**Mattu v Ngoma (Environment and Land Appeal E007 of 2024)**
**[2025] KEELC 5472 (KLR) (23 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5472 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MAKUENI**

**ENVIRONMENT AND LAND APPEAL E007 OF 2024**

**EO OBAGA, J**

**JULY 23, 2025**

**BETWEEN**

**DAVID MWEU MATTU ..... APPELLANT**

**AND**

**STEPHEN NZIOKA NGOMA ..... RESPONDENT**

***(Being an appeal from the ruling and order of Hon. P. N. Gesora, Chief Magistrate delivered on 20th June, 2024 in Chief Magistrate' Court as Makueni in ELC Case No. 17 of 2020)***

## JUDGMENT

1. The Appellant filed this appeal against the Respondent in which he raised the following grounds:
    1. The learned magistrate erred in law and in fact in failing to find and hold that the Respondent herein had failed to demonstrate or strictly proof, as dictated by the provisions of Order 45 Rule 3(2) of the Civil Procedure Rules, 2010, that the new matter or evidence discovered was not within his knowledge and even after the exercise of due diligence, the same could not be produced before the court when the decree was passed.
    2. The learned magistrate erred in law and in fact in failing to hold and find that the discovered new matter or evidence was not important as to have been capable of persuading the trial court to arrive at a different decision, other than that contained in the impugned judgment, on the issue of determination as crafted by the trial court to wit "whether the 1st Defendant had good title to pass".
    3. The learned magistrate erred in law and in fact in failing to appreciate that he had, upon delivery of judgment, become functus officio on the issue of transfer to person(s), other than the Respondent, of the parcels of land forming part of the estate of the Appellant's deceased father, the same having been raised during the hearing of the suit before the trial court.

4. The learned magistrate erred in law and fact in failing to hold and find that the newly discovered matter or evidence was not in support of the Respondent's case as pleaded in its plaint hence the same ran a foul the time hallowed legal tenet that parties are bound by their pleadings.

5. The learned trial magistrate erred in law and in fact in granting an order of specific performance against the Appellant yet no case had been set out in the plaint for the grant of the said order and no such prayer had been sought.

6. The learned magistrate erred in law and in fact in granting an order of specific performance against the Appellant notwithstanding the absence of valid contracts or any contract at all entered by or between the Appellant and the Respondent.

7. The learned magistrate did not have the requisite jurisdiction to adjudicate over or issue orders of specific performance in regards to the suit property to wit LR No. Makueni/Unoa/3769, the same having been valued, at the behest of the Respondent, at Kshs.30,000,000/= as at 27th May, 2024.

**Background**

2. The Respondent had filed a suit against the Appellant and three others. In that suit, the Respondent sought the following reliefs:

    1. An order of permanent injunction do issue restraining the Defendant/Respondents, their agents, servants or anyone acting or claiming through them from entering, trespassing, subdividing, registering and or in any other manner interfering with the Plaintiffs parcel of land being Plot No. Mukueni/Unoa/3769 being a subdivision of what was formerly Makueni/Unoa/23 and further subdivided to form Makueni/Unoa/6348-6360.

    2. A declaration that the Plaintiff is the legal and bonafide owner of all that parcel of land measuring 6½ acres comprised in land parcel No. Makueni/unoa/3769 being a subdivision of what was formerly Makueni/Unoa/236 and further subdivided to form Makueni/Unoa/6348-6360.

    3. An order for cancellation of all titles, subdivisions and all entries made in land parcel No. Makueni/Unoa/3769 being a subdivision of what was formerly Makueni/Unoa/236.

    4. Costs of this suit.

3. The Appellant and Peter Mutisya Mattu who was the 1st Defendant are brothers. Their father who is deceased was the registered owner of LR No. Makueni/Unoa/236 which has since been subdivided into various portions including Makueni/Unoa/3769 (suit property) which has also been subdivided into Makueni/Unoa/6348 to 6360.

4. The registered owner of LR No. Makueni/Unoa/236 Jaspher Nzangi Mattu died on 4th August, 2004. Grant of letters of administration in respect of his estate were given to the Appellant and his mother on 29th September, 2009. A confirmed grant was issued on 15th June, 2012.

5. On diverse dates in the year 2012, the 1st Defendant sold a total of 6.5 acres to the Respondent. The Respondent moved to court to file suit after he learned that the Appellant had subdivided the suit property into 13 portions ranging from LR No. Makueni/Unoa/6348 to 6360.

6. The Respondent's suit was heard and was dismissed through a judgment delivered on 11th April, 2024 on the ground that the 1st Defendant had no capacity to sell land belonging to his deceased father as he did not have grant of letters of administration or confirmed grant to do so.

7. On 16th May, 2024, the Respondent filed an application for review of the judgment delivered on 11th April, 2024. In a ruling delivered on 20th June, 2024, the Respondent's application was allowed with the result that an order of specific performance was given directing the Appellant to transfer the suit property to the Respondent. This is what triggered the appeal to this court.

**Parties Submissions**

8. The parties were directed to dispose of the appeal by way of written submissions. The Appellant field his submissions dated 25th March, 2025. The Respondent filed his submissions dated 22nd April, 2025.

**The Appellant's Submissions**

9. It was submitted on behalf of the Appellant that the Respondent had not discharged the burden of proof which was upon him as per the proviso to Order 45 Rule 3(2) which states as follows:

> " Where the court is of opinion that the application for review should be granted, it shall grant the same:
>
> > Provided that no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made without strict proof of such allegation".

10. The Appellant relied on the case of Rose Kaiza –vs- Angela Mpajuiza (2009) eKLR where the court of Appeal stated as follows:

> " Applications on this ground must be treated with great caution and as required by Rule 4(2)(b) the court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. Before a review is allowed on the ground of a discovery of new evidence, it must be established that the Applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made".

11. The Appellant further submitted that even where there is discovery of new evidence, the person seeking to rely on the same has to show that the evidence was such important and that were it to be placed before the trial court, it would have had an impact on the decision which was reached and which is the subject of review.

12. The Appellant further submitted that the alleged discovery of new evidence was not in support of the Respondent's case as the remedy of specific performance which was granted in the review was not pleaded in the plaint as a remedy which was contrary to the principle that parties are bound by their pleadings.

13. The Appellant relied on the case of Charles Kagema Muraya –vs- Equity Bank Limited (2019) eKLR where Justice Kasango held as follows:

> " The Defendant relied on the case of Malawi Railways Ltd v-s- Nyasulu (1998) MWSC 3 as follows:
>
> > "As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings....for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a difference or fresh case without due amendment properly made. Each party thus knows the case he had to meet and cannot be taken by surprise at the trial. The court itself is as bound duty of the court to enter upon any inquiry into the case before it other than adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any clam or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....".

14. The Appellant further submitted that the trial magistrate erred by granting a remedy of specific performance based on contracts which were illegal. The Appellant submitted that despite the trial magistrate having found that the agreements between the Respondent and his brother Peter Mutisya Mattu who was the 1st Defendant were illegal, he proceeded to allow specific performance based on the same illegal contracts.

15. The Appellant relied on the case of Virginia Mwari Thuranira –vs- Purity Nkirote Thuranira (2017) eKLR where Justice Gikonyo stated as follows:

> "....As for the assertion that the Respondents mother sold 1½ acres of land to Elias Mwongera, I have to say the said sale agreement is null and void for violating Section 82 (b)(ii) of the *Law of Succession Act*, as the said Julia Thuranira had not obtained letters administration of the estate of the deceased at the time of the alleged sale. The property of a deceased person vests in the legal representative and constitutes the estate of the deceased person. It is only the legal representative of the estate or a person under the authority of the written law shall have authority to deal with the estate of the deceased, but in accordance with the grant or authority of the written law or order of the court. In this case, there is not a will and so the principle of relation back does not apply. Under Section 80 (2) *Law of Succession Act*, Cap 160 a grant of letters of administration takes effect only as from the date of issue and not otherwise. Therefore, until a legal representative is appointed in intestacy, any act done in respect of the estate of deceased by a person without authority of the law amounts to intermeddling, illegality and is a nullity.....".

16. The Appellant went on to submit that the trial magistrate was wrong in ordering specific performance against the Appellant when he was not privy to the contracts which were in issue. He relied on the case of Helga Christa Ohany –vs- ICEA Lion General Insurance Company Ltd (2022) eKLR where

the court relied on the case of Aineah Liluyani Njirah –vs- Aga Khan Health Services (2013) eKLR where it was stated as follows:

> " Privity of contract is a long-established part of the law of contract. In the earlier part of the last century, it was identified by Viscount Haldance LC as one of the fundamental principles of the English Contract Law. See Dunlup Pneumonic Tyre v Selfridge and Co. Ltd [1] The essence of the privity rule is that only the people who actually negotiated a contract (who are privy to it) are entitled to enforce its terms. Even if a third party is mentioned in the contract, he cannot enforce any of its terms nor have any burdens from that contract enforced against him[2]".

17. Lastly, the Appellant submitted that trial magistrate did not have jurisdiction to handle the subject matter of the suit as it was beyond his monetary jurisdiction. The Appellant submitted that the Respondent had introduced a valuation report in his supplementary affidavit which put the value of the suit property at Kshs.30,000,000/=. The monetary jurisdiction of the trial magistrate who is a Chief Magistrate is Kshs.20,000,000/=. He submitted that the trial magistrate should have downed his tools the moment it was brought to his attention that the value of the suit property was more than his maximum monetary jurisdiction.

18. The Appellant relied on the case of Kenya Ports Authority –vs- Modern Holding (EA) Limited (2017) eKLR where it was stated as follows:

> " Generally speaking and on the authority of the Supreme Court decision in Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & 2 Others, a court can only exercise that jurisdiction that has been donated to it by either *the Constitution* or legislation or both. Therefore it cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. Jurisdiction is in the end everything since it doe to the very heart of a dispute. Without it, the court cannot entertain any proceedings and must down its tools. See the owners of the Motor Vessel Lilian 'S' Vs Caltex Kenya Limited (1989) KLR 1.
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> This court in Adero & Another Vs Ulinzi Sacco Society Limited (2002) 1 KLR 577, quite sufficiently summarized the law on jurisdiction as follows:
>
> 1. .....
> 2. The jurisdiction either exists or does not ab initio and the non-constitution of the forum created by statute to adjudicate on specified disputes could not of itself have the effect of conferring jurisdiction on another forum which otherwise lacked jurisdiction.
> 3. Jurisdiction cannot 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 an appeal.
> 5. Where a cause is filed in court without jurisdiction, there is no power on that court to transfer it to a court of competent jurisdiction.
> 6. .....
> 7. .....

> We have stressed that jurisdiction is such a fundamental matter that it can be raised at any stage of the proceedings and even an appeal, though it is always prudent to raise it as soon as the occasion arises. It can be raised".

**Respondent's Submissions**

19. The Respondent submitted that he had proved that there was new evidence which came to his knowledge after the trial had been concluded and judgment delivered. The new evidence was of significant relevance to the matters in issue. He therefore submitted that he had discharged the burden which was placed upon him by the provisions of the law. He submitted that the new evidence was beyond his reach and if he had the same during the trial, the same will have swayed the trial magistrate. He submitted that the Appellant had selectively given titles to other persons who had purchased their properties before grant of letters of administration were given.

20. The Respondent further submitted that the remedy of specific performance is a discretionary remedy which is given based on circumstances of the case. He submitted that the trial magistrate had exercised his discretion properly and that the same should not be disturbed. He relied on the case of Mbogo & Another –vs- Shah (1968) EA 93 as was quoted in the case of Price & Another –vs- Hilaler (1984) eKLR where the court states as follows:

> " .....that this court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.

21. The Respondent submitted that the court should look at his case with an eye of substantive justice without resorting to strict rules of procedure or law. He submitted that he was lured into entering into contracts with the 1st Defendant as they had included a clause in the agreement that the 1st Defendant was going to take out letters of administration in respect of his father's estate and transfer the land to him. He submitted that he came to learn later on that the Appellant had gone ahead to take letters of administration and had transferred the land to himself.

22. The Respondent relied on the case of Eldo City Limited –vs- Corn Products Kenya Ltd & Another (2013) KEHC 5916 (KLR) where Justice Mabeya stated as follows:

> " It is trite law that in deciding disputes, it is the court's duty to give effect to the intention of the parties. The parties' intention is discernible from the documents and conduct of the parties. However, onerous a document or contract may be, the court's duty is to give effect to it. In the case of Smith –vs- Cook (1891) AC 297 at 303 the court held:-
>
> The duty of the court is to give the natural meaning to the language of the deed unless it involves some manifest absurdity or would be inconsistent with some other provision of the deed and would therefore be contrary to the intention of the parties as appearing upon the face of the deed".

23. On the issue of jurisdiction, the Respondent submitted that the Appellant had submitted himself to the jurisdiction of the court and that he is estopped from raising it in this appeal and that in any case, the issue of jurisdiction was not pleaded in the plaint. He relied on the case of Daniel Otieno Migore –vs- South Nyanza Co. Ltd (2018) eKLR where Justice Mrima quoted the case of Muchiri –

vs- Boresha Maisha Self Help Group (Civil Appeal 48 of 2022)(2024) KEHC 2488 (KLR) (11 March, 2024)(Judgment) where it was stated as follows:

> "……..it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded….. In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new station.

**Analysis and Determination**

24. I have carefully considered the grounds of appeal as well as the submissions made by the parties as well as the authorities cited. From the grounds of appeal raised, the following are the issues which emerge for determination;

    a. Whether the Respondent proved that he was entitled to review on account of discovery of new evidence.

    b. Whether the trial court was correct in ordering the Appellant to transfer the suit property to the Respondent.

    c. Whether the trial court had jurisdiction to entertain the application for review and by extension the suit itself.

25. The duty of a first appellate court was stated by the Court of Appeal in the case of Abok James Odera & Associates –vs- John Patrick Machira T/A Machira & Co. Advocates (2013) eKLR 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. See the case of Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2EA 212 wherein the Court of Appeal held inter alia that:
>
> On a first appeal form the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it had neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence".
>
> a. Whether the Respondent proved that he was entitled to review on account of discovery of new evidence

26. The Respondent in his application for review had stated that the new evidence which he discovered was that he found out from his neighbours that some of them who had purchased their land from the 1st Defendant before grant of letters of administration was given, had their properties transferred to them by the Appellant after he obtained grant of letters of administration in respect of his father's estate. The Respondent went on to exhibit a green card in respect of LR No. Makueni/Unoa/3771.

27. A look at the green card in respect of LR No. Makueni/Unoa/3771 shows that this property was registered in the Appellant's name on 24th February, 2018. He transferred it to Sammy Mavutha Lala

on 6th October, 2017. The Respondent filed his suit in 2020. There was no evidence adduced to show that Sammy Mavutha Lala had purchased his land before letters of administration were given.

28. The judgment which was the subject of review was delivered on 11th April, 2024. The record of proceedings show that during the hearing, the Respondent was aware that the Appellant was one of the administrators of the Estate of Jasper Nzangi Mattu. He cannot therefore turn around and claim that he discovered that the Appellant had gone ahead to obtain letters of administration and had transferred land to persons who had purchased land before grant of letters of administration were given. There was no evidence of other neighbours to whom the Appellant had transferred land to for the Respondent to justify his claim that the process was done selectively.

29. The evidence which emerged during the hearing is clear that even before he filed his case, the Respondent was aware that the Appellant was one of the administrators and that he had approached him for transfer severally but he declined. The Respondent did not prove the facts he was alleging. He did not prove that whatever he was calling new evidence would not have been obtained if he had exercised due diligence. The Respondent did not meet the requirements of Order 45 Rule 3(2) of the Civil Procedure Rules.

30. In allowing the application for review, the trial magistrate stated as follows:

> " The application herein is premised on the discovery of fresh evidence subsequent to the conclusion of the trial. In this case the Applicant has produced green cards of portion of land subdivided from land parcel Makueni/Unoa/236. The said documents show the current owners who purchased land before a grant of letters of administration were issued and were subsequently transmitted to them after the grant was issued.
>
> The discovery of the green cards and the content therein was not canvassed as (sic) hearing of the main suit. A green card and search certificate are two different and distinct documents known in law the Respondent cannot therefore purport to argue that present the same information and/or can be used inter-changeably. I hold that the Applicant herein the other purchasers stand on the same pedestal as regards the purchase of the parcels of land. The 1st Defendant is obligated to transmit to the Applicant his share of land by processing his title deed. The Applicant has brought himself with the conditions that must be met before an order of review can be made".

31. I have gone through the application for review with the annexures thereto. I do not see any green cards which show that the Appellant transferred land to persons who had purchased land before grant of letters of administration were given or any evidence that there were people who had purchased land before grant of letters of administration and had their plots transferred to them after the grant had been issued. The two green cards are what the trial magistrates heavily relied on by granting review on the basis that the Respondent was on the same pedestal as the others who have not been named in the application.

32. When there was an application for injunction filed against the appellant and his brother, the Appellant field a reply in which he annexed a copy of grant of letters of administration which was issued on 29th September, 2009. He cannot therefore be accused of having without disclosure of material facts obtained a grant. The Respondent bought his land in 2012 when the Appellant had already obtained a confirmed grant. There was therefore no discovery of new evidence established to warrant the trial court to grant a review.

33. The Respondent having failed to prove that there was discovery of new evidence which would have been obtained with due diligence, the trial magistrate was wrong in proceeding to grant a review on

the basis of equal treatment. The alleged selective transfer was not proved. This was the holding in the case of Rose Kaiza –vs- Angela Mpajuiza (Supra).

b. Whether the trial court was correct in ordering the Appellant to transfer the suit property to the Respondent.

34. What the trial magistrate allowed in prayer 5 of the application for review was an order of specific performance compelling the Appellant to transfer the suit property to the Respondent. The evidence on record was that the agreements were signed between the Respondent and the 1st Defendant who is brother to the Appellant. The ruling of the trial magistrate clearly stated that the person who was obligated to transfer the suit property was the 1st Defendant whom he had early on in his judgment found to have had no capacity to sell the land to the Respondent. Despite being aware of this, he went ahead to order that the Appellant does the transfer.

35. The Respondent was aware that the 1st Defendant had no grant of letters. He was aware that it is the Appellant and his mother who had the grant. He admitted as much in cross examination during the hearing of the main suit. It defeats logic that a person who was aware that there was a grant would again be duped in to entering into an agreement with the same person on the pretext that the same person was going to transfer the land upon getting grant of letters of administration.

36. The Appellant had no privity of contract with the Respondent. There is no way he would be ordered to transfer land to a person with whom he had no contract. Even the doctrine of equity could not be stretched to aid the Respondent. The case of Helga Christa Ohany –vs- ICEA Lion General Insurance Company Ltd (Supra) clearly states that only parties to the contract are the only ones who can enforce its terms. It clearly states that even if a third party is mentioned in the contract he cannot enforce any of its terms nor have any burdens from that contract enforced against him.

37. In the case of Reliable Electrical Engineers (K) Ltd –vs- Mantrac Kenya Ltd (2006) KEHC 2855 Justice Maraga (as he then was) stated as follows:

> " Specific performance, like any other equitable remedy, is discretionary and the court will only grant it on the well settled principles. The jurisdiction of specific performance is based on the existence of a valid, enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or unenforceable. Even where a contract is valid and enforceable specific performance will, however, not be ordered where there is adequate alternative remedy".

38. In the instant case, the contract between the Respondent and the 1st Respondent was a nullity because it was entered into with a person who had no capacity to do so. The contract therefore suffered from an illegality and cannot be enforced.

c. Whether the trial court had jurisdiction to entertain the application for review and by extension the suit itself

39. The Respondent caused a valuation of the suit property to be undertaken. The purpose of the valuation was for court use in a litigation which was pending. The value of the property was assessed at Kshs.30,000,000/=. The valuation report was introduced through a supplementary affidavit. The valuation was seen by the trial magistrate. What he should have done was to down his tools as his monetary jurisdiction was capped at Kshs.20,000,000/=.

40. The Respondent tried to argue that the issue of jurisdiction was not contained in the pleadings and that it was being raised too late in the day. This is not the correct position. The value of the property had been ascertained by a professional and the valuation was introduced to the pleadings by an affidavit duly sworn by the Respondent. It is clear that the issue of jurisdiction is so fundamental that it can even be raised on appeal. This was the holding in the case of Kenya Ports Authority –vs- Modern Holding (EA) Ltd (Supra).

**Disposition**

41. It is now clear that not only the Respondent failed to establish ground for review but the trial magistrate too had no jurisdiction to entertain the review. I therefore allow the appeal with the result that the ruling of the trial court delivered on 11th April, 2024 is hereby set aside and in place thereof I make an order dismissing the application dated 16th May, 2024 with costs.

.....

**HON. E. O. OBAGA**

**JUDGE**

**JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 23RD DAY OF JULY, 2025.**

IN THE PRESENCE OF:

Mr. Mwanthi for Appellant.

Ms. Mutua for Mr. Muema for Respondent.

Court assistant – Steve Musyoki