Kata v Sila & another (Environment and Land Appeal E004 of 2023)
[2025] KEELC 5280 (KLR) (15 July 2025) (Judgment)

Neutral citation: [2025] KEELC 5280 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ENVIRONMENT AND LAND APPEAL E004 OF 2023

EO OBAGA, J

JULY 15, 2025

BETWEEN

ILEMUSAU KATA ..... APPELLANT

AND

JAPHETH MUTHENYA SILA ..... 1ST RESPONDENT

STEPHEN SILA NGOMA ..... 2ND RESPONDENT

(Being an appeal from the judgment of Hon. J. O. Magori delivered on 11th May, 2022 in Makindu Senior Principal Magistrate's Court in CC No. 312 of 2014)

JUDGMENT

1. The Appellant had sued the Respondents in Makindu Senior Principal Magistrate's Court in Civil Case No. 312 of 2014 in which he sought the following reliefs:
    a. Plot No. 2252 Mang'elete Settlement Scheme be subdivided and 5 acres therefrom be registered in the sole name of the Plaintiff, ½ an acre in the name of Africa Inland Church and the balance in the names of the Defendants.
    b. Costs of this suit and interest.
    c. Any other relief that the honourable court may deem just and expedient to grant.
2. The Respondents filed a defence and counterclaim in which they sought the following reliefs:
    a. Special damages Kshs.150,000/=
    b. The Plaintiff's suit be dismissed with costs to the Defendants.
    c. A declaration that the plot No. 2252 Mang'elete Settlement Scheme belongs to the estate of Sila Ngomo and William Wambua Ngomo only.

d. Costs of the suit.

3. The case was fully heard and in a judgment delivered on 11th May, 2022, the trial magistrate dismissed the Appellants' suit and allowed the Respondent's counterclaim. This is what triggered this appeal in which the Appellant raised the following grounds:

    1. That the learned trial magistrate erred in both law and fact in dismissing the Plaintiff's suit.

    2. That the trial magistrate erred in both law and fact in finding that the Respondents herein had proved their case on a balance of probabilities.

    3. That the trial Magistrate erred in both law and fact in finding that the suit property in question belongs to the late Mbelete Musau and the deceased Sila Ngomo.

    4. That the trial magistrate erred in both law and fact when he failed to consider the evidence and the submissions of the Appellant herein.

    5. That the trial magistrate reached his decision by considering extraneous mattes and not the issues before him.

    6. That the learned trial magistrate erred in both law and facts in declaring that the Appellant herein did not have the locus standi to bring the suit herein.

    7. That the learned trial magistrate erred in both law and facts in declaring that the Appellant herein was not the owner of the suit property.

    8. That the learned magistrate erred in both law and fact when he found that the Respondent had proved their case and ordered refund of Kshs.150,000/=.

4. The parties were directed to file written submissions. The Appellant filed his submission dated 13th November, 2024. The Respondents filed their submissions dated 7th May, 2025.

5. The Appellant submitted on three issues. The first is whether the Appellant was owner of the suit property. On this issue, he submitted that after the adjudication process in 1992 the Appellant was registered as owner of 6½ acres and the Respondent's father took the rest but the registration remained joint. He submitted that there were no objections raised by any party as required by the *Land Adjudication Act*. He submitted further that the Appellant decided to sell his portion as he found that the Respondents who were occupying their father's portion had still encroached on his portion.

6. The other issue he submitted was on locus standi. It was submitted that he had entered into the agreement with the Respondents not in the capacity as representative of his late wife but on his own right. He also submitted that the Respondents entered into the sale agreement in their own right in furtherance of what their father had started. He submitted that the Respondents entered in to an agreement with him and therefore both parties had locus to bring the suit.

7. The Appellant relied on the case of Alfred Njau & others –vs- City Council of Nairobi (1992) KAR 229 where the court held as follows:

> " The term locus standi means a right to appear in court and conversely to say that a person has no locus standi means that he has no right to appear or be heard in such proceedings."

8. The other issue the Appellant submitted on was whether the agreement between him and the Respondent was procured through duress. On this, he submitted that there was no evidence adduced before the trial court to show that they were coerced into entering the agreement. He submitted that

the Respondents' evidence that they felt threatened as the Appellant had told them that if they kept on pushing the land case, they were going to face what their parents had faced was hearsay and of no probative value.

9. The Appellant relied on the case of LTI Kisii Safaris Inns Ltd & 2 others –vs- Deutche Investitions – Und Enwicklungsgellschaft ('Deg') & others (2011) KECA 1 (KLR) where the court stated as follows:

> " The relevant factors in determining whether economic duress has been established include whether the victim protested, whether there existed an effective alternative remedy, the availability of independent advice, the benefit received and the speed with which the victim sought to avoid the contract (see Pao on –vs- Lau Yiu (1979) 3 ALL ER 65 p. 78, 79).

10. The Appellant submitted that there was no duress because the Respondents did not report any allegations of duress anywhere until he brought an action against them. He submitted that since the Respondents had raised duress, it was upon them to prove that allegation. The Appellant relied on Section 108 and 109 of the *Evidence Act*.

11. The Appellant too submitted that the Respondents had not proved their claim before he lower court especially the claim of Kshs.150,000.

12. The Respondents reiterated the facts of the case before the lower court and submitted on four issues. The first issue was whether the Appellant and the Respondents had capacity to sue or be sued. On this issue, the Respondents submitted that the Appellant had brought this suit against the Respondent as sons of Sila Ngomo who had allegedly started the process of purchasing land from the Appellant but died before completing payment. On the part of the Appellant the Respondents submitted that the evidence on record showed that the suit property belonged to the wife of the Appellant one Mbeleete Musau who was the one who entered into a sale agreement with the Respondent's father. This being the case, the Respondents submitted that the Appellant had no capacity to sue on behalf of the Estate of his late wife and the Respondents had no capacity to be sued on behalf of the Estate of their late father.

13. The Respondents submitted that the Appellants had clearly stated in paragraph 3 and 4 of the plaint that the Respondents were being sued as heirs of the late Sila Ngomo who died before he completed payment for the suit property. The Respondents relied on the case of Raila Amolo Odinga & Another –vs- IEBC & 2 Others (2017) eKLR where it was held as follows:

> " In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact of law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings...."

14. The Respondents submitted that where parties have no locus standi, the court does not have jurisdiction to adjudicate on that matter. They relied on the case of Juliana Adoyo Ongunga –vs- Francis Kiberenge Abano Migori Civil Appeal No. 119 of 2015 where the court held as follows:

> " Further, the issue of locus standi is so cardinal in a civil matter since it runs through to the heart of the case. Simply put, a party without locus standi in a civil suit lacks the right to

institute and/or maintain that suit even where a valid cause of action subsists. Locus standi relates mainly to the legal capacity of a party. The impact of a party in a suit without locus standi can be equated to that of a court acting without jurisdiction, since it all amounts to null and void proceedings. It is also worth noting that the issue of locus standi becomes such a serious one where the matter involves the estate of a deceased person since in most cases the estate involves several other beneficiaries or interested parties".

15. On the issue whether the Appellant was the owner of the suit property, the Respondents submitted that evidence which was adduced showed that the suit property was owned by Mbeleete Musau the late wife of the Appellant. The Appellant did not produce any sale agreement to show that he is the one who was selling the land to the Respondents' father. The Respondents produced evidence to show that the full purchase price was paid and that the agreement was with Mbeleete Musau. They further submitted that the Appellant used force to have his name put in the register as co-owner of the land part of which the Appellant is claiming to own.

16. On the issue of whether the agreement of 11th November, 2013 and 16th December, 2013 were void, the Respondents submitted that the same were void for lack of capacity of the parties to enter into the same. They submitted that the Appellant's suit was based on void agreements which cannot stand. They relied on the case of Macfoy –vs- Untied Africa Company Ltd (1961) 3 All ER as quoted in the case of NCBA Bank of Kenya PLC –Vs- Okonya (2024) KEHC 625 (KLR) where it was stated as follows:

> "If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse".

17. The other issues submitted on by the Respondents was whether the payment of Kshs.150,000/= to the Appellant was recoverable. They submitted that money paid as a result of a void agreement is recoverable. Retention of the money with the recipient will amount to unjust enrichment. They relied on the case Root Capical Incorporated –vs- Tekangu Farmers Co-operative Society Limited &Another (2016) where it was stated as follows:

> "According to Halsbury's Laws of England (Supra) paragraph 883 a claim for the return of money paid over in these circumstances may take one of the four basic forms. It may be:
>
> 1. A personal action for a debt (for instance, on a loan);
> 2. A personal restitutionary claim for money had and received;
> 3. An action in tort for the return of identifiable coins or notes or their value; or
> 4. A proprietary claim in equity even where the money has been paid into a mixed fund.
>
> However, all the cases on recovery of money paid under illegal contracts concern actions in debt or for money had and received."

18. The Respondents submitted that the claim of Kshs.150,000/= was filed in their personal capacity as money which was paid to the Appellant on the basis of false pretenses that there was a balance when there was evidence that the entire purchase price had been cleared.

19. I have considered the ground of appeal, the submissions by the evidence, the evidence before the trial court as well as the authorities cited. The issues for determination in this appeal are firstly, whether the Appellant had capacity to sue and whether the Appellants had capacity to be sued. The second issue is whether the Appellant was the owner of the suit property. The third issue is whether Kshs.150,000/= was recoverable from the Appellant.

20. This being a first appellate court, my duty was well stated in the case of Selle & Another –vs- Associated Motor Boat Co. Ltd & Others (1968) EA 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 demeanour 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)"

21. A look at the evidence adduced before the lower court shows that Respondents' father together with their uncle William Wambua Ngomo had land in an area which later came to be known as Mang'elete Settlement Scheme. The Respondents' father purchased land from Mbeleete Musau who was the wife of the Appellant. The sale agreement between the Respondents' father and Mbeleete Musau was made on 6th June, 1972. The purchase price was Kshs.750/=. As at the time of signing the agreement, the Respondent father paid Kshs.200/= and there was a balance of Kshs.550/= which was to be cleared in accordance with the agreed terms.

22. The evidence further shows that a dispute arose between the Respondents' father and Mbeleete Musau. This dispute was taken before the chief on 1st February, 1982 where it was resolved that the Respondents' father did not owe Mbeleete Musau anything and that the land belonged to the Respondent's father.

23. At the time of demarcation the land which the Respondents' father owned with their uncle was given parcel No. 3327. The one which Mbeleete sold to the Respondents' father was given parcel 2252 and this is the portion which is in dispute. On the ground, there is no boundary marking the two parcels but it is the family of the Respondents who are utilizing both parcels.

24. There were disputes which arose between the Respondents on the one part and the sons of the Appellant over the ownership of parcel 2252. On 11th November, 2013 the Respondents and the sons of the Appellant went to the two parcels in the company of elders and measurements of parcel 3327 and 2252 were taken. The total was found to be 19 acres. It was found that the family of the Respondents were entitled to 12 acres and the Appellant's family was entitled to 6½ acres their family having donated ½ an acre to a church. It was then agreed that the Respondents buy the 6½ acres from the Appellant's family at Kshs.75,000/= per acre. The total purchase price was Kshs.487,500/=. The 1st instalment of Kshs.150,000/= was to be made on 15th December, 2013 and the balance after six months.

25. On 16th December, 2013, the Respondents paid the Kshs.150,000/= to the Appellant. At this meeting, the Respondents were informed that the price of an acre had increased from Kshs.75,000/= to Kshs.100,000/=. The Respondents were given a month to think about the increased price per acre.

The Respondents did not agree to the new price and did not pay the balance. This is what prompted the Appellant to file a suit.

26. When the Appellant filed suit against the Respondents, the Respondents gathered evidence which revealed that what they were intending to purchase was their own land as their late father had cleared paying for the suit property. This was clear after their uncle William Wambua Ngomo brought documents for the purchase of 1972 and the subsequent evidence of 1982 which showed that the Respondents' father owed nothing to the seller who was Mbeleete Musau.

27. The plaint which the Appellant filed clearly showed that he was suing the Respondents in furtherance of a sale agreement entered into by their late father. This therefore shows that the Respondents were being sued for an alleged incomplete payment for the land he was purchasing. The Respondents had no grant of letters of Administration in respect of their father's estate. They therefore did not have capacity to be sued.

28. On the part of the Appellant, the evidence which emerged is that he was not the one who sold the suit property to the Respondents' father. It is his wife who had passed away who sold the land to the Respondents' father. This being the case, he needed to have letters of administration in respect of her estate to bring the suit. The Appellant did not adduce any evidence to show that he was the one who sold the land to the Respondents' father.

29. The evidence of DW6 Charles Kamani who was the Settlement Officer explained the inclusion of the Appellant's name as co-owner of the Respondents' father as being possibly as a result of a pending dispute. This is so because there is no other possible explanation as to why his name would have been included when evidence is that his wife had already sold the land to the Respondents' father.

30. The evidence of PW2 Joseph Kioko Musau who is the Appellant's son in his witness statement referred to the sale of 1972 to the Respondents' father. He only tried to claim that the sale was by the Appellant when the evidence does not support any sale by the Appellant. In this statement he alleged that the purchase price was Kshs.1,100/= and that the Respondents' father paid Kshs.700/= leaving a balance of Kshs.400/=. When they took measurements of the land on 11th November, 2013 they found that the Respondents' father had paid for 12 acres and that he was supposed to purchase 6½ acres. It is not clear on what basis he came by the acres as the agreement of 1972 did not talk of any acreage.

31. As was held in the case of Julian Adoyo Onunga (Supra) both the Appellant and the Respondents had no capacity to sue and be sued respectively.

32. The evidence which was adduced showed that the suit property belonged to Mbeleete Musau wife of the Appellant. She is the one who entered into the sale agreement over the same. The Appellant did not adduce any evidence to show that he owned the suit property. The amount of Kshs.400/= which he claimed to have been the balance of the sale of 1972 turned out to be money which he was supposed to be given to give to elders who were involved in trying to solve the dispute between him and the family of the Respondents' father. This is clear from the letter of 4th November, 1993 by the Assistant Chief who had listened to the dispute which had been taken to him. The Kshs.400/= which the Appellant was demanding was brought by the uncle of the Respondent but the Appellant declined to take it and instead demanded for Kshs.10,000/= . The case was referred to the Chief who finally referred it to the Assistant County Commissioner who agreed with the earlier findings of the Chief and Assistant Chief on the issue of the Kshs.400/= as per letter of 11th April, 2014.

33. DW4 – James Mutie Makusi was the Assistant Chief who gave the history of the kshs.400/= which was being claimed by the Appellant. The Appellant had initially demanded Kshs.40/= but he changed

to Kshs.400/=. From the evidence adduced, it is clear that the Appellant was not the owner of the suit property.

34. On the last issue as to whether Kshs.150,000/= is payable to the Respondents, it is clear that the payment was in respect of two agreements which were null and void. The agreements with persons who had no capacity to enter into the same. The agreement of 11th November, 2013 was made by the sons of the Appellant. The payment of Kshs.150,000/= was made to the Appellant on 16th December, 2013. The Appellant had no capacity to bring the suit on account of agreements he had no capacity to enter into. DW5 Kinyali Kimunyu was a village elder who was present when the agreement of 11th November, 2013 was made. He testified that the 1st Respondent asked for adjournment of the meeting but the Appellant refused insisting that the meeting had to be concluded so that he could be paid otherwise he was going to use other means to be paid. The agreement was signed to avoid quarrels. The 1st Respondent had wanted his uncle who had the documents relating to purchase to be present so that they could assist. This was not done.

35. After payment of Kshs.150,000/= had been paid, it turned out that the entire purchase price had been paid in 1972. The payment having been made to a person who had no capacity to claim the same and the money having been paid over and above the purchase price, I find that the same is refundable to the Respondents. The money was paid by the Respondents in their individual capacity not on behalf of the Estate of their late father. When they realized that they had paid money which they ought not to have paid, they filed a counterclaim demanding its refund. As was held in the case of Root Capital Incorporated (Supra), money paid as a result of a null agreement is recoverable.

36. The trial magistrate properly analyzed the evidence before him before he arrived at a finding that the Respondents were entitled to a refund of Kshs.150,000/=. He did not consider any extraneous factors in arriving at his decision. I therefore find no merit in this appeal which is dismissed with costs to the Respondents.

.....

HON. E. O. OBAGA

JUDGE

JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 15TH DAY OF JULY, 2025.

IN THE PRESENCE OF:

Ms. Singi for Respondent.

Ms. Isika for the Appellant

Court assistant – Steve Musyoki