



**Masila & another v Lukenya Ranching and Farming Co-operative
Society Limited & another (Environment and Land Appeal
75 of 2017) [2025] KEELC 2885 (KLR) (25 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 2885 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL 75 OF 2017
NA MATHEKA, J
MARCH 25, 2025**

BETWEEN

ROSE NDUNGE MASILA 1ST APPELLANT

SUSAN MUMBE MASILA 2ND APPELLANT

AND

**LUKENYA RANCHING AND FARMING CO-OPERATIVE SOCIETY
LIMITED 1ST RESPONDENT**

JOSEPH MUNYAO KIILU 2ND RESPONDENT

JUDGMENT

1. The 1st and 2nd Appellants above-named Appealed to the High Court of Kenya at Machakos from the Award and Decree of the Co-operative Tribunal in Co-operative Tribunal Case Number 297 of 2006 Nairobi dated 4th March, 2010 and set forth the following grounds of objection to the Decree appealed from namely;
 1. The Honourable Tribunal erred in law and in fact in failing to determine that the original copy of the Sale Agreement dated 16th January, 1985 made between the 2nd Respondent and the late John N.M Masila (deceased) relied upon by the Appellants and produced as an exhibit during the trial of the Co-operative Tribunal Case Number 297 of 2006 Nairobi was valid and legally binding between the said parties.
 2. The Honourable Tribunal erred in law and in fact in dismissing the Appellant’s claim in the Co-operative Tribunal Case Number 297 of 2006 Nairobi without any and/or any proper and due regard to the original copy of the Sale Agreement dated 16th January, 1985 made between the 2nd Respondent and the late John M. N. Masila (deceased) produced as an exhibit by the Appellants who relied on the same in support of their claim.



3. The Honourable Tribunal erred in law and in fact in holding that the 2nd Respondent and the late John M.N. Masila (deceased) had entered into a Sale Agreement on 16th January, 1983 when neither of the parties relied on nor exhibited any such Agreement.
4. The Honourable Tribunal erred in law and in fact in failing to hold that there was a material difference between the original copy of the Sale Agreement dated 16th January, 1985 made between the 2nd Respondent and the late John N.M. Masila (deceased) relied on and exhibited by the Appellants and the document marked “K” relied on and exhibited by the 2nd Respondent and thereafter make a determination as to their authenticity.
5. The Honourable Tribunal erred in law and in fact in arriving at the conclusion that a number of the “other membership plots” (the subject matter of the Co-operative Tribunal Case Number 297 of 2006 Nairobi) has “since changed hands and transferred to persons who are not parties to the suit” in absence of any and/or any sufficient evidence properly adduced before the Honourable Tribunal by the parties.
6. The Honourable Tribunal erred in law and in fact in failing to take into consideration the fact that Plot Number 417 (currently known as No. 3/3098) was transferred to Estate of the late John M.N. Masila (deceased) after the institution of Co-operative Tribunal Case Number 297 of 2006 Nairobi and the Appellant’s claim in respect of the same was accordingly not “superfluous” and/or “futile”.
7. The Honourable Tribunal erred in law and in fact in failing to hold that upon the due execution of the Application for transfer of both Plot Number 417 and membership Number 460 with the 1st Respondent , the 2nd Respondent had effectively transferred both Plot Number 417 and Membership Number 460 to the late John M.N. Masila (deceased) in accordance with the 1st Respondent’s practice with the 2nd Respondent accordingly thereafter surrendering the original share certificate for Membership Number 460 to the deceased, thereby rendering the deceased, the lawful proprietor of the aforesated Plot Number 417 and Membership Number 460.
8. The Honourable Tribunal erred in law in failing to hold that the 1st and 2nd Respondents had fraudulently continued with the process of allotting Plot Number 417 together with other Membership Plots (the subject of Co-operative Tribunal Case Number 297 of 2006 Nairobi) to the 2nd Respondent, despite the 1st Respondent having stopped all further dealings in the said plots and Membership Number 460.
9. The Honourable Tribunal erred in law and in fact in failing to take into consideration the evidence of the Appellants’ witness regarding the preparation of the original copy of the Sale Agreement dated 16th January, 1985 (relied on and produced as exhibit in support of the Appellant’s claim in Co-operative Tribunal Case Number 297 of 2006 Nairobi) by Mutua Ndunda Advocate (deceased) together with the subsequent execution and witnessing by the 2nd Respondent and the late John M.N. Masila (deceased) together with their respective witnesses.
10. The Honourable Tribunal erred in law and in fact in failing to take into consideration the fact that the original copy of the Sale Agreement dated 16th January, 1985 produced by the Appellant’s witness as an exhibit and relied on in support of the claim in Co-operative Tribunal Case Number 297 of 2006 Nairobi was not examined by the 2nd Respondent’s witness, a Document Examiner, whose report and/or evidence had no bearing whatsoever as regards



the authenticity and the legal validity of the Appellant's aforesaid original copy of the Sale Agreement.

11. The Honourable Tribunal erred in law and in fact in making several holdings and/or determinations regarding the content and/or preparation and/or execution and/or attestation and/or interpretation of a Sale Agreement allegedly entered into by the 2nd Respondent and the deceased on 16th January, 1983 without stating whether they were referring to the document marked "K" produced by the 2nd Respondent's witness, the Document Examiner as an exhibit or the original copy of the Sale Agreement dated 16th January, 1985 produced by the Appellant's witness as an exhibit.
 12. The Honourable Tribunal erred in law and in fact in holding that the Appellants had not proved the Claim in Co-operative Tribunal Case Number 297 of 2006 Nairobi on a balance of probabilities especially in light of the pleadings(s), Affidavits and evidence adduced by the Appellants and their witnesses in the said case and in further dismissing the aforesaid claim with costs.
 13. The Honourable Tribunal erred in law and in fact in failing to interpret the content of the original copy of the Sale Agreement dated 16th January, 1985 relied upon by the Appellants and produced as an exhibit in Co-operative Tribunal Case Number 297 of 2006 Nairobi in accordance with the applicable law.
 14. The Honourable Tribunal erred in law and in fact in failing to hold that the evidence adduced by the 2nd Respondent and his witness as regarding the document marked "K" produced as an exhibit, was full of inconsistencies and contradictions, thus lacking credibility and failing to meet the required standard of proof.
 15. The Honourable Tribunal erred in law and in fact in making the Award in Co-operative Tribunal Case Number 297 of 2006 Nairobi which decision is untenable and unjustifiable, in light of the totality of the pleadings and Affidavits filed and the evidence adduced by the parties therein together with the applicable law.
2. The appellants prayed for the following orders;
- a. The Award and Decree of the Co-operative Tribunal Case Number 297 of 2006 Nairobi dated 4th March, 2010 be set aside and/or vacated and/or reviewed.
 - b. The Awarded and Decree of the Co-operative Tribunal in Co-operative Tribunal Case Number 297 of 2006 Nairobi between the Appellants and the Respondents be substituted with an Award and Decree in favour of the Appellants as against the Respondents jointly and/or severally in terms of the prayers contained in the Appellants' Statements of Claim filed in the said case.
 - c. Costs of Co-operative Tribunal Case No. 297 of 2006 Nairobi and those incidental to and/or relating to the Appeal herein, all between the Appellants and the Respondents be awarded to the Appellants herein.
 - d. The Honourable Court be pleased to make and/or grant such other and/or further relief(s) that it may deem just and fit.
3. 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 v Shah* [1968] EA 93 where it was held that;
4. 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.”
 5. The matter began by a Statement of Claim in the Co-operative Tribunal at Nairobi under Case No. 297 of 2006. The matter concerns a Sale Agreement dated 16th January, 1985 between the late John Mathew Nzuki Masila and Joseph Munyao Kiilu for the purchase of Lukenya Ranching and Farming Co-operative Society Membership No. 460 entitling the member to Plot No. 417 (currently 3098) for a consideration of Kenya Shillings one hundred and forty five thousand (Kshs. 145,000/=). At the time of the said agreement, the said Membership Number entitled the holder thereof to Plot No. 417 and in absence of the title, the Membership Number stood as proof of ownership of the same. Subsequently, the said membership number was ascribed the following plots in the year 1999;
 - a. Plot No. 5 (Currently known as No. 3221) 40 acres
 - b. Plot No. 442 (Currently known as No. 316) 5 acres
 - c. Plot No. 747 (Currently known as No. 385) commercial plot 50ft by 100ft
 - d. Plot No. 37 Ngalalia commercial plot 50ft by 100ft
 6. The 2nd Respondent, Joseph Munyao Kiilu, on his part admits that he entered into an agreement for sale with the deceased only for the sale of Plot No 417 and only discovered in the year 1999 that the deceased had fraudulently altered his copy of the agreement by adding a Clause that he had bought the whole membership 460 together with Plot 417. The 2nd Respondent insisted that the agreement relied on by the estate of the deceased was fraudulent and that the amendments therein were not initialed by the parties. He further states that Plots 442, 747 and 37 were in existence as at 1985 and if that they were part of the sale, then the same would have been included in the Sale Agreement. They further contended that the original certificate of membership was only given for purposes of the transfer of Plot 417 and that in any case the transfer was not approved by the Co-operative hence rendering it a nullity. The Respondent further contended that the agreement needed the consent of the Land Control Board within six months of execution consequently rendering it a nullity.
 7. Be that as it may, the *Land Registration Act* is very clear on issues of ownership of land and Section 24(a) of the *Land Registration Act* provides as follows;
 8. Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”
 9. Section 26 (1) of the *Land Registration Act* states as follows;
 10. The Certificate of Title issued by the Registrar upon registration ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner... and the title of that proprietor shall not be subject to challenge except –
 - a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or



- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”
11. The *Law of Contract Act* clearly stipulates the requirements for a valid instrument to convey an interest in land. Section 3 (3) of the *Law of Contract Act* (Cap 23 of the Laws of Kenya) stipulates that;
12. 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. While Section 38 (1) of the *Land Act* states;
- Other than as provided by this Act or by any other written law, no suit shall be brought upon a contract for the disposition of an interest in land—
- (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 to by a witness who was present when the contract was signed by such party.
14. In *Harris JA in Garvey v Richards* [2011] JMCA 16 the court in considering the essential components of a contract reflected the following principles;
15. It is a well-settled rule that an agreement is not binding as a contract unless it shows an intention by the parties to create a legal relationship. Generally, three basic rules underpin the formation of a contract, namely, an agreement, an intention to enter into contractual relationships and consideration. For a contract to be valid and enforceable an essential terms governing the relationship of the parties must be incorporated therein. The subject matter must be certain. There must be positive evidence that a contractual obligation, born out of an oral or written agreement is in existence.”
16. The Supreme Court of United Kingdom in *RTS Flexible Systems Ltd v Moikerei Alois Muller GMBH & Co K. G.* [2010] UKSC 14;
17. The general principles are not in doubt, whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon them, by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precaution to a concluded and legally binding agreement.”
18. I have perused the said sale agreement dated 16th January 1985 and clause 1 states as follows;
- Whereas:-



1. The Vendor is the registered proprietor of all that parcel of land Plot No. 417 Membership No. 460 in Lukenya Ranching And Co-operative Ltd.
2. The Vendor has agreed to alienate, sale and relinquish all the interests and all the accretments pertaining to Plot No. 417 and the purchaser has agreed to purchase the same at a price of Kenya shillings One Hundred Fourty Five Thousand only (145,000/=).

Now This Agreement Witnesseth

1. That in consideration of Kenya shillings One Hundred Fourty Five Thousand only (145,000/=) and the vendor has agreed to sell the membership of the said Co-Operative Society and alienate and transfer the said plot into the purchaser's name”
19. The respondents argue that the agreement dated 16th January, 1985 was for the sale of Plot No. 417 and did not entitle the appellants the subsequent allotments. Just by looking with the naked eye of a layman one can see that the words in bold have been inserted by hand and have a different typed font. Indeed, this was confirmed by the document examiner. The question then in my mind is when was this amendment done and did the vendor consent to it?
20. It is a longstanding principle of law that parties to a contract are bound by the terms and conditions thereof and that it is not the business of the Courts to rewrite such contracts. In *National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd* [2002] 2 E.A. 503, [2011] eKLR the Court of Appeal at page 507 stated as follows;
- “A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.”
21. In *Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd* [2017] eKLR the Court of Appeal further stated that;
- “We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties, They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved.”
22. The Court has carefully perused the original sale agreement produced and noted that the same is in writing and is signed by the parties. It thus met the requirements of Section 3(3) of the Contract Act. Further the agreement for sale contains the names of the parties, the description of the property, the full purchase price and the conditions thereto. If the parties agreed to the amendments then they should have counter signed or entered further contracts or addendums for them to be enforceable. In the case of *Nelson Kivuvani v Yuda Komora & Another*, Nairobi HCCC No.956 of 1991, the Court held that;
- “the agreement for sale of land which contains the names of the parties, the number of the property, the purchase price and the conditions attached thereto, the obligations, express or implied, of each of the parties and signed and witnessed by two witnesses who signed against their names amount to a valid contract”.
23. In the case of *Shah v Guilders International Bank Ltd* [2003] KLR the Court in considering the terms of the parties contract stated;
- “The parties executed the same willingly and they are therefore bound by it.”



And in the case of *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another*, Civil Appeal No.95 of 1999 [2001] KLR 112 [2002] EA 503, the Court held that;

A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved”.

24. The Appellants submitted that they are administrators of the estate of the deceased and sue as administrators’ ad litem intestate. The Claimants contend that the agreement dated 16th January, 1985 was for the sale of Plot No. 417 and the membership 460 entitling the deceased to the subsequent allotments. The Claimants further contended that the deceased continued to occupy and construct a house on Plot No 417 where he continued to reside until his untimely death on 8th April, 2006. They contended that the Respondents colluded to fraudulently and illegally have the subsequent plots allotted to the 2nd Respondent Joseph Munyao Kiilu. They continued to seek injunctions against the Respondents in opposition to the alienation of the suit plots and a declaration that the deceased was entitled to membership 460 together with all the subsequent plots therein. They adduce evidence of the Sale Agreement, executed transfer documents and the original certificate of membership. Section 109 of the *Evidence Act* Cap 80 is clear that;

“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.”

25. The well-known mantra “he who asserts must prove.” Was well pointed out by the Court of Appeal in *Jennifer Nyambura Kamau v Humphrey Mbaka Nandi* [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.”

26. In *James Muigai Thungu v County Government of Trans-Nzoia & 2 others* (2022) eKLR it was held that;

It is now settled law that whosoever asserts the existence of a legal right or liability is vested with the burden to prove it except in so far as the law may expressly exempt him or her. Section 107 of the *Evidence Act* Chapter 80 Laws of Kenya succinctly states:

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.

Also, further, Section 108 of the Act states thus:

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

27. Again Section 109 of Act refers to the burden of proof of a particular fact. It states that:



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.

28. In the instant case I have carefully perused the agreement dated 16th January 1985 and it is clear that the purchase price was Ksh. 145,000/= for the parcel of land plot No. 417 and no shares were mentioned in the original agreement. It is instructive to note the additional plots were allocated long after the agreement was signed so how would the Respondents sell what they did not own? Clause 1 of paragraph 3 of the agreement has clearly been altered and/or amended to include “the membership of the said Co-operative Society and.....” this is not countersigned by the parties. DW2, Emmanuel Kenga the forensic document examiner confirmed that the typed prints were made by a different machine from the rest of the agreement. I also noticed that the line spacing was different and the said words were inserted in between the normal line spacing of the rest of the document. I find this alteration was not signed by the parties and I reject it. I have perused the Appellants’ copy of the said agreement and it shows only the advocates signature against the same. This is insufficient evidence to prove it was a valid and legal amendment and I do not accept it. Consequently, I find that the tribunal did not err in law and in fact when they failed to determine that the original copy of the Sale Agreement dated 16th January, 1985 made between the 2nd Respondent and the late John N.M Masila (deceased) relied upon by the Appellants and produced as an exhibit during the trial of the Co-Operative Tribunal Case Number 297 of 2006 Nairobi was valid and legally binding between the said parties. I find that the Appellants/Claimants have failed to prove their case on a balance of probabilities and find that the appeal is not merited and is dismissed with costs.

It is so ordered.

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

N.A. MATHEKA

JUDGE

