



REPUBLIC OF KENYA



KENYA LAW
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**Kimaru v Salim (Civil Appeal E008 of 2021)
[2025] KEHC 4032 (KLR) (28 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 4032 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CIVIL APPEAL E008 OF 2021
AK NDUNG’U, J
MARCH 28, 2025**

BETWEEN

ANTHONY MUTAHI KIMARU APPELLANT

AND

ABDUL HAKIM OMAR SALIM RESPONDENT

*(Appeal from the judgment passed on 28/05/2021 in
Nanyuki CM Civil Case No. 142 of 2018- L Mutai (CM))*

JUDGMENT

1. The Respondent instituted a suit against the Appellant vide a plaint dated 02/07/2018 where he averred that through a sale agreement dated 01/12/2014, the Appellant sold to the Respondent a portion of land then described as Plot No F (a subdivision of L.R NO 10422/21) at an agreed consideration of Kshs.1,800,000/- and he made payments in accordance to the terms of the contract. It was also a term of the contract that the Appellant was to obtain the completion documents and the Respondent would pay the balance. That in blatant breach of the sale agreement, the Appellant sold the suit property to a third party and offered to refund the purchase price received from the Respondent. His claim against the Appellant was for payment of Kshs.4,000,000/- being compensation for the current market value of the suit land.
2. The Appellant on the other hand filed a statement of defence dated 07/08/2018. He admitted that indeed they executed the said agreement but it was the respondent who breached the terms of the contract by failing to pay the agreed deposit in full and due to that, he had no obligation to deliver the completion documents and therefore he was well within his rights as the registered owner to sell the property to any other willing buyer and that the Respondent was only entitled to a refund of the purchase price which he had already refunded.



3. The matter proceeded for hearing and the trial court delivered a judgment in favour of the Respondent and ordered payment of Kshs.1,645,000/- being the amount paid by the Respondent and Kshs.2,355,000/- being loss of bargain and costs of the suit.
4. Being aggrieved by the trial court's judgment, the Appellant appealed to this court vide a memorandum of appeal dated 19/06/2021 raising the following grounds of appeal;
 - i. The learned magistrate erred finding that there existed a sale agreement between the parties capable of being enforced.
 - ii. The learned magistrate erred in failing to find that the Respondent was in breach of the sale agreement and therefore could not enforce the same against the Appellant.
 - iii. The learned magistrate erred for failing to find that recession was one of the remedies available to the Appellant once the sale agreement between him and the Respondent was breached by the latter.
 - iv. The learned magistrate erred finding that the Respondent had proven his case to the required standards.
 - v. The learned magistrate erred in failing to find that the subject matter of the suit was not ascertainable and therefore the contract of sale was not enforceable in law as against the Appellant.
 - vi. The learned magistrate erred in awarding prayers that were not prayed for.
 - vii. The learned magistrate erred finding that the Respondent was entitled to loss of bargain whereas there was no evidence led to ascertain that fact.
 - viii. The learned magistrate erred in purporting to rewrite the contract between the parties and proceeded to find in favour of the Respondent which was a miscarriage of justice.
5. The appeal was canvassed by way of written submissions. I have had occasion to consider the written submissions by the parties herein including the cases cited. I have read through the pleadings, the evidence, the judgement and the entire record of the trial court.
6. I have noted that the dispute between the parties was on the breach of a contract of sale of land. Parties had entered into the said agreement and the Respondent sued the Appellant claiming breach of contract and demanding refund of the purchase price as well as compensation. Indeed, the case citation at the Magistrates' Court is ELC Suit No. 142 of 2018.
7. A preliminary and key issue arises as to whether this court has jurisdiction to hear this appeal. Article 165(5) of *the Constitution* provides that the High Court shall not have jurisdiction in respect of matters falling within the jurisdiction of the courts contemplated in Article 162(2). Article 162(2) of *the Constitution* provides that Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to the environment and use and occupation of, and title to land. Article 162(3) provides that Parliament shall determine the jurisdiction and functions of the Courts contemplated in Article 162(2). It was on the basis of this provision that Parliament enacted the *Environment and Land Court Act*. The object of the Act is stated as follows:

“An Act of Parliament to give effect to Article 162(2)(b) of *the Constitution*; to establish a superior court to hear and determine disputes relating to the environment and the use and



occupation of, and title to land, and to make provision for its jurisdiction, functions and powers, and for connected purposes”

8. In Section 13, the Act provides that:

1. The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
2. In exercise of its jurisdiction under Article 162 (2) (b) of *the Constitution*, the Court shall have power to hear and determine disputes?
 - a. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - b. relating to compulsory acquisition of land;
 - c. relating to land administration and management;
 - d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - e. any other dispute relating to environment and land.

.....

5. In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—
 - a. interim or permanent preservation orders including injunctions;
 - b. prerogative orders;
 - c. award of damages;
 - d. compensation;
 - e. specific performance;
 - f. restitution;
 - g. declaration; or
 - h. costs.

9. Courts have over time identified the correct approach to determine the appropriate court to hear land matters by inquiring into what the is the most substantial question or issue presented in the controversy. In *Suzanne Achieng Butler & 4 others v Redhill Heights Investments Limited & another* [2016] eKLR held that;

When faced with a controversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the Courts utilize the Pre-dominant Purpose Test: In a transaction involving both a sale of land and other services or goods, jurisdiction lies at the ELC if the transaction is predominantly for land, but the High Court has jurisdiction if the transaction is predominantly for the provision of goods, construction, or works. The Court must first determine whether the pre-dominant purpose of the transaction is the



sale of land or construction. Whether the High Court or the ELC has jurisdiction hinges on the predominant purpose of the transaction, that is, whether the contract primarily concerns the sale of land or, in this case, the construction of a townhouse. Ordinarily, the pleadings give the Court sufficient glimpse to examine the transaction to determine whether sale of land or other services was the predominant purpose of the contract. This test accords with what other Courts have done and therefore lends predictability to the issue. (emphasis added).

10. In the instant case, the subject of the dispute is regulated by the [Land Registration Act](#) of 2012 and the [Land Act](#) of 2012. The [Land Registration Act](#) provides for both disposal of interests in land and for transfers. These provisions are in Part III of the Act. The [Land Act](#) also covers the same matters. Section 38 of the [Land Act](#) covers validity of contracts in sale of land, while section 40 provides for damages for breach of a contract of sale of land, section 41 provides the procedures for possession and section 42 provides the reliefs against rescission of contract. Sections 43 to 48 of the [Land Act](#) deal with transfer of interests in land.
11. A determination of the question as to whether there was a valid sale of the registered land, whether there was breach by the Appellant, and whether the Respondent is entitled to the remedies that were granted by the trial court, is, in my view, well outside the jurisdiction of the High Court. Even looking at the submissions before this court, it is clear that the dispute is purely a land dispute and going by the authority of Suzanne Achieng Butler as quoted above, a dispute over a sale of land lies with the land court which has powers to grant remedies sought by the Respondent before the trial court as stipulated in section 5 of the [Environment and Land Court Act](#) as quoted above.
12. This position is buttressed in Philip Jalang'o v Ryan Properties Limited [2020] eKLR where the court held thus;

“William R. Anson in Principles of the Law of Contract 362 n. (b) (Arthur L. Corbin ed., 3d Am. ed.1919) expounded that by “rights of property” the court meant to include under the term chose in action rights under a contract and rights of action arising from breach of contract. Based on this definition then the Plaintiff’s claim qualifies as a chose in action under Section 13 of the ELC Act and it would be the ELC and not the High Court to try cases relating to rights under contracts for the sale of land and rights of action arising from breaches of contracts over land.”
13. Further on the matter, in Peter Mukhunya Maloba v Dennis Kusinyo [2020] eKLR the court was of the view that;

“The dispute that was before the trial court related to sale of land, which is regulated by the [Land Registration Act](#) and the [Land Act](#). Contracts relating to sale of land are about title, for the agreement concerns conveyance of the title in the land from the vendor to the purchaser. After sale, transfer should follow. All these processes are regulated and governed by the [Land Act](#) and the [Land Registration Act](#), and any dispute arising from the same ought to be a matter for resolution by the Environment and Land Court, as envisaged by the [Land Act](#) and the [Land Registration Act](#).”
14. The predominant purpose of the alleged contract in the present case was solely the sale and purchase of land. This court as constituted lacks the requisite jurisdiction entertain this appeal.
15. It is trite law that jurisdiction is at the core of exercise of power by a court. Where there is no jurisdiction the court cannot exercise power without violating the principles of the rule of law and legality. The



Court of Appeal in Owners of the Motor Vessel “Lillian S” vs. Caltex Oil (Kenya) Ltd [1989] eKLR, stated:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

16. It is trite that the jurisdiction of a Court can neither be implied nor conferred by agreement of parties, by judicial craft or legal sophistry, it must be expressly provided for in *the Constitution* or in the statute. This was the holding of Supreme Court in the case of, Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, where it held, that:

“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. We agree with counsel for the first and second Respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceeding.

17. From the foregoing, this appeal is improperly before the court for want of jurisdiction. I therefore must down my tools. So then, which way this appeal?

18. It is apparent that filing of this appeal was an administrative lapse in which the court itself cannot be completely absolved. Sending away the parties from the seat of justice would not serve the interests of justice.

19. The order that commends itself is that the appeal herein should be placed before the environment and land court for disposal. Towards that end, I direct that the matter be transferred to the ELC court for further dealing.

20. The matter shall be mentioned before the Deputy Registrar of that court for directions on when the parties would appear before the Judge ELC.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 28TH DAY OF FEBRUARY 2025

A.K. NDUNG’U

JUDGE

