



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mmasi v Matayo (Environment and Land Appeal E053 of 2022)  
[2025] KEELC 565 (KLR) (13 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 565 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT AND LAND APPEAL E053 OF 2022  
DO OHUNGO, J  
FEBRUARY 13, 2025**

**BETWEEN**

**SAMWEL S. MMASI ..... APPELLANT**

**AND**

**HARON S MATAYO ..... RESPONDENT**

*(Being an appeal from the ruling and order of the Senior Principal  
Magistrate's Court at Butali (Hon. Z J Nyakundi, Senior Principal Magistrate)  
delivered on 10th November 2022 in Butali MCELC No. 19 of 2019)*

**JUDGMENT**

1. The background of this appeal is that the Respondent moved the Subordinate Court through Plaintiff dated 15<sup>th</sup> April 2019, which he filed on 23<sup>rd</sup> April 2019. He averred in the Plaintiff that on 12<sup>th</sup> July 1993, he entered into a sale agreement with the Appellant pursuant to which the Appellant sold to him 1 acre of the parcel of land known as North Kabras/Matsakha/782 (the suit property) at a consideration of KShs 30,250. That he paid to the Appellant a sum of KShs 22,000 on the date of execution of the agreement and a further KShs 2,000 on 14<sup>th</sup> September 1993, thereby leaving a balance of KShs 6,250. That since then, the Appellant refused to transfer the portion to him or to accept the balance of the purchase price.
2. Consequently, the Respondent sought judgment against the Appellant for transfer to him of the portion purchased and in the alternative, a refund of the sum paid at current price. He also sought costs of the suit.



3. The Appellant reacted to the suit by filing Notice of Preliminary Objection dated 2<sup>nd</sup> May 2019. The objection was pleaded as follows:

The defendant shall raise a preliminary objection to the plaintiff's suit on the following ground of law:

1. That the plaintiff's suit is statutory time barred under the [Limitation of Actions Act](#) Cap 22 Laws of Kenya.
  2. That the plaintiff is estopped from bringing this suit.
  3. That the plaintiff is guilty of laches.
  4. That this suit is frivolous, vexatious and is otherwise an abuse of the court process.
4. Upon hearing the objection, the Subordinate Court (Hon. ZJ Nyakundi, Senior Principal Magistrate) delivered ruling thereon on 10<sup>th</sup> November 2022. The Learned Magistrate held that the suit was statute barred. He then posed two other issues for determination: whether the Appellant should keep both the suit property and the money paid and who occasioned the breach of contract? In his final orders, he reiterated that the suit was statute barred and ordered the Appellant to "refund the purchase price at the current market price less the balance of KShs 6,250." He ordered that there be no order as to costs.
  5. Aggrieved with the outcome, the Appellant filed this appeal on 14<sup>th</sup> November 2022, through Memorandum of Appeal dated 14<sup>th</sup> November 2022. He prayed that the appeal be allowed and that the order of the Subordinate Court be set aside and the Respondent's suit be dismissed with costs. He also prayed for costs of the appeal.
  6. The following are the grounds of appeal, as listed on the face of the Memorandum of Appeal:
    1. That the learned trial Magistrate erred in fact and in law in entering judgment for the entire suit in a ruling on the Appellant's Preliminary Objection where parties had not been heard viva voce.
    2. That the learned trial Magistrate erred in fact and in law in finding merit in the Appellant's Preliminary Objection and simultaneously entering judgment against the Appellant.
    3. That the learned trial Magistrate erred in fact and in law in failing to consider the Appellant's pleadings, preliminary objection and submissions hence misdirecting himself and entering a judgment on unknown facts and/or legal principles.
    4. That the learned trial Magistrate misdirected himself in law and in fact in entering judgment on a limb that was neither pleaded nor proved.
    5. That the learned trial Magistrate erred in fact and in law in failing to find that the claim on the refund of the purchase price was statutorily time barred under the [Limitation of Actions Act](#) Chapter 22 of the Laws of Kenya.
    6. That the learned trial Magistrate erred both in fact and in law in ordering refund of the purchase price at current market rates when the plaintiff was in breach of the contract.
    7. That the decision of the learned trial Magistrate amounts to a mistrial.
    8. That the decision of the learned trial Magistrate has led to a miscarriage of justice.



7. The appeal was canvassed through written submissions. The Appellant filed submissions dated 21<sup>st</sup> July 2023. He posed the question of whether the Learned Magistrate could render himself on the merits of the case having arrived at the conclusion that the suit was statutorily time barred. The Appellant relied on the case of *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* (1969) EA 696 and proceeded to argue that it was not within the Learned Magistrate’s purview to make a determination on the substance of the suit since a successful preliminary objection disposes of the entire suit. He faulted the Learned Magistrate for reaching a conclusion that the Respondent had proved his case, yet the case had not been heard through oral evidence. He urged the Court to allow his appeal.
8. On his part, the Respondent filed submissions dated 14<sup>th</sup> August 2023. He agreed with the Learned Magistrate’s finding as to refund of the purchase price at current market rates and contended that the Appellant had breached the contract. He argued that his suit met the requirements of Section 3 (3) of the *Law of Contract Act* and added that the order made by the Subordinate Court was reasonable since the land was available for transfer, but the Appellant had refused to fulfil his obligations as a seller.
9. As the first appellate court in this matter, this court has an obligation to re-consider and re-evaluate the preliminary objection, the pleadings, and the material on record and to determine whether the conclusions reached by the Learned Magistrate are to stand or not and to give reasons either way. See *Selle & Another v Associated Motor Boat Co. Ltd & Others* (1968) EA 123 and *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR.
10. I have considered the grounds of appeal, the preliminary objection, the record of the Subordinate Court and the parties’ submissions. The Respondent has not filed any cross-appeal. Thus, the merits of the objection are not for determination in this appeal. The sole issue for determination is whether upon upholding the objection, the Learned Magistrate could validly make the additional orders that he made.
11. The law relating to preliminary objections was stated Law JA in *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* (1969) EA 696 thus:
 

So far as I’m aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.
12. By its very nature, a valid preliminary objection raises a jurisdictional issue. Jurisdiction is everything. 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 *Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service* [2019] eKLR.
13. The Supreme Court emphasised the centrality of jurisdiction in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR thus:
 

A Court’s jurisdiction flows from either the *Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.
14. Having concluded that he did not have jurisdiction, the Learned Magistrate could not validly make further orders in the nature of the reliefs that he granted. While it seems that the Learned Magistrate



was actuated by a desire to do justice, it must be remembered that in the judicial process, justice must issue from a court with jurisdiction. Without jurisdiction, what is thought to be justice will in fact be unjust.

15. The Learned Magistrate was deprived of jurisdiction by the *Limitation of Actions Act*. If only to assuage any fears that to reverse the decision of the Learned Magistrate would foment an injustice, suffice it to revisit the rationale behind statutes of limitation, which the Court of Appeal restated in *The German School Society & another v Ohany & another* [2023] KECA 894 (KLR) thus:

The statutes of limitations are enacted as a matter of public policy to fix a limit within which an action must be brought, or the obligation is presumed to have been paid, and is intended to run against those who are neglectful of their rights, and who fail to use reasonable and proper diligence in the enforcement thereof. The underlying purpose of statutes of limitation is to prevent the unexpected enforcement of stale claims concerning which persons interested have been thrown off their guard by want of prosecution.

16. The Respondent had an option to sue within time. Having failed to do so, the Appellant was entitled to seek refuge from the stale claim, behind the shield of the *Limitation of Actions Act*. That, too, is justice.
17. I find merit in this appeal, and I therefore allow it. I set aside the orders of the Subordinate Court and replace it with an order striking out the Respondent's case. The Appellant shall have costs of both this appeal and of the proceedings before the Subordinate Court.

**DATED, SIGNED, AND DELIVERED THROUGH MICROSOFT TEAMS, AT NYAMIRA, THIS 13<sup>TH</sup> DAY OF FEBRUARY 2025.**

**D. O. OHUNGO**

**JUDGE**

Delivered in the presence of:

No appearance for the Appellant

No appearance for the Respondent

Court Assistant: B Kerubo

