

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA**  
**ELCLA No. E015 OF 2024**

**STEPHEN OBENGA TENGEYA .....**  
**APPELLANT**

**VERSUS**

**ELIJAH OBARE MOGOBA .....**  
**1<sup>ST</sup> RESPONDENT**

**EUNICE NYABOKE OBARE .....**  
**2<sup>ND</sup> RESPONDENT**

**CHARLES MORWABE TENGEYA ..... 3<sup>RD</sup>**  
**RESPONDENT**

***(Being an appeal from the ruling and order of the Chief Magistrate's Court at Nyamira (W.K. Chepseba, Chief Magistrate) delivered on 28<sup>th</sup> November 2024 in Nyamira MCELCMISC No. E012 of 2024)***

**JUDGMENT**

1. Litigation leading to this appeal commenced in the Subordinate Court on 14<sup>th</sup> August 2024 as a Miscellaneous Application when the First and Second Respondents herein filed Notice of Motion dated 14<sup>th</sup> August 2024, against the Third Respondent herein and the Appellant as First Respondent and Second Respondents, respectively. The First and Second Respondents averred that they were purchasers of a 16250 square feet portion of the parcel of land known as West Mugirango/Siamani/4275 (the suit property) and that the

Third Respondent herein was the registered proprietor of the suit property through transmission in trust for himself and other beneficiaries.

2. The First and Second Respondents further averred that the Third Respondent herein and the Appellant had refused, without any legal justification, to transfer to them the portion of the suit property that they had purchased. They therefore prayed for the following orders:

- 1. THAT this matter be certified urgent and same be heard ex-parte in the first instance.*
- 2. Upon prayer 1 (sic) hereinabove being granted the Honourable Court be pleased to compel the 1<sup>st</sup> Respondent to sign the Land Transfer Papers, Mutation Forms and Nyamira Lnad (sic) Control Board Application Forms in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Applicant's portion in the said parcel of land WEST MUGIRANGO/SIAMANI/4275 measuring 16250 FT<sup>2</sup>.*
- 3. The Honourable Court be pleased to issue an Order to the Court Executive Officer/ Administrator to Land Transfer Papers, Mutation Forms and Nyamira Land Control Board Application Forms if the 1<sup>st</sup> Respondent fails to do so.*
- 4. THAT the Honourable Court be pleased to issue an Order to the Land Registrar Nyamira to effect the Registration of the 1<sup>st</sup> and 2<sup>nd</sup> Applicant name as proprietors in the*

*Proprietorship section of the land register and or Books of Record.*

*5. Costs of this application be provided for.*

*6. Such other/or further relief as the court may deem fit and Expedient.*

3. Upon hearing the Notice of Motion, the Subordinate Court (W.K. Chepseba, Chief Magistrate) delivered ruling on 28<sup>th</sup> November 2024 and allowed the application as prayed.

4. Dissatisfied with the outcome, the Appellant filed this appeal on 11<sup>th</sup> December 2024, through Memorandum of Appeal dated the same date. Subsequently, with leave of the Court, he filed Amended Memorandum of Appeal dated 24<sup>th</sup> January 2025 through which he prayed that the appeal be allowed with costs and that the First and Second Respondents' application in the Subordinate Court be dismissed.

5. The following are the grounds of the appeal, as listed on the face of the Amended Memorandum of Appeal:

*1. That the Learned Magistrate erred in law and in fact in failing to properly direct his mind so as to appreciate the law on evidence.*

*2. That the Learned Trial Magistrate erred in law and fact by dismissing 1<sup>st</sup> Appellant's case while no evidence was offered by the Respondents in particular being a valid Sale of Land Agreement between the 1<sup>st</sup> and 2<sup>nd</sup>*

*Respondents and the Appellant to controvert the 1<sup>st</sup> Appellant's evidence.*

- 3. That the Learned Magistrate erred in law and in fact by pronouncing himself on the subject land parcel No. Mugirango/Siamani/4275 registered in the names of the 3<sup>rd</sup> Respondent who holds it in trust of himself and other beneficiaries being the 1<sup>st</sup> Appellant Stephen Obenga Tengeya ID No. 5835365, 3<sup>rd</sup> Respondent Charles Morwabe Tengeya ID No. 0331108, one Zacharia Nyandieka ID No. 0332801, Thomas Oindi Tengeya ID No. 1659337 and Ruth Nyaboke Okangi ID No. 21139916 in Nyamira MC Succ No. 204 of 2016 in the matter of the Estate of Tengeya Okangi (Dcd) to which the Respondents are neither listed as beneficiaries nor as creditors to the Estate of Tengeya Okangi (dcd)*
- 4. That the trial magistrate erred in law and in fact in failing to take into consideration the submissions and case-law authorities availed by the 1<sup>st</sup> Appellant in regard to the fact that the subject land parcel No. West Mugirango/Siamani/4275 registered in the Names of the 3<sup>rd</sup> Respondent fell under the provisions of Law of Succession Act (Cap 160) section 4 (1) (a) on the Law Applicable to Succession.*
- 5. That from the aforementioned, the trial Magistrate erred in law and in fact in failing to appreciate that the subject land parcel No. West Mugirango/Siamani/4275 registered*

*in the names of the 3<sup>rd</sup> Respondent who holds it in trust of himself and other beneficiaries is a subject in Nyamira MC Succ No. 204 of 2016 in the matter of the estate of Tengeya Okangi (Dcd) any claim by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents as purchasers for value of creditors is to be dealt in that succession court and not in the Environment & Land Court.*

*6. That the Learned Judge erred in law and fact by applying the wrong principles of law and evidence in arriving at the ruling.*

6. The appeal was canvassed through written submissions. The Appellant filed submissions dated 3<sup>rd</sup> October 2025, the First and Second Respondents filed submissions dated 10<sup>th</sup> November 2025 and the Third Respondent also filed submissions dated 10<sup>th</sup> November 2025.
7. On whether there was a valid agreement of sale between him and the First and Second Respondents, the Appellant submitted that of the six annexures attached to the First and Second Respondents' supporting Affidavit sworn on 14<sup>th</sup> August 2024, there was no valid sale agreement in respect of the suit property.
8. The Appellant relied on **Section 3** of the **Law of Contract Act** and the case of **Nelson Kivuvani - v- Yuda Komora & Another Nairobi HCCC No.956 of 1991** and submitted that

in the absence of a sale agreement, there was nothing binding between him and the First and Second Respondents.

9. The Appellant urged the Court to take judicial notice that the Third Respondent held the suit property in trust for himself and other beneficiaries who did not include the First and Second Respondents. That if they purchased any part of the subject parcel of land then they ought to have been included as creditors in **Nyamira Chief Magistrate succession Cause No. 204 of 2016, Estate of Tengeya Onkanki (deceased)**. In conclusion, he urged the Court to dismiss the Respondent's case and to order the Respondents to pay costs.
10. The First and Second Respondents submitted that there were land sale agreements between them and the Appellant and added that the agreements were consolidated in Criminal Case No E266 of 2023 followed by a report by the Land Registrar and County Surveyor. That all those confirmed that the Appellant sold to them a portion measuring approximately 16,250 square feet.
11. The First and Second Respondents further submitted that the Appellant signed a Mediation Settlement Agreement in Criminal Case No E266 of 2023 and that the impugned ruling emanated from the said Mediation Settlement Agreement. They also submitted that the Third Respondent who was registered as proprietor of the suit property in trust for himself and other beneficiaries was aware that they were purchasers and had no objection to transferring the portion to them.

- 12.They also submitted that the Appellant herein had failed to prove his case and had in his submissions canvassed only a single issue: whether there existed a sale agreement between him and them. Relying on the case of **James Muniu Muchere v National Bank of Kenya Ltd Civil Appeal No 365 of 2017 [2019] eKLR**, they urged the Court to dismiss the appeal with costs to them.
- 13.On his part, the Third Respondent submitted that despite the Appellant setting forth six grounds of appeal, he elected to argue only ground number 2. He contended that the First and Second Respondents had demonstrated through their replying affidavit sworn on 14<sup>th</sup> March 2025 and filed in the Subordinate Court that there was a valid agreement for sale of land.
- 14.The Third Respondent further submitted that record of appeal filed by the Appellant was incomplete and that the Appellant did not link his submissions to any page of the said record. He relied on the case of **Wanjiru Yusuf Abdalla v Elizabeth Mweni Ewins Malindi Civil Appeal No. 87 of 2021** and further argued that the Appellant did not avail copies of the authorities that he had relied on in his submissions. He concluded by contending that the appeal was devoid of merit and urged the Court to dismiss it with costs to him.
- 15.This is a first appeal. A first appeal is essentially a retrial. In other words, and in the context of this appeal, this Court is rehearing Notice of Motion dated 14<sup>th</sup> August 2024, but within the circumscribed rules of an appeal. This Court therefore has

a duty to re-evaluate the application and all the material that was before the Subordinate Court and draw its own independent conclusions.

16. The principles applicable while considering a first appeal were stated in **Selle v Associated Motor Boat Co. & others [1968] E.A. 123** 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 allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed sholan (1955), 22 E.A.C.A. 270).***

17. I have carefully considered the Amended Memorandum of Appeal, the submissions and the entire record. The issues that

arise for determination are whether the Subordinate Court had jurisdiction and whether the reliefs sought in the application ought to have issued.

18. Jurisdiction is an ever present issue in all proceedings. As has often been restated by the Courts, jurisdiction is the entry point in any matter that the Court is called upon to determine and is the very life and soul of any proceedings. Without it, the proceedings come to a certain end and the Court cannot take any further step. See **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR** and **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR**.

19. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a valid one in the correct Court. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. See **Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] eKLR**.

20. Every Court must decide, from the very onset, whether it has jurisdiction to hear and determine a particular matter. That duty remains whether the parties maintain silence on the issue or even if they chant in unison that the Court has jurisdiction. While it is obvious, it is important to reiterate the prime position that the task of establishing jurisdiction holds, given the futility of proceedings conducted without jurisdiction.

21. Suffice it to refer to the holding of the Court of Appeal in **National Social Security Fund Board of Trustees vs. Kenya Tea Growers Association & 14 Others [2023] KECA 80 (KLR)** thus:

***Jurisdiction, a mantra in adjudication connotes the authority or power of a court to determine a dispute submitted to it by contending parties in any proceeding. A Court of law is invested with jurisdiction to hear a matter when: (a) it is properly constituted as regards numbers and qualifications of members of the bench, and no member is disqualified for one reason or another; (b) the subject matter of the case is within its jurisdiction, and there is no feature in the case which prevents the Court from exercising its jurisdiction; and, (c) the case comes before the Court initiated by due process of law, and upon fulfilment of any condition precedent to the exercise of jurisdiction. The three ingredients must co-exist in order to infuse jurisdiction in a Court. Where a Court is drained of the jurisdiction to entertain a matter, the proceedings flowing from it, no matter the quantum of diligence, dexterity, artistry, sophistry, transparency and objectivity injected into it, will be marooned in the intractable web of nullity.***

22. In his Amended Memorandum of Appeal, the Appellant variously faulted the Learned Magistrate for erring both in law and fact. In particular, at ground 6 of the appeal, the Appellant contended that the Learned Magistrate erred by applying the wrong principles of law.

23. The issue of jurisdiction featured in the impugned ruling, even if from a slightly different perspective. The Learned Magistrate held thus:

***The averment by the respondent that the Court lacks jurisdiction on this matter fails. The issue of Succession is complete and the 1<sup>st</sup> Defendant is now the registered owner in Court. It is clear that the 2<sup>nd</sup> Respondent sold the land and cannot now claim protection of the law. Whoever goes to equity must go with clean hands.***

24. As noted in the opening paragraphs of this judgment, the case before the Subordinate Court was commenced as a Miscellaneous Application, through Notice of Motion dated 14<sup>th</sup> August 2024. A reading of the said application and the affidavits in respect of it reveals that the cause of action was a claim for land, specifically a 16250 square feet portion of the parcel of land known as West Mugirango/Siamani/4275 (the suit property). The First and Second Respondents contended that they had purchased the portion and that the Third Respondent and the Appellant had refused to transfer it to them.

25. The prayers that the First and Second Respondents sought leave no doubt that it was a claim for title to land. Among other reliefs, they sought an order compelling the Third Respondent herein to sign land transfer forms, mutation forms and application forms for purposes of consent of the Land Control Board. As a precaution against the possibility of the Third Respondent refusing or failing to sign, they prayed that the Court Administrator of the Subordinate Court signs on his behalf. They also prayed for an order requiring the Land Registrar Nyamira to register them as proprietors. Based on the origin of the dispute which was an alleged land sale agreement and owing to the reliefs sought, the claim before the Subordinate Court bore all the hallmarks of a claim for specific performance.

26. Can a claim for title to land and specific performance be commenced as a Miscellaneous Application through a Notice of Motion? The answer is a firm no.

27. While Courts of law are always available to hear suits brought before them, a suit must be commenced in the prescribed manner. Indeed, the **Civil Procedure Act** defines a suit under **Section 2** thereof to mean "*all civil proceedings commenced in any manner prescribed.*"

28. Further, **Section 19** of the **Civil Procedure Act** lays down the manner of institution of suits. It provides that "*Every suit shall be instituted in such manner as may be prescribed by rules.*" In turn, **Order 3 Rule 1 (1)** of the **Civil Procedure**

**Rules** provides that *“Every suit shall be instituted by presenting a plaint to the Court, or in such other manner as may be prescribed.”*

29.A Miscellaneous Application is a procedure to be used for seeking simple reliefs that do not entail determination of parties’ rights in contested disputes. For example, an application for enlargement of time within which to appeal can validly be brought by way of a miscellaneous application, particularly where the appeal is yet to be filed. Similarly, an application for leave to commence judicial review proceedings under **Order 53 rule 1** of the **Civil Procedure Rules** may also be brought through a miscellaneous application.

30. There is no procedure permitting the filing of a claim seeking substantive reliefs such as title to land and specific performance through a Miscellaneous Application. On the contrary, the mandatory provisions of **Section 19** of the **Civil Procedure Act** and **Order 3 Rule 1 (1)** of the **Civil Procedure Rules** expressly bar instituting suits in a manner not prescribed. There are many authorities to that effect.

31. In **Geoffrey Ndungu Theuri vs. Law Society of Kenya [1988] eKLR**, the Court held:

***The order specifically refers to a suit which is defined under section 2 of the Civil Procedure Act in these terms: “suit” means all civil proceeding commenced in any manner prescribed under the***

***Civil procedure Rules and an applicant is not entitled under order 39 of the Civil Procedure Rules to seek or obtain an order for injunctive relief against another party without filing a suit. The grossly abused section 3A of the Civil Procedure Act does not give the court the power to act without jurisdiction.***

32. Similarly, in **Proto Energy Limited v Hashi Energy Limited [2019] KEHC 12311 (KLR)**, the Court held as follows:

***Order 3 Rule (i) (ii) provides that every suit shall be instituted by way of a Plaint. As a general rule a suit can only be instituted by way of a Plaint, Petition or an Originating summons. A Notice of Motion is not legally recognized as an originating process. A Notice of Motion can only be filed within a properly instituted suit. The Applicants failed to file any originating process in this matter. I find that the attempt to institute this suit by way of a notice of Motion renders the entire suit defective.***

33. In **Joseph Kibowen Chemjor v William C Kisera [2013] KEELC 140 (KLR)**, Munyao, J. (as he then was) explained the place of miscellaneous applications thus:

***It means therefore that where a person is commencing a civil suit ( in this instance to***

***enforce a civil action), he needs to follow prescribed rules. There are times when all that a person wants is an order of court where the rights of the parties are not going to be determined. There is no “action” being enforced or being tried. In many such instances, it is the discretion of the court being sought or a procedural issue sought to be endorsed. The court in such a case is not being asked to determine any rights of the parties. Now, the Civil Procedure Rules do not specifically provide for the procedure to be followed where there is no “action”. In such instances, I think it is permissible for such person to file a miscellaneous application because the court is not asked to determine any issues between the parties. This is common and permissible where all that the party wants is a mere order from the court which does not settle any rights or obligations of the parties. This for instance can cover applications for leave to institute suit out of time or for leave to commence judicial review proceedings.***

***At this level, the court is not adjudicating on any rights. Where there is a call to adjudicate on rights of parties then it must be said that there is a “civil action” and this must be commenced in***

***the manner prescribed by the Rules. A matter touching on whether or not a caution needs to be removed is in my view a civil action which then must be commenced in the manner prescribed by the Rules. The issue whether the caution should be removed or should remain is at that moment a contentious issue that must be tried on merits.***

34. In the matter at hand, the First and Second Respondents placed material before the Learned Magistrate showing that the reliefs that they sought entailed interfering with title to the suit property, a registered parcel of land. In particular, they annexed a copy of a certificate of search as of 20<sup>th</sup> May 2024.

35. The right to landed property is jealously guarded by law through **Article 40** of the **Constitution** and **Section 24** and **26** of the **Land Registration Act**. The law lays down specific circumstances and grounds on which title to land can be nullified. These include fraud or misrepresentation to which the registered proprietor is proved to be a party and where it is shown that the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme. All those requirements exclude a miscellaneous application as a procedure for seeking such reliefs.

36. I have said enough to demonstrate that the matter before the Learned Magistrate was not the type to be heard and determined through a miscellaneous application. Clearly, the Learned Magistrate had no jurisdiction to interfere with title to

registered land in proceedings commenced through a miscellaneous application.

37. In view of the foregoing discourse, I find and hold that the proceedings in the Subordinate Court were incompetent and were for striking out. If the Respondents are still interested in pursuing any issues arising from the transaction, they may wish to file a competent suit.

38. I find merit in this appeal, and I make the following orders:

**a) This appeal is allowed.**

**b) The ruling and order of the Subordinate Court delivered on 28<sup>th</sup> November 2024 is set aside.**

**c) Notice of Motion dated 14<sup>th</sup> August 2024 is struck out.**

**d) The Appellant shall have costs of both this appeal and of the proceedings before the Subordinate Court. The Respondents herein shall bear costs of the appeal while the First and Second Respondents herein shall bear costs of the proceedings before the Subordinate Court.**

**Dated, signed, and delivered at Nyamira, this 25<sup>th</sup> day of March 2026.**

**D. O. OHUNGO  
JUDGE**

Delivered in the presence of:

Mr Onyancha for the Appellant

Mr Mongare for the First and Second Respondents

Mr Nyamwange for the Third Respondent

Court Assistant: B Kerubo