trial Magistrate sitting as an Environment and Land Court did not have jurisdiction to hear and determine the suit and by extension, this Court does not have jurisdiction to hear the appeal.

82. The Appellant did not submit on this issue.

83. It is important to note that the issue of jurisdiction was not raised before the trial Court.

84. The Court of Appeal in *Jamal Salim v Yusuf Abdulahi Abdi & another* [2018] KECA 14 (KLR) held as follows;

“17. Jurisdiction either exists or it does not. Neither can it be acquiesced or granted by consent of the parties. This much was appreciated by this Court in *Adero & Another vs. Ulinzi Sacco Society Limited* [2002] 1 KLR 577, as follows;



- “1) ...
- 2) The jurisdiction either exists or does not ab initio ...
- 3) Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.
- 4) Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal.”

18. It follows that even where a party initially admits to jurisdiction, as in this case, the same does not clothe a Court with jurisdiction it did not have to begin with. Similarly, an objection to jurisdiction can be raised at any stage. Nonetheless, such an objection ideally should be raised at the earliest opportunity.

19. Therefore, did the trial Court have jurisdiction to entertain the respondents’ claim?...” (Emphasis mine)

85. The Court of Appeal in *Jamal Salim v Yusuf Abdulahi Abdi & another* (supra) cited the judicial decision of *Adero & Another vs. Ulinzi Sacco Society Limited* [2002] 1 KLR 577 where the Court of Appeal held that jurisdiction is such an important issue that it can be raised at any stage of the proceedings even on appeal.

86. A perusal of the Amended Complaint dated 24th November, 2018 filed before the trial Court shows that the Appellant averred as follows at paragraphs 3, 4, 5, 6, 9, 10 and 11:

- “3. The deceased is the registered owner of the suit land herein designated as Ker/Kunyak/281 measuring 2.9 Hectares.
4. That on 16-4-2007, the deceased entered into a formal agreement for sale of the suit land herein at a price of Kenya Shillings 639,000 out of which the Defendant paid a deposit of Kenya Shillings 250,000.00.
5. That it was agreed that the Defendant would offset the remaining balance of Kenya Shillings 389,000/= on or before 16-6-2007 and would only take possession of the suit land upon completion of payment of the said outstanding balance.
6. The deceased has always been in occupation of the suit land and its cultivating (sic) thereon and it was agreed that he would only surrender possession to and offered to refund the Defendant the entire deposit made of Kenya Shillings 250,000.00 and has continued with his dependents to enjoy quiet use and occupation of this suit property herein in view of the lapse of time and opportunities.
10. That sometime in the month of February 2014, the Defendant surfaced and unlawfully threatened to move into the deceased’s land with a view to cultivating it, erecting structure (sic) thereon in spite of the breach and failure to act within the time stipulated in the agreement.
11. That the sale agreement on the strength of which the Defendant seeks to unlawfully act is void and the remedy available to the Defendant is refund of



the deposit made of Kenya Shillings 250,000.00 which the Plaintiff Deceased (sic) has always been ready and willing to refund...”

87. The prayers sought in the Amended Plaintiff have been set out in the preceding paragraphs but I will nonetheless replicate them as hereunder;
- a. A declaration that the Sale agreement made on 16th April 2007 is void.
 - b. An Order of Permanent Injunction restraining the Defendant, of his own, agents, servants and/or employees from trespassing onto, developing, alienating, disposing off, or in any other way interfering with the Plaintiff's quiet use and occupation of the suit land herein designated as Kunyak/281 Measuring 2.9 Hectares.
 - c. Costs of the suit.
88. In the Amended Plaintiff, the Appellant contended that Dunstan Omoke Owich (deceased) was the registered owner of land parcel No. Kericho/Kunyak/281.
89. The Appellant also contended that Dunstan Omoke Owich (deceased) sold the suit parcel of land to the Respondent at a consideration of Kshs. 639,000/= which amount of money was not paid in full.
90. The Appellant further contended that sometime in February, 2014, the Respondent threatened to move into the suit parcel of land despite failing to pay the entire purchase price.
91. The Appellant then sought for among other orders that a declaration be made that the agreement dated 16th April, 2007 was null and void.
92. Section 13 of the *Environment and Land Court Act* provides as follows;
- “(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.
 - (3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of *the Constitution*.



- (4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.
- (5) Deleted by Act No. 12 of 2012, Sch.
- (6) Deleted by Act No. 12 of 2012, Sch.
- (7) 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;
 - (g) restitution;
 - (h) declaration; or
 - (i) costs.

93. The Court of Appeal in *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others* [2017] eKLR held as follows;

“41. 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...” [Emphasis Mine]

94. In the judicial decision of *Nzioka & another v Akoko* [2025] KEELC 4346 (KLR) the Court considered the judicial decision of *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others* (supra) and held as follows;

“It suffices from this decision that, though the ELC has jurisdiction to handle disputes over contracts, its jurisdiction on such contracts is restricted to matters dealing with the environment and the use and occupation of and title to land.” (Emphasis mine)

95. In the judicial decision of *Peter Mukhunya Maloba v Dennis Kusinyo* [2020] KEHC 4668 (KLR) the Court held as follows;

“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.” (Emphasis mine)

96. In Peter Mukhunya Maloba v Dennis Kusinyo (supra) the Court held that any dispute arising from contracts for sale of land fall under the jurisdiction of the Environment and land Court. The reasoning is that a contract for sale of land is the first step towards acquisition of land through purchase. If this contract is flawed then there would be no interest worth registering.

97. Part V of the Land Act has a subheading i.e. Administration and Management of Private Land. Section 38 falls under part V of the Act. There are two more subheadings before the Provisions of Section 38 are set out and I reproduce the said section as hereunder;

Contracts Over Land

Validity of contracts in sale of land.

- (1) Other than as provided by this Act or by any other written law, no suit shall be brought upon a contract for the disposition of an interest in land—
 - (a) the contract upon which the suit is founded—
 - (i) is in writing;
 - (ii) is signed by all the parties thereto; and
 - (b) the signature of each party signing has been attested to by a witness who was present when the contract was signed by such party.

98. It is evident that Section 38 of the Land Act 2012 provides for contract over land and further makes provision for validity of contracts in sale of land. Which other Court is better placed to interrogate these contracts especially when parties have disagreements on use and occupation? I have no doubt that it is the Environment and Land Court.

99. From the averments in the Amended Complaint, it is evident that the Appellant’s prayer for an order of permanent injunction against the Respondent was based on the land sale agreement dated 16th April, 2007 which he also sought to be declared void.

100. I find that the Learned Trial Magistrate sitting as the Environment and Land Court had jurisdiction to hear and determine the dispute before him. By extension, this court has jurisdiction to hear and determine the appeal.

101. The second ground on the Respondent’s Preliminary Objection is that the Appeal offends Section 79 of the Civil Procedure Act and Order 42 Rules (1) & (2) of the Civil Procedure Rules, 2010 as the Appellant failed to attach the decree and/or a certified copy of the judgement of the trial Court.

102. The Appellant did not submit on this issue.

103. A perusal of the Record of Appeal filed by the Appellant on 20th February, 2025 shows that the Appellant did not, indeed, attach the decree and the copy of the judgement of the trial Court attached has missing pages.

104. Section 79 of the Civil Procedure Act provides as follows;

“The provisions of this Part relating to appeals from original decrees shall, as far as may be, apply to appeals—



- (a) from appellate decrees; and
- (b) from orders made under this Act or under any special or local law in which a different procedure is not provided.”

105. In the judicial decision of *Elizanya Investments Limited v Lean Energy Solutions* [2021] KEHC 8495 (KLR) the Court held as follows;

“ 31. In this Court’s view, the failure to include a certified copy of the decree in the Record of appeal should not invalidate the present appeal for reasons of non-compliance as this Court has had the benefit of reading Judgment which was rendered by the Trial Court.

32. It is the finding of this Court that the lack of a certified copy of a decree does not in any way affect the appellant’s appeal and the right to be heard as enshrined under Article 50 of *the Constitution*. It is thus incorrect for the respondent to assert that the appellant’s appeal is defective. I therefore decline to strike out the appeal on the said ground.” (Emphasis mine)

106. In the above cited judicial decision, the Court held that failure to include a certified copy of the decree in the Record of Appeal should not invalidate an appeal.

107. *The Constitution* at Article 159 (2) (d) reminds us to administer justice without undue regard to procedural technicalities. In the present appeal, the trial Court file has been availed and the Court has had opportunity to read the judgement of the trial Court that was delivered on 3rd October, 2023. Therefore, failure to attach the decree and/or a certified copy of the judgement of the Trial Court is not fatal.

108. Taking the foregoing into consideration, I find that the Respondent’s Preliminary Objection lacks merit.

B. Whether the Learned Trial Magistrate erred in failing to find that the agreement dated 16th April, 2007 was void.

109. This question for determination addresses Ground (a) of the Appellant’s Memorandum of Appeal.

110. An agreement is void if does not satisfy the requirements for a valid agreement. The requirements of a valid agreement include such things as offer, acceptance, consideration, capacity of the parties, legality of the object, execution of the agreement, witnessing etc.

111. The agreement in respect of which the Appellant sought orders was entered into by the Appellant’s deceased father and the Respondent on 16th April, 2007. It is in writing, is signed by them and witnessed by two persons i.e. Paul Kiplangat Kirui and Geoffrey Cheruiyot Rotich. The consideration for the agreement in an amount of Kshs. 639,000. As at the time of execution, Kshs. 250,000 had been paid toward the consideration.

112. In my estimation, the agreement dated 16th April, 2007 is perfectly valid as it meets the requirements of a valid agreement both under the *Law of Contract Act* (CAP 23) Laws of Kenya and the *Land Act* 2012.

113. To this extent, I find that the Learned Trial Magistrate made no mistake in failing to find that the agreement dated 16th April, 2007 was void.



114. However, the evidence tendered before the Trial Court by the Appellant is that the Respondent failed to perform his obligations under the contract. Specifically, the Appellant contends that the Respondent failed to pay the balance of Kshs. 389,000 which amount was to be paid on or before 16th June, 2007.
115. The fact of non-payment caused the Appellant to write a letter dated 15th August, 2007 to the Respondent. Excerpts from the said letter are as follows:
- ...We are further informed by our client, that he has completely lost touch with you, you do not call to notify him of any difficulties you might be facing as to make it impractical to honour the agreement not do you pick his calls of courtesy. Our client can only interpret your conduct as that of a purchaser who is no longer interested in fulfilling his obligations under the agreement and is only bent on frustrating it.
- Kindly note that our client reserved the rights to void the agreement and offer the land for sale to a third party at your own loss in light of your conduct herein.
- Take Notice that in the event that you do not liquidate in full the outstanding balance of Kenya Shillings 389,000 within seven days from the date of this notice, then our client will surely nullify the agreement an opt to dispose the land herein to any third party. You will be free to seek recourse in court to recover the deposit if need be. This will be done without any further reference to you.
116. From the said letter it is evident that its intention was to rescind the agreement dated 16th April, 2007 for the reason that it was breached. The fact of receipt of the letter has not been denied.
117. I must point out that when one party fails to perform his or her obligations under a contract, the aggrieved party may approach the Court for orders such as specific performance, rescission, damages etc. Non performance of obligations under a contract does not render it void but renders it voidable at the option of the party who is not in breach.

C. Whether an agreement was entered into on or about 14th August, 2010 and the legal effect of the said agreement.

118. This question answers to ground (a), (c), (e) and (g) of the cross appeal.
119. As stated in the preceding paragraphs, the role of the Appellate Court is to reconsider the evidence, evaluate it itself and draw its own conclusions.
120. Regrettably, the Trial Court did not give evidence of the Respondent as contained in his witness statement dated 3rd May, 2014 and the documents contained in the Respondent's list of documents dated 3rd May, 2014 much premium. The said statement was adopted as part of the Respondent's evidence in chief and the documents contained in the list of documents produced as Exhibits D1-D8
121. In his witness statement, the Respondent states that the in the month of July 2010 or thereabouts, while he was in the company of Samuel Kabore Keter and Paul Kiplangat Kirui, they met the Applicant's deceased father at Kupere market center. In his statement, he states that he informed the Appellant's deceased father that it was not possible to pay balance of the purchase price as stated in the agreement of 16th April, 2007 and also informed him that there was need to review the entire contract because the suit parcel of land had not been discharged from the Settlement Fund Trustee. The Respondent goes on to state that this fact of charge was not within his knowledge as at the date of entering the agreement.



122. The Respondent states that the Appellant's deceased father gave additional conditions which conditions were that :
- a. He (Respondent) had to pay an additional 20,000 Kenyan shillings Per acre totalling to Kenyan shillings 140,000.
 - b. That the Respondent pays Kenyan shillings 289,000 leaving a balance of 100,000
 - c. That the balance of Kshs. 100,000 was to be cleared upon transfer of the Suit parcel.
123. The Respondents states that on 14th August, 2010 in a follow up meeting at Kupere he gives the Appellant a bankers cheque of Kenya shillings 289,000.
124. It is his further statement that though the initial negotiations were verbal, they were reduced into an undated agreement which was produced as Exhibit D2 before the Trial Court.
125. Excerpts of the said agreement are as follows;

“That on 16th April 2007 I received Kenya shillings 250,000 via bankers check number 006905 from Mr. Kosgei being initial payment for the said land.

That we met on 14th August,2010 in Kupere. where Mr. Kosgei in the company of Mr. Paul Kirui and retired chief Mr. Samuel Keter brought a bankers check of kshs. 289,000(two hundred and eighty-nine thousand only) via cheque no. 506173 as part payment for the remaining balance.

That having discussed comprehensively taking into account the amount of delay for payment from 2007, we agreed that Mr. Kosgei adds kshs. 20,000 (twenty thousand only) per acre (on top of the agreed sum of kshs.639,000) amounting to kshs. 140,000(one hundred and forty thousand only) for us to continue into concluding the transaction

That Mr. Kosgei issues a banker's cheque for kshs. 140,000 (one hundred and forty thousand only) on or before December 2010.

That thereafter he starts moving /utilizing the piece of land and that any outstanding balances be paid upon commencement of consent to transfer the land from the land control board.

126. The said agreement is signed by the Appellant's deceased father and the Respondent, and is witnessed by one Paul Kiplagat Kirui, and retired chief Samuel Kibore Keter. I must mention that the Plaintiff in cross examination stated that the said agreement is a forgery but did nothing else.
127. My view is that if at all the Appellant was serious about his allegations of forgery in respect of this second agreement, he had enough time- from the time that he was served with the Defendant's list of documents (now Respondent) to the time that the suit proceeded for hearing- to lead evidence to counter it but did not.
128. In the judicial decision *Kinyanjui Kamau v George Kamau* [2015] eKLR, the Court of Appeal observed and found as follows;

“It is trite law that any allegations of fraud must be pleaded and strictly proved. (See *Ndolo v Ndolo* [2008] 2 KLR (G & F) 742 wherein the court stated that: -“...We start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the Respondent was making a serious



charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary Civil cases, namely proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in criminal cases ...” (Emphasis mine)

129. Samuel Kibore Keter and Paul Kiplagat Kirui both testified as defence witnesses. Retired chief Samuel Kibore Keter was not cross-examined and therefore his evidence remains uncontroverted. His evidence is contained in his witness statement which was adopted as his evidence- in-chief. In the said witness statement he associates himself with the evidence on the Respondent as contained in his (Respondent’s) witness statement. He confirms that he is privy to what transpired in relation to the dispute.
130. In his statement, Paul Kiplagat Kirui associates himself with the evidence on the Respondent as contained in his (Respondent’s) witness statement and he also adds that he was also present during the negotiation/agreements that followed later and ends by stating that it is the Appellant who breached the terms of the agreements.
131. During cross examination Paul Kiplagat Kirui stated that the Respondent made the last payment in 2014 and that he had already taken possession as at the time of making this payment. He added that he took possession in the year 2007.
132. During his re-examination Paul Kiplagat Kirui stated that he was aware that the Respondent made payments to the Appellant’s deceased father.
133. Although this evidence is acknowledged by the Learned Trial Magistrate, he failed to address the legal effect of the second agreement. Had he done so, he would have come to a different finding.
134. The wording of the second agreement suggests that it was intended to modify the terms of the first agreement which was entered into on 16th April, 2007. In this second agreement, the parties acknowledge the contents of the first one, state what was already done under it and modify it by introducing new obligations. The Appellant’s deceased’s father acknowledges receipt of kshs. 289,000 (Two Hundred and eighty nine thousand only) via cheque no. 506173 as part payment for the balance that remained under the agreement of 16th April, 2007.
135. The evidence that was adduced before the Trial Court points to the fact that the Appellant’s deceased Father caused the said cheques to become stale by not banking them within the required time. It is therefore not true that the Respondent refused and/or neglected to perform his obligations under both agreements.
136. Taking the foregoing into consideration, I find that an agreement was entered into on or about 14th August, 2010. The said agreement meets the legal requirements necessary to deem a contract for the sale of the suit land as valid. I therefore find it to be valid and binding on the parties.

D. Whether the Learned Trial Magistrate erred in failing to issue an order of injunction and in failing to find that the Respondent’s occupation and development of land parcel No. Kericho/Kunyak/281 was without basis.
137. This question for determination is in answer to ground (b) and (c) of the memorandum of Appeal.
138. Under (B) and (C) above, I have found that the Learned Trial Magistrate made no mistake in failing to find that the agreement dated 16th April, 2007 was void. This is because the said agreement complies with the provisions of the Law of Contract Act (cap 23) Laws of Kenya and the Land Act in so far as they relate to disposition of interest in land.



139. Further I have found that the second agreement which was entered into on or about 14th August, 2010(it is undated) was valid and also found that it had the effect of modifying the agreement of 16th April, 2007.
140. It follows that the Learned Trial Magistrate failure to issue an order of permanent injunction against the Respondent was not erroneous.
141. Therefore, the contention by the Appellant that the Respondent's rights and interests upon the suit parcel of land was extinguished on account of breach cannot hold.
142. The undated agreement entered into on or about 14th August, 2010 had the effect of modifying the initial agreement. Evidence adduced is that the Respondent issued cheques to the Applicant's deceased father who failed to bank the said cheques as a consequence of which they became stale.
143. The said agreement entered into on or about 14th August, 2010 also authorized the Respondent, upon payment of Kshs 289,000 and Kshs 140,000, to move in and utilize the suit parcel. The agreement went on to state that any outstanding balance was to be paid upon obtaining consent to transfer the land from the land Control Board. Excerpts from the said agreement are as follows:
- “That Mr. Kosgei issues a banker's cheque for kshs. 140,000 (one hundred and forty thousand only) on or before December, 2010.
- That thereafter he starts moving /utilizing the piece of land and that any outstanding balances be paid upon commencement of consent to transfer the land from the land control board.[emphasis Mine]
144. Taking into consideration the said circumstances, it would have been grossly unjust to issue orders of permanent injunction to the Respondent who had substantially performed his obligations under both agreements and is in occupation of the suit parcel.
- E. Whether the Learned Trial Magistrate erred in not finding that land parcel No. Kericho/ Kuniyak/281 did not belong to either Dunstan Omoke Owich (deceased) and/or his estate.
145. This question for determination is in answer to Ground (b) of the cross-appeal.
146. The Respondent submits that land parcel No. Kericho/Kuniyak/281 does not belong to either Dunstan Omoke Owich (deceased) or his estate.
147. The Respondent also submits that at pages 23 and 24 of his Record of Appeal, he has attached a copy of the Grant of Letters of Administration Intestate issued in Nyando SPMCC No. 69 of 2017 In the matter of Dunstan Omoke Owich (deceased) to Victor Otieno Omoke on 19th November, 2018.
148. The Respondent also submits that the suit parcel of land is not listed among the properties of Dunstan Omoke Owich (deceased) on the said grant of letters of administration.
149. The Appellant did not submit on this point.
150. I am baffled by these submissions of the Respondent. What then was he buying? This is a typical case of approbating and reprobating. Courts expect consistency from litigants. It is for this reason that Courts frown upon parties who attempt to take contradictory stands to suit their convenience.
151. The Learned Trial Magistrate at page 11-12 of the judgment observed and stated thus;
- “The Court has considered the Defendant's submissions. It was argued that the subject matter of the suit does not form (sic) part of the estate of the deceased as contained in



the certificate of confirmation of grant. Based on this counsel argued the case should be dismissed. This argument is not sound since the defendant is estopped from denying having entered into a sale agreement with the deceased based on which he states he took possession of the land and has done some development on it. It did not matter whether it formed part of the estate of the deceased.” (Emphasis Mine)

152. The Respondent is blowing hot and cold. He wants to benefit from the sale agreements and has gone to great lengths to prove their terms and their validity. At the same time, he denies that the subject matter of the said agreements i.e. land parcel No. Kericho/Kunyak/281, belongs to the Appellant’s deceased father.
153. I fully concur with the reasoning of the Learned Trial magistrate in declining to find that land parcel No. Kericho/Kunyak/281 did not belong to either Dunstan Omoke Owich (deceased) and/or his estate. Equity, good conscience and fairness demanded that he declines to do so.
154. Finally, in order to make sense of the disposal paragraph, I feel obligated to state that before the trial Court, the Appellant sought orders declaring the agreement of 16th April, 2007 void and also sought orders of permanent injunction against the Respondent prohibiting him from trespassing onto, developing, alienating, disposing off, or in any other way interfering with the Appellant’s quiet use and occupation of the suit land. On the other hand, the Respondent in his statement of defence only sought orders for dismissal of the suit, his counterclaim having been withdrawn.

Disposition.

155. In the result, I find that the Appeal and cross-appeal lack merit and are both dismissed. Each party shall bear own costs of the Appeal.
156. Based on my analysis of facts evidence and the law as presented before the Trial Court, I order as follows:
- a. The Judgment and decree of the Learned Trial Magistrate delivered on 3rd October, 2023 in Kericho CM ELC Case No. 9 of 2018 is hereby set aside.
 - b. The suit is dismissed with costs.
157. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 19TH DAY OF MARCH, 2026.

L. A. OMOLLO

JUDGE.

In the presence of: -

Mr. Sigira for the Respondent

Mr. Ouma for the Appellant - Absent

Court Assistant; Mr. Joseph Makori.

