



REPUBLIC OF KENYA



**KENYA LAW**  
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**Rwimbo v Gachagua (Civil Appeal 7 of 2018)  
[2025] KEHC 5130 (KLR) (30 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5130 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NANYUKI  
CIVIL APPEAL 7 OF 2018  
AK NDUNG'U, J  
APRIL 30, 2025**

**BETWEEN**

**SALLY NJERI RWIMBO ..... APPELLANT**

**AND**

**FRANCIS KIURA GACHAGUA ..... RESPONDENT**

*(Appeal from the decree in Nanyuki CM Civil Case No. 99 of 2011- L Mutai (CM))*

**JUDGMENT**

1. The Respondent instituted a suit against the Appellant vide a plaint dated 18/10/2011 where he averred that through a sale agreement dated 21/07/2008, he sold the suit property to the Appellant at a purchase price of Kshs.380,000/- which she paid in full. That it was the term of the agreement that the Appellant was to pay the outstanding rates and rents and charges for processing of lease certificate but the Appellant declined to comply with the said terms of the contract and she purported to alter the terms of the contract to imply that it was the Respondent who was supposed to pay the aforesaid charges. Due to this, he averred that he revoked the sale agreement by a letter dated 13/03/2009 and requested the Appellant to collect the purchase price which she refused to but demanded for Kshs.915,000/- instead of the purchase price she had paid.
2. He therefore prayed for an order of permanent injunction to restrain the Appellant from alienating, disposing off, selling or interfering with the ownership, use and possession of the Respondent of the suit property known as Unsurveyed Residential A2 Plot No. 21 Nanyuki Municipality (hereby referred as the suit property) and a declaration that the Appellant was only entitled to refund of the purchase price.
3. The Appellant on the other hand filed a statement of defence dated 01/11/2011. She admitted that indeed they executed the said agreement but she was to share the fee for processing the lease certificate and that it was a term of the agreement that all the outstanding rates and rents were to be cleared by



- the Respondent. She denied the allegations of breach of contract as was contained in the plaint and that she never made any agreement revoking the sale agreement hence the issue of refund did not arise.
4. The matter proceeded for hearing and the trial court delivered a judgment in favour of the Respondent and ordered that the suit property do revert to the Respondent and the Appellant was ordered to vacate the suit property and collect the purchase price from her advocate.
  5. 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 in acting suo moto and holding that the two sale agreements were null and void for she could not ascertain which is the genuine one and directing that the status quo ante be maintained which had not being sought by the Respondent or the Appellant.
    - ii. The learned magistrate misdirected herself in applying an erroneous standard of proof and failed to appreciate that the Respondent had failed to discharge the burden of proof placed upon him.
    - iii. The learned magistrate misdirected herself by failing to appreciate the totality of the evidence before her and in not considering the submissions propounded on behalf of the Appellant.
    - iv. The learned magistrate erred in failing to consider fully, adequately and/or at all the evidence placed before her and duly applying the law to the facts thereof.
    - v. The learned magistrate erred in reaching a conclusion that was contrary to the evidence before her and the relevant law on the same.
    - vi. The learned magistrate erred in holding that Plot Number Unsurveyed Residential A2 Plot No. 21 Nanyuki Municipality, the suit property should revert back to the Respondent and directing that the Appellant should vacate the suit property and collect the purchase price from her advocate.
  6. The appeal was canvassed by way of written submissions. I have considered the written submissions by the parties herein including the cases cited. I have read through the trial record and the judgment of the trial court.
  7. The Respondent in his submissions argued that this court has no jurisdiction to hear and determine this appeal for reason that the subject matter of the suit is predominantly for a transaction for purchase and sale of land which is within the ambit of the Environment and Land Court.
  8. As seen earlier, the pleadings and proceedings before the trial court were solely on breach of contract for sale of land, the suit property herein.
  9. 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”

10. 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.

11. Subsequent to the above section our Courts have identified the correct approach to determine the appropriate court to hear land matters by inquiring what the most substantial question or issue presented in the controversy is. The court 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).

12. In the instant case, the subject matter 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.
13. A determination of the question as to whether which agreement was genuine, whether the respondent revoked the agreement, whether there was breach of agreement is in my view well outside the jurisdiction of the High Court. Even looking at the submission before this court, they clearly show that the dispute is purely a land dispute and by going by authority of Suzanne Achieng Butler as quoted above, a transaction involving a sale of land lies with the land court which has powers to grant remedies that were sought by the Respondent before the trial court as stipulated in section 5 of the [Environment and Land Court Act](#) quoted above.
14. See also 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.”
15. Also, 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](#).”
16. The predominant purpose of the alleged contract in the present case was solely the sale and purchase of land. I am therefore convinced that this Court lacks the requisite jurisdiction to entertain this suit.



17. 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 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.”
18. I therefore must down my tools. So then, which way this appeal?
19. 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.
20. 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.
21. 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 30<sup>TH</sup> DAY OF APRIL 2025.**

**A.K. NDUNG’U**

**JUDGE**

