Kithongo v Nzioka & another (Environment and Land Appeal E035 of 2023) [2025] KEELC 2910 (KLR) (25 March 2025) (Judgment)

Neutral citation: [2025] KEELC 2910 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT AND LAND APPEAL E035 OF 2023

NA MATHEKA, J

MARCH 25, 2025

BETWEEN

WILBER MBALUKA KITHONGO ..... APPELLANT

AND

STEPHEN MUTISYA NZIOKA ..... 1ST RESPONDENT

CHARLES MUINDI MAINGI ..... 2ND RESPONDENT

JUDGMENT

1. The Appellant Wilber Mbaluka Kithongo appeals to the Environment and Land Court at Machakos against the Judgment of the Chief Magistrate's Court at Kangundo of the Hon. Ole Keiwua delivered on 26th October, 2023 in ELC Cause No. 72 o 2020 on the following grounds;

    1. The learned Magistrate erred in law and fact by allowing the Respondent's Plaint without considering all evidence on record

    2. The learned Magistrate erred in law and fact by dismissing the Appellant's Counter-claim without considering all evidence on record.

    3. The learned Magistrate erred in law and fact by failing to consider all material facts relevant to the case.

    4. The learned Magistrate erred in law and fact by failing to consider that the issue in dispute is time barred as it offends the Limitations of Action Act Cap 22 Laws of Kenya.

    5. The learned Magistrate erred in law and fact by failing to appreciate that there were two Sale Agreements duly executed be Appellant herein and the late Malia Kanini in the years 1994 and 1996 which bore similarities and were duly executed by the parties and attested accordingly with all the parties therein having fulfilled their obligations.

6. The learned Magistrate erred in law and fact by failing to appreciate that the reason the Appellant failed to provide witnesses to the Sale Agreement executed in the year 1996 was because the witnesses were deceased which evidence was corroborated by PW2 during the hearing.

7. The learned Magistrate erred in law and fact by arguing that the Appellant had not brought witnesses in support of his case whereas the Appellant did call two witnesses in support of his case.

8. The learned Magistrate erred in law and fact by failing to appreciate that the Agreement entered on 2nd May, 1996 was valid.

9. The learned Magistrate erred in law and fact by failing to appreciate that any party to a contract upon satisfying the terms of a contract always has a legitimate expectation to enjoy the proceeds of the contract in spite of death of either of the party and that the death of a party to a contract does not ordinarily at all times vitiate or terminate the contract.

10. The learned Magistrate misapprehended the law by arguing that the Appellant had not proved that he had bought the 7.6 acres vide the Agreement dated 2nd May, 1997 because the seller died in the same year of the sale.

11. The learned Magistrate erred in law and fact by failing to take note that there was no pleading or evidence led by the Respondents on any vitiating factor which would otherwise have affected the Agreement dated 2nd May, 1996.

12. The learned Magistrate erred in law and fact by failing to appreciate that besides the Sale Agreement entered into between the Appellant and the late Malia Kanini, the said Malia Kanini proceeded to transfer the land at the offices of Muka Mukuu Farmers Co-operative Society into the name of the Appellant.

13. The learned Magistrate erred in law and fact by falling to take cognizance that the Respondents together with their witnesses were incredible witnesses taking note of the inconsistencies as well contradictions in the pleadings and testimonies on the key issues of the land bought in 1994 with regard to the size of the land and when the Appellant took possession.

14. The learned Magistrate erred in law and fact by failing to take cognizance that the disputants to the Agreement dated 2nd May, 1996 were not witnesses to the Agreement dated 8th August, 1994 and that in the two Agreements the late Malia Kanini chose at least one of her sisters as a witness.

15. The learned Magistrate erred in law and fact by failing to take cognizance that the 1st Respondent was guilty of impersonation on matters relating to this matter.

16. The learned Magistrate erred in law and fact by failing to recognize that the 2nd Respondent, who claims to have bought the land in 2015, has no evidence by way of a valid Agreement to show that he bought the contested land.

17. The learned Magistrate erred in law by failing to properly interprete and apply the rules of evidence.

The Appellant prays that this Honourable Court be pleased to issue orders;

1. That the Appeal be allowed and the orders issued by the learned Magistrate on 26th October, 2023 set aside.

2. That the Honourable Court do evaluate all the evidence on record and Appellant's Counter-claim dated 23rd September, 2020 be allowed.

3. That the Appellant be granted the costs of the Appeal.

2. This court has considered the evidence and the submissions therein. This is the first appeal, the primary role of the court is to re-evaluate, re-assess and re-analyze the evidence on record and decide as to whether the conclusion reached by the learned magistrate was sound, and give reasons either way. This duty was emphasized by the Court of Appeal in Mbogo and another vs Shah (1968) EA 93 where it was held that;

> I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matter on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is for the company to satisfy this court that the judge was wrong and this, in my view it has failed to do."

3. In the trial court, the appellant/defendant averred that on the 8th August 1994 he acquired from one Malia Kanini Nzioka a portion of 21/2 acres the suit land parcel No. 19-07 for a consideration of Kshs. 18,000/=. He produced a copy of the sale agreement dated 8th August 1994 and transfer between the Malia Kanini Nzioka and himself. The appellant further testified that on the 2nd May 1996 he bought the remaining portion of 7.9 acres for consideration of Kshs. 50,000/= from the Late Malia Kanini He produced a copy of the sale agreement dated 2nd May 1996 and transfer between the Malia Kanini Nzioka and himself. The appellant testified that the Society also confirmed that he bought the land. DW2, Michael Mwanzia corroborated his evidence and stated that the Society had ruled that the suit property belonged to the appellant. He produced the proceedings and the determination DEx 4 & 8. The appellant testified that he had been in actual possession of the suit land for over twenty years since 1998. DW3 the forensic expert testified that the thumbprint in the IDs matched that of the Land Consent Board forms. The appellant states that the suit is therefore barred by the statute of limitation.

4. The 1st respondent admits that on the 8th August 1994 the late Kanini Nzioka sold a portion of the suit land measuring 21/2 acres from her share of plot No. 1481(19-071) under a sale agreement dated the same date for a consideration of Kshs. 18,000/= to the appellant. That the said portion was clearly demarcated and the appellant took possession and there was never any dispute. However, after the passing away of the Late Malia Kanini Nzioka the appellant claimed he had bought the entire parcel. That at the time of the purchase the 2nd respondent and his predecessor who sold the land to the 2nd respondent after buying it from the late Malia Kanini Nzioka had occupied the land established their homes and buried relatives thereon. The remaining sections were being cultivated by the 1st respondent's family.

5. The 2nd defendant stated that the late Malia Kanini Nzioka sold a portion of the suit land to his brother in the year 1993 as per the sale agreement dated 9th October 1993. The 2nd defendant/respondent was enjoined into the suit through third party proceedings. His brother sold the land to him through an agreement dated 4th August 2002. That his sister in law was buried there in the year 1997 and the appellant did not object.

6. The preliminary issue to be determined in this appeal is whether the action in this suit is time barred. The appellant submitted that the suit is founded on contract and in accordance with section 4(1) of

the *Limitation of Actions Act*, it ought to have been instituted within a period of six years from the date when the cause of action accrued. The said section provides as follows:

Section 4(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued:

a) Actions founded on contract

7. The purpose of the Law of Limitation was stated in the case of Mehta vs Shah (1965) E.A 321, as follows;

> The object of any limitation enactment is to prevent a Plaintiff from prosecuting stale claims on the one hand, and on the other hand protect a Defendant after he has lost evidence for his defence from being disturbed after a long lapse of time. The effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case."

8. In the case of Gathoni vs Kenya Co-operative Creameries Ltd (1982) KLR 104, the Court of Appeal held as follows;

> ...The Law of Limitation of Actions is intended to protect Defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending Plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest."

9. A suit barred by limitation is a claim barred by law, hence by operation of law, the Court cannot grant the relief sought. In the case of Iga vs Makerere University (1972) EA, the Court had this to say on the Law of Limitation;

> A Plaint which is barred by limitation is a Plaint barred by law. Reading these Provisions together it seems clear that unless the Applicant in this case had put himself within the limitation period by showing grounds upon which he could claim exemption, the Court shall reject his claim. The Limitations Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for and when a suit is time barred the Court cannot grant the remedy or relief sought."

10. Section 4 of the *Limitation of Actions Act* provides that an action based on contract may not be brought after the lapse of 6 years from the date the right of action accrued to the plaintiffs/respondents.

11. In my view, this suit required a trial to ascertain as to when the Plaintiff discovered the contract or the fact that he would not get any ownership and I rely on the authority of Justus Tureti Obara vs Peter Koipetai Nengisoi (2014) e KLR where Okongo J. Stated that;

> .....The proviso to section 26 (a) of the *Limitation of Actions Act*, Cap. 22, Laws of Kenya provides that where an action is based on the fraud of the defendant or his agent, the period of limitation does not begin to run until the Plaintiff has discovered the fraud or could with reasonable diligence have discovered it. As to when the Plaintiff herein discovered the fraud alleged against the defendant is a matter to be ascertained at the trial."

12. Further, Section 7 of the *Limitation of Actions Act* provides as follows;

> An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."

13. I therefore find that this suit is not time barred. The other issue in this appeal is whether the appellant had discharged the burden of proving that the he purchased the suit land and it was the burden of the defendant to satisfy the court on that issue. As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of section 107(1) of the *Evidence Act* (Chapter 80 of the Laws of Kenya), which provides:

> 107.(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

14. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence (See Isca Adhiambo Okayo vs Kenya Women's Finance Trust KSM CA Civil Appeal No. 19 of 2015 (2016) eKLR). That is captured in sections 109 and 112 of the Act as follows;

> 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
>
> 112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

15. The well-known aphorism, "he who asserts must prove" was augmented by the Court of Appeal in Jennifer Nyambura Kamau v Humphrey Mbaka Nandi NYR CA Civil Appeal No. 342 of 2010 (2013) eKLR as follows;

> We have considered the rival submissions on this point and state that section 107 and 109 of the *Evidence Act* places the evidential burden upon the appellant to prove that the signature on these forms belong to the Respondent. Section 107 of the *Evidence Act* provides that "whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the *Evidence Act* provides, the burden lies on that person who would fail if no evidence at all were given on either side."

16. In their testimony DW1, DW2 and DW3 stated that the late Malia Kanini Nzioka sold the suit property to DWI on the 8th August 1994 a portion of 21/2 acres the suit land parcel No. 19-07 for a consideration of Kshs. 18,000/=. A copy of the sale agreement dated 8th August 1994 and transfer between the Malia Kanini Nzioka and himself was produced. Further testified that on the 2nd May 1996 DW1 bought the remaining portion of 7.9 acres for consideration of Kshs. 50,000/= from the Late Malia Kanini a copy of the sale agreement dated 2nd May 1996 and transfer between the Malia Kanini Nzioka was produced. There is no dispute as to the first agreement dated 8th August 1994. Indeed, the respondents testified that the appellant took possession and developed the area which was clearly demarcated in the first agreement of 8th August 1994 which was 21/2 acres. Be that as it may, the question in my mind is was the portion in the second agreement dated 2nd May 1996 available for sale at the time the agreement was entered to if at all?

17. The 2nd defendant/respondent stated that the late Malia Kanini Nzioka sold a portion of the suit land to his brother in the year 1993 as per the sale agreement dated 9th October 1993. The said brother Sammy Maingi took possession and constructed his home. The 2nd defendant resides there to date. When the

appellant bought his portion in 1994 he found them there. I find that the remaining portion which includes where the respondents are in occupation was not vacant and or available for sale in 1996 and the respondents are the beneficial owners. The appellant admitted during the trial that they had even buried their relative there in 1997. One wonders why the appellant never took possession of the entire suit land when the late Malia Kanini Nzioka was still alive. The appellant knew the respondents were on the suit land when he allegedly bought the additional parcel and never attempted to take possession until after the demise of the seller and when this suit was filed by putting in a counterclaim.

18. In the circumstances, this court is satisfied that the plaintiffs/respondents have not only occupied the suit property for more than 30 years and also before the second sale agreement in 1996 but also that the appellant/defendant has failed to establish his proprietorship interest over the extra 7.9 acres of the suit property as per the agreement dated 2nd May 1996 to the required standards. I find that the appellant did not present enough evidence before the learned magistrate to challenge the respondents' claim to the portion of the suit property within the confines of the law. The learned magistrate did not err in finding the appellant is not the legal of the suit property. I find no probable reason to disturb the judgement of the trial court and this appeal is dismissed with costs to the respondents.

    It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 25TH DAY OF MARCH 2025.

N.A. MATHEKA

JUDGE