



**Okwayo v Mbithi & another (Environment and Land Appeal
E004 of 2023) [2025] KEELC 797 (KLR) (25 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 797 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL E004 OF 2023
AY KOROSS, J
FEBRUARY 25, 2025**

BETWEEN

NAFTALI MASARA OKWAYO APPELLANT

AND

ADELAIDE MBAIKA MBITHI 1ST RESPONDENT

PETER MULWA MBITHI 2ND RESPONDENT

*(Being an appeal from the ruling of the CM Hon. A. W. Francis
delivered on 14/12/2022 in Machakos ELC Case No. E45 of 2021)*

JUDGMENT

Background

1. The subject of this appeal emanates from a ruling rendered by the Hon. A.W. Francis (as he then was) on a preliminary objection (PO) dated 14/04/2022 filed by the firm of M/s. Oyugi & Co. Advocates who are on record for the appellant.
2. In the lower court, the appellant was the defendant and the respondents were the plaintiffs. This PO raised the following grounds: -
 - a. The Hon. court is devoid of jurisdiction to grant the prayers sought by the respondents.
 - b. The suit herein is premised on a claim expressly statutory barred by the provisions of Section 3(3) of the *law of Contract Act*.
 - c. The suit offends the holding of an avalanche of court decisions where the courts declined to enforce contracts which fell afoul of Section 3(3) of the *law of Contract Act* and proceeded to strike out the suits for non-compliance. These cases are:
 - I. Peter Mbiri Michuki vs. Samuel Mugo Michuki(2014) eKLR (Court of Appeal).



II. Daudi Ledama Morintat vs. Mary Christine Karie (2017) eKLR (ELC).

- d. That the jurisdiction of the court is expressly ousted by statute and case law and thus the suit herein is a nullity and should be struck out with costs to the appellant.
3. The PO was canvassed by both parties' written submissions with the law firm of M/s. Musyoka Murambi & Associates filing the respondents' submissions.
4. The matter was subsequently reserved for ruling and in the impugned decision, the learned trial magistrate found the issue of jurisdiction raised a pure point of law.
5. The learned trial magistrate proceeded to state the respondents' claim was on constructive trust and not on enforcement of contract and thus by dint of Section 4 (1) of the Law of Contract Act, the PO was misplaced. He found the PO not merited and dismissed it with costs to the respondents.

Appeal to this court

6. The above outcome did not augur well with the appellant and dissatisfied with the impugned ruling, the appellant preferred an appeal to this court on 8 grounds as set out in his memorandum of appeal dated 19/01/2023.
7. These grounds were repetitive and as can be seen by his counsel's written submissions dated 25/08/2024, he consolidated them into 2 grounds.
8. They were whether the learned trial magistrate erred in not dismissing the respondents' case and erred when he found the respondent's claim was on constructive trust and not on breach of contract.
9. Accordingly, the appellant implored this court to allow the appeal with costs, uphold the PO and that the respondents' suit before the trial court be struck out with costs to the appellant.

Submissions.

10. As directed by the court, the appeal was canvassed by written submissions. The appellant's submissions were highlighted earlier herein and his counsel argued the appeal on the summarised grounds.
11. The respondents' law firm on record which was earlier highlighted in this judgement filed their written submissions dated 29/08/2024. These submissions framed 2 issues for determination; whether the suit before the trial court was statutory barred by dint of Section 3(3) of the Law of Contract Act and who should bear the costs of the appeal.
12. Upon identifying and considering the issues for determination, this court will in its analysis and determination consider the respective counsels' arguments as posited on the particular issue and also consider provisions of the law and judicial precedents that were relied upon to advance the arguments.

Issues for determination

13. As was stated in the case of Abok James Odera t/a A. J Odera & Associates vs. John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR, this court is alive that its role as a first appellate court is to re-evaluate, re-assess and re-analyze the record and then determine whether the conclusions reached by the learned trial magistrate stand or not and give reasons either way.
14. Turning to the matter at hand, I have carefully considered the records, rival submissions, provisions of law relied upon, and judicial precedents cited and the issues for resolution are as follows: -
 - a. What was the nature of the respondents' cause of action?



- b. By the provisions of Section 3(3) of the Law of Contract, was it time barred?
- c. What orders should this court grant including an order as to costs?

Analysis and determination

- 15. These issues that have been earlier highlighted as arising for determination shall be dealt with together.
- 16. Before delving further, it is paramount to appreciate what a cause of action is. Black's Law Dictionary 11th Edn has defined a cause of action thus: -
 - “ 1. A group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person;”
- 17. I will also be guided by the Court of Appeal decision of D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another [1980] KECA 3 (KLR) which stated as follows:-
 - “ per Lord Pearson in Drummond-Jackson V.B.M.A. (1970) 1 W.L.R. 688 at p. 696.
 - “A cause of action is an act on the part of the defendant which gives the plaintiff his cause of complaint.” “
- 18. In his decision, the learned trial magistrate concluded the respondents' claim was on constructive trust. In concurring with this conclusion, the respondents' counsel argues the respondents' claim as evidenced by the plaint was on constructive trust.
- 19. Moreover, counsel argues by Section 3(4) of the Law of Contract Act, constructive trusts could not be subjected to the provisions of Section 3(3) of the Law of Contract Act.
- 20. With a contrary argument, the appellant's counsel argued the plaint demonstrates parties did not enter into a written agreement and that by Section 3(3) of the Law of Contract Act, this suit was unsustainable. Counsel argued this was so as the law required contracts for the disposition of an interest in the land to be in writing.
- 21. Given these counterarguments, this court is constrained to interrogate the plaint that was before the trial court and establish the cause of action as posited by the respondents. In doing so, this court will unravel whether the learned trial magistrate erred or not.
- 22. Thus, and in summary, the key paragraphs of the plaint allege that in March 2013, the respondents as purchasers sought to purchase land parcel no. Title no. Machakos Municipality Block1/716 (suit property) from the appellant who was its registered owner.
- 23. The plaint contends the agreed purchase price was kshs. 1,800,000/-. It avers towards its settlement, a sum of kshs. 1,000,000/- was paid to the appellant.
- 24. It asserts that moreover, an additional kshs.825,000/- was channelled towards settling the outstanding suit property's land rent and rates with the understanding an agreement for sale would be drawn by the appellant which was never to be.
- 25. They pleaded and particularized fraud and also asserted the appellant unjustly benefited from the profits of the sale. They sought several reliefs including an order of permanent injunction, constructive trust, declaration of breach of fiduciary duty or in the alternative, a refund of monies.



26. The plaint as drawn and reliefs sought therefrom show the appellant's causes of action are several in nature. Being privy that I am only dealing with an interlocutory ruling and the suit is yet to be heard, for now, I will restrain myself from making adverse comments.
27. Significantly, Section 3(3) and (4) of the [Law of Contract Act](#) states: -
- “No suit shall be brought upon a contract for the disposition of an interest in land unless—
- (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 by a witness who is present when the contract was signed by such party:
- Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the [Auctioneers Act](#) (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.
- (4) Subsection (3) shall not apply to a contract made in the course of a public auction nor shall anything in that subsection affect the creation or operation of a resulting, implied or a constructive trust” Emphasis added.
28. As earlier stated, the respondents' causes of action are several including fraud and constructive trust. Whether or not the claim of constructive trust has been drawn to the required standard is not the subject of this court's determination.
29. Be that as it may, in my honest view, had the appellant wholesomely considered the entire claim, I am sure he would not have filed the PO.
30. As properly emphasized by the learned trial magistrate, claims of constructive trust are exempted from the sphere of Section 3(3) of the [Law of Contract Act](#).
31. I must mention the learned trial magistrate erroneously referenced Section 4 (1) of the [Law of Contract Act](#) instead of the saving provision of Section 3 (4) of the [Law of Contract Act](#). For the reasons stated above, I must find the learned trial magistrate did not err.
32. Ultimately, I find and hold that this appeal is devoid of merit. I hereby dismiss the appeal and uphold the ruling of the learned trial court delivered on 4/12/2022 which dismissed the PO dated 14/04/2022.
33. Accordingly, the appeal fails and is hereby dismissed. It is trite law costs follow the event and being successful, I award costs to the respondents.

It is so ordered.

DATED AT MACHAKOS THIS 25TH DAY OF FEBRUARY, 2025

HON A. Y. KOROSS

JUDGE

25. 02.2025

Delivered virtually through Microsoft Teams Video Conferencing Platform



In the presence of;

Mr. Manyara for Appellant

N/A for 1st Respondent

N/A for 2nd Respondent

Ms Kanja- Court Assistant

