



**Munala v Bale & 4 others (Environment and Land Appeal E028 & E036 of 2023  
(Consolidated)) [2025] KEELC 581 (KLR) (13 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 581 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL E028 & E036 OF 2023 (CONSOLIDATED)  
MD MWANGI, J  
FEBRUARY 13, 2025  
(AS CONSOLIDATED WITH ELC APPEAL ELC E036 OF 2023)**

**BETWEEN**

**PATRICK MAKANGA MUNALA ..... APPELLANT**

**AND**

**SUPER KHALIF BALE ..... 1<sup>ST</sup> RESPONDENT**

**AGGREY NYANGONG ..... 2<sup>ND</sup> RESPONDENT**

**NATIONAL SOCIAL SECURITY FUND ..... 3<sup>RD</sup> RESPONDENT**

**NAIROBI COUNTY LAND REGISTRAR ..... 4<sup>TH</sup> RESPONDENT**

**ZAHRA HUSSEIN ISSE ..... 5<sup>TH</sup> RESPONDENT**

*(Being appeals against the decision of Hon. B.M Cheloti {PM} delivered on 29th  
September, 2023 at Milimani Commercial Courts Nairobi in Civil Suit No. E143 of 2020)*

**JUDGMENT**

**Background**

1. This judgment is in respect to two consolidated appeals; both being appeals from the judgement of Hon. B.M. Cheloti (PM) delivered on 29<sup>th</sup> September 2023 in Milimani Commercial Court Civil E 143 of 2020 (Patrick Makanga Munala –vs- Surer khalif Bale & others).
2. In ELCA E028/2023, the Appellant filed his appeal vide that memorandum of appeal dated 9<sup>th</sup> October 2023 which is premised on grounds that the Honorable trial court erred in law and fact;
  - a. When it failed to find that the Plaintiff's suit was merited and failed to grant all the orders. Further, it failed to find that the Plaintiff was the legal owner of L.R No. 97/21190/5180/



TASSIA yet he had paid the full amount required for award of certificate of ownership. It also erred when it found that the suit property belongs to the 1<sup>st</sup> Defendant and directed the 3<sup>rd</sup> Defendant to issue the 1<sup>st</sup> Defendant with an allotment letter for L.R No. 97/21190/5190/Tassia.

- b. When it failed to appreciate the Plaintiffs efforts in investing on the suit property by constructing and building a foundation at a cost of Ksh. 3,000,000/= so as to set up a permanent house on the suit property.
  - c. When it issued a permanent injunction restraining the Plaintiff or any person claiming under him from interfering with the 1<sup>st</sup> Defendant land L.R No. 97/21190/5190/Tassia.
  - d. When it failed to find that all the transactions by the 1<sup>st</sup> and 5<sup>th</sup> Defendants/Respondents at the office of the 3<sup>rd</sup> Defendant were done after the Plaintiff made the final payment to the 3<sup>rd</sup> Defendant.
3. The Appellant prays that the whole judgment, orders, and decree of the Lower Court delivered on 29<sup>th</sup> September 2023 be set aside and be substituted with a judgment, decree and order directing that the 3<sup>rd</sup> Defendant to issue the Appellant with a letter of allotment of the suit property being L.R 97/21190/5180 TASSIA. He further prays for an order of permanent injunction restraining the Respondents from encroaching on, trespassing on, wasting, damaging, alienating, transferring, selling or in any other manner interfering with the Appellant's rightful ownership, peaceful enjoyment and ownership of the suit property. He prayed for the costs of the appeal too.
4. In ELCA E036/2023, the Appellant is the National Social Security Fund (NSSF). On its part, NSSF filed a memorandum of appeal dated 25<sup>th</sup> October 2023 on grounds that the learned Magistrate erred in law and fact by;
- a. Holding that the Appellant owed the 1<sup>st</sup> Respondent a duty of care despite the fact that the Appellant never offered to sell the suit property to the 1<sup>st</sup> Respondent.
  - b. Failing to consider and appreciate the fact that the receipt issued to the 1<sup>st</sup> Respondent upon payment of Ksh. 550,000/= was for what purpose and or purchase of a property and in particular the suit property.
  - c. Holding that the Appellant took almost two years to notify the 1<sup>st</sup> Respondent that the suit property had already being purchased by the 5<sup>th</sup> Respondent yet there was no evidence to show that the Appellant sold and offered the suit property to the 1<sup>st</sup> Respondent.
  - d. Holding that the Appellant led the 1<sup>st</sup> Respondent to believe that he was the bona fide purchaser for value of the suit property yet the 1<sup>st</sup> Respondent pleaded that it was Bishop Lawi who showed him the property and informed him to deposit Ksh.550,000/= to the Appellant's account and not the Appellant. Additionally, it failed to appreciate that Lawi was neither an employee or agent of the Appellant.
  - e. Ignoring evidence of the 3<sup>rd</sup> Respondent's certificate of service showing that by the time its purported employee allegedly wrote the letter dated 2<sup>nd</sup> December, 2028 acknowledging 1<sup>st</sup> Respondent payment of Ksh.550,000/=, he had already retired from the Appellant's employment.
  - f. Ordering the Appellant to refund the 1<sup>st</sup> Respondent Ksh.550,000/= deposited in its account with interest at current market value from 27<sup>th</sup> November,2018 until full payment without any proof.



- g. Failing to appreciate that the 1<sup>st</sup> Respondent is not entitled to refund with interest because he deposited Ksh.550,000/= into Appellants account at his own instance.
  - h. Wrongly exercised her discretion by holding that the Appellant must meet costs of the 1<sup>st</sup> Respondent's suit at the trial court. Lastly, the findings on interest and costs were not judicious.
5. The Appellant seeks to set aside the judgment of the trial court as follows.
- i. The order directing the 3<sup>rd</sup> Respondent to refund the Appellant Kshs. 550,000/- being a refund of the amount deposited into the 3<sup>rd</sup> Respondent's account with interest at current market rate from the 27<sup>th</sup> November 2018 until payment in full be set aside and substituted thereof with an order directing the 3<sup>rd</sup> Respondent to refund the Appellant Kshs. 550,000/- being a refund of the amount he deposited into the 3<sup>rd</sup> Respondent's account without interest.
  - ii. The order directing the 3<sup>rd</sup> Respondent to meet the costs of the Appellant's suit be set aside.

### **Directions of the court**

6. The court's directions were that the consolidated appeals be heard by way of written submissions. The Appellant in ELCLA E028 of 2023 as well as the 1<sup>st</sup> and 3<sup>rd</sup> Respondents complied and filed their respective submissions in respect of the consolidated appeals which now form part of the record of this court.

### **Issues for determination**

7. This being a first appeal, the court has powers to reconsider and reevaluate the evidence before the trial court before making its conclusions as was stated in *Selle and Another Versus Associated Motor Boat Company Ltd & Others* [1968] EA, where the court held 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 conclusion. 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 in 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 on the case generally.”

8. The role of a 1<sup>st</sup> appellate court was further discussed by the Court of Appeal in *Peter M. Kariuki v Attorney General* [2014] eKLR, which held as follows;

“We have carefully considered the judgment of the trial court, the record of the proceedings, the submissions by learned counsel, both written and oral, as well as the authorities from different jurisdictions that were presented to us. We have also, as we are duty bound to do as a first appellate court, reconsidered the evidence adduced before the trial court and reevaluated it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence. See *Ngui v Republic*, (1984) KLR 729 and *Susan Munyi v Keshar Shiani*, Civil Appeal No. 38 of 2002 (unreported)”.



9. Having carefully considered the memoranda of appeal filed by the two Appellants, the record of appeal and the submissions by the parties filed herein, the main issue of course is whether either of the appeals is merited. In considering that issue, there are six pertinent issues arising from the appeals as follows:-
- i. Whether a suit for a claim of interest in land that does not comply with Section 3 (3) of the *Law of Contract Act* is legally viable.
  - ii. Whether the Appellant as a purchaser of land was obligated to conduct due diligence before embarking on a transaction to purchase land.
  - iii. Whether the 3<sup>rd</sup> Respondent owed the Appellant a duty of care.
  - iv. Whether the trial court exercised its discretion judiciously in awarding interest on the amount deposited by the Appellant into the bank account of the 3<sup>rd</sup> Respondent.
  - v. Whether the trial court exercised its discretion, judiciously by directing the Respondent to pay the costs of the Appellant's suit.
  - vi. Whether the court was justified in upholding the 1<sup>st</sup> Respondent's counterclaim.
  - vii. What orders should issue in respect to the costs of this appeal?

### **Analysis and determination**

#### **i. Whether a suit for a claim in interest in land that does not comply with Section 3 (3) of the *Law of Contract Act* is legally viable.**

10. From the plaint filed by the Appellant before the trial court and also his witness statement which he adopted as his evidence in chief before the trial court, the Appellant's testimony was that he was directed by Bishop Lawi to deposit the sum of Kshs. 550,000/- into the 3<sup>rd</sup> Respondent's account at Kenya Commercial Bank being the purchase price for the property, LR. No. 97/21190/5180. Bishop Lawi (now deceased) is the person who had allegedly introduced the Appellant to Kwa Ndege Self Help Group and informed him that the group was selling the land in conjunction with the 3<sup>rd</sup> Respondent. That was in the year 1998 according to the Appellant's testimony.
11. The Appellant deposited the money into the 3<sup>rd</sup> Respondent's account twenty (20) years later in the year 2018. No agreement for the sale of the suit property was entered into between the Appellant and the 3<sup>rd</sup> Respondent and or Kwa Ndege Self Help Group which was allegedly selling the property jointly with NSSF.
12. Section 3 (3) of the *Law of Contract Act* is explicit that;
- 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.



13. The mandatory provisions of Section 3 (3) of the Law of Contract Act are repeated verbatim in Section 38 (1) of the Land Act. The obvious import of the provisions is that a contract for sale of land that does not comply with the provisions is invalid and a suit premised on such a contract is untenable.
14. I agree with the holdings in the cases cited by the 1<sup>st</sup> and 3<sup>rd</sup> Respondents in that regard i.e. Silverbird (K) Limited –vs- Junction Limited & 3 others (2013) eKLR & Patrick Tarzan Matu & ano -vs- Shariff & others (2009) eKLR. A suit in contravention of Section 3 (3) of the Law of Contract Act must fail. The trial court was therefore justified to dismiss the Appellant’s claim for the suit property.

**ii. Whether the Appellant as a purchaser of land was obligated to conduct due diligence.**

15. The Court of Appeal in its judgment delivered on 26<sup>th</sup> July 2024 in the case of Said –vs- Shume & 2 others (Civil Appeal E050 of 2023) (2024) KECA 866 (KLR), reiterated on the obligation of a purchaser of land to conduct appropriate and adequate due diligence. The court made reference to the Supreme Court of Kenya (SCK) decision in Dina Management Limited –vs- County Government of Mombasa & 5 others Petition 8 (E010) of 2021 (2023) KESC 30 (KLR) where the SCK held that;

“...in order to be considered a bona fide purchaser for value, they must prove; that they acquired a valid and legal title. Secondly, they carried out the necessary due diligence.”

16. The Court of Appeal further referred to the Supreme Court of Uganda in Lwanga –vs- Mbiru & others (Civil Appeal No. 18 of 2022) (2024) UGSC 7, where the court re-affirmed the law of due diligence in land transactions holding that,

“Lands are not vegetables which are bought from unknown sellers. Lands are very valuable properties and buyers are expected to make thorough investigations not only on land but also of the owner before the purchase.”

17. The question in the mind of the court in this case is whether the Appellant herein conducted due diligence before depositing the sum of Kshs. 550,000/- into the account of the 3<sup>rd</sup> Respondent purportedly in purchase of the suit property. Did he care to establish whether the owner was keen on selling the land to him? Did he bother to establish whether the land was still on sale, 20 years after he was informed by his friend Bishop Lawi that it was on sale?

18. The Black’s Law Dictionary, 11<sup>th</sup> Edition defines due diligence as,

“...the diligence reasonably expected from and ordinarily exercised by, a person who seeks to satisfy a legal requirement or discharge an obligation also termed as reasonable diligence.”

19. Reasonable diligence on the other hand is;-

“ a fair degree of diligence expected from someone of ordinary prudence under circumstances like those in issue.”

20. The Appellant was obligated to exercise due diligence as well as reasonable diligence as an intending purchaser of land. That way he ought to have confirmed from the 3<sup>rd</sup> Respondent through its authorized officers that the land was indeed on sale before depositing the money into the bank account. He too ought to have questioned and sought to verify the information given by his friend Bishop Lawi. He should have demanded to know whether he was an agent or authorized officer of the 3<sup>rd</sup> Respondent.



**iii. Whether the 3<sup>rd</sup> Respondent owed the Appellant a duty of care as held by the trial court.**

21. I must confess that I am taken aback by that holding of the trial court. Having established that there was no sale agreement and or any relationship between the 3<sup>rd</sup> Respondent and the Appellant then there was no basis for that finding. The Appellant's claim was based on "an assumed contract of sale of land"; not a tort. Considering that there was no kind of relationship, between the 3<sup>rd</sup> Respondent and the Appellant; contractual or otherwise, then the 3<sup>rd</sup> Respondent owed no duty of care to the Appellant.

**iv. Whether the trial court exercised its discretion judiciously in awarding interest on the sum of Kshs. 550,000/- deposited by the Appellant into the bank account of the 3<sup>rd</sup> Respondent.**

22. The trial court having found that there was no contract between the 3<sup>rd</sup> Respondent and the Appellant rightly ordered for a refund of the sum of money deposited into the 3<sup>rd</sup> Respondent's account. It however ordered that the same be refunded with interest at the prevailing commercial rates from the date of deposit until payment in full.

23. The power of the court to award interest is provided for under Section 26 of the *Civil Procedure Act*. The Court of Appeal in the case of Kipchumba –vs- BOG Tambach Teachers Training College (Civil Appeal 100 of 2019) (2023) KECA 802 (KLR) (30<sup>th</sup> June 2023) (Judgment ), noted that courts have over time come up with several principles derived from the general rule in Section 26 of the *Civil Procedure Act*, which have over time acquired stable meanings. It stated that;

“The following three principles emerge from the section;-

First, the Trial Court has the discretion to award and fix the rate of interest provided that the discretion must be used judiciously. As a result of this discretion, an appellate court is enjoined to treat the decision by a trial court with utmost respect and should refrain from interference with it unless it is satisfied that the trial court proceeded upon some erroneous principle or was plainly and obviously wrong. Second, the court has discretion to award and fix the rate of interest to cover; the period from the date the suit is filed to the date when the court gives its judgment; and the period from the date of the judgment to the date of payment of the sum adjudged due or such earlier date as the court may, in its discretion fix. Lastly, section 26 of the Act is not applicable to the period before a suit is filed.”

24. The Court of Appeal held that interest prior to the date of the suit is a matter of substantive law and is only claimable where under an agreement there is a stipulation for the rate of interest, such as a contractual rate of interest or where there is no stipulation, but interest is allowable by mercantile usage, and proved or where there is a statutory right to interest, or where an agreement to pay interest can be implied from the course of dealings between the parties.

25. Regarding the rate of interest, the Court of Appeal made reference to practice direction No. 1 of 1982 and decreed that the rate of interest in the absence of a valid reason for ordering a higher or lower rate of interest, should be 12% per annum.

26. The plaintiff definitely did not prove why he would be entitled to interest at commercial rates. The trial court did not justify the award of a rate of interest higher or lower than 12% per annum.

27. Secondly, there was no justification whatsoever in granting the Appellant interest before the filing of the suit. The trial court does not seem to have given much thought to the prayer by the Appellant for interest at commercial rates from the date of deposit until payment in full. It is a matter of substantive law and no evidence was offered whatsoever to justify it at all.



28. The question for this court to consider is whether the Appellant was entitled to interest at all. The 3<sup>rd</sup> Respondent has submitted that the Appellant was not entitled to interest.
29. The fact that the plaintiff deposited the money into the account of the 3<sup>rd</sup> Respondent is not in dispute. Amongst the documents that the Appellant listed on his list of documents is a letter by the 3<sup>rd</sup> Respondent dated 21<sup>st</sup> January 2020 which was in response to a letter by the Appellant's lawyers. In the letter, the 3<sup>rd</sup> Respondent acknowledged the deposit of Kshs. 550,000/- but was categorical that it did not relate to the suit property.
30. Upon the Appellant filing his suit before the trial court, the 3<sup>rd</sup> Respondent should have offered to deposit the money in court or to refund it to the Appellant immediately. I have keenly perused the proceedings. The 3<sup>rd</sup> Respondent did not make such an offer.
31. It is my considered view, that the Appellant is entitled to interest on the amount but only from the date of filing suit until payment in full and at the court rate of 12% per annum.

**v. Whether the court exercised its discretion judiciously in directing the 3<sup>rd</sup> Respondent to pay the costs of Appellant's suit**

32. On the issue of costs, the 3<sup>rd</sup> Respondent submits that the trial court exercised its discretion wrongly in awarding costs to the Appellant, having found that its claim of ownership to the suit property was unmerited.
33. I agree with the Appellant. In the case of Party of Independent Candidates of Kenya & ano –vs- Mutula Kilonzo & 2 others (2013) eKLR, the court held that,

“It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is a matter in which the trial judge is given discretion. But this is judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at...In the second place, the general rule is that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.”

34. The circumstances of the case and the findings of the trial court dictated that each party (meaning the Appellant and the 3<sup>rd</sup> Respondent) bears its own costs. The Appellant's claim for land having failed, it could not be referred to as the successful party.

**vi. Whether the court was justified in upholding the counterclaim of the 1<sup>st</sup> Respondent.**

35. The 3<sup>rd</sup> Respondent being the registered owner of the suit property readily admitted having sold it to the 5<sup>th</sup> Respondent who in turn sold it to the 1<sup>st</sup> Respondent. The evidence availed before the court proved the 1<sup>st</sup> Respondent's case on a balance of probabilities. I uphold the decision of the trial court in that respect.

**vii. What orders should issue in regard to the costs of the appeal?**

36. Guided by the decision in the case of Party of Independent Candidates of Kenya (supra) and considering that overall circumstances of this case, I direct that each party bears its own costs.
37. The final orders therefore are;
  - A. The Appellant's appeal filed as ELCA E028 of 2023 is hereby dismissed.



- B. The 3<sup>rd</sup> Respondent's appeal filed as ELCA E036 of 2023 partially succeeds in the following terms.
- i. The orders by the trial court directing the 3<sup>rd</sup> Respondent to refund the Appellant Kshs. 550,000/- being a refund of the amount deposited into the 3<sup>rd</sup> Respondent's account with interest at current market rate from 27<sup>th</sup> November 2018 until payment in full be and is hereby set aside and substituted with an order directing the 3<sup>rd</sup> Respondent to refund the Appellant the sum of Kshs. 550,000/- being a refund of the amount deposited into the 3<sup>rd</sup> Respondent's account with interest at court rates from the date of filing suit until payment in full.
  - ii. The order directing the 3<sup>rd</sup> Respondent to meet the costs of the Appellant's suit before the trial court is set aside and substantiated with an order that each party (meaning the Appellant and the 3<sup>rd</sup> Respondent) bears its own costs.
- C. Each party in this appeal shall bear its own costs.

It is so ordered.

**DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 13<sup>TH</sup> DAY OF FEBRUARY 2025.**

**M.D. MWANGI**

**JUDGE**

In the virtual presence of:

Mr. Wang'ang'a for the Appellant

Mr. Omar for the 1<sup>st</sup> Respondent

Mr. Muuo h/b for Mrs. Mbabu for the 3<sup>rd</sup> Respondent

N/A by the 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents

Court Assistant: Mpoye

**M.D. MWANGI**

**JUDGE**

