



Nzioki v Nzioki ((Sued as the administrator/ personal representative of the Estate of Benajmin Nzioki Kyungu)) (Environment and Land Appeal E19 of 2023) [2025] KEELC 2902 (KLR) (25 March 2025) (Judgment)

Neutral citation: [2025] KEELC 2902 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL E19 OF 2023**

**NA MATHEKA, J
MARCH 25, 2025**

BETWEEN

JANE MUENI NZIOKI APPELLANT

AND

SAMMY NZIOKI RESPONDENT

(SUED AS THE ADMINISTRATOR/ PERSONAL REPRESENTATIVE OF THE ESTATE OF BENAJMIN NZIOKI KYUNGU)

JUDGMENT

1. The Appellant herein named above being dissatisfied with the whole Judgment delivered by Honourable Ole Keiwua K.D. (MR) Chief Magistrate in Kangundo Chief Magistrate Court Appeals to this Honourable Court on the following Grounds:
 1. That the learned trial Magistrate erred in Law and fact and misdirected himself by failing to consider that the Appellant had discharged her burden of proof in proving that the she had acquired the suit property lawfully.
 2. That the learned trial Magistrate erred both in law and in fact by dismissing the Appellant's suit despite the fact that the same had been proved against the Respondent on a balance of probabilities.
 3. That the Honourable trial Court erred in law and fact by failing to enter judgment for the Appellant notwithstanding the fact that the Appellant's pleadings and evidence on record had established a strong case to warrant grant of the reliefs sought.
 4. That the Honourable Magistrate erred in law and fact by ignoring the evidence and the submissions adduced by the Appellant.



5. That the learned Trial Magistrate erred by ignoring the pleadings and the evidence adduced by the Appellant and hereby substituting his own position and thus arrived at a wrong decision.
 6. The Learned Trial Magistrate erred in law and fact by bailing to totally address the mind as regards the gravity of all the issues raised by the Appellant and the totality of evidence adduced by the Appellant.
 7. That the Learned Trial Magistrate erred in law and fact by failing to consider all the issues arising from the suit.
 8. That the trial court misdirected itself by relying on extraneous matters and or factors to dismiss an otherwise legally tenable claim by the Appellant.
 9. That the Judgment and Order of the trial magistrate was against the evidence before him.
2. The Appellant submitted that she is the purchaser and sole beneficial owner of the suit parcel of land known as Donyo Sabuk/Komarock Block 1/3837 having acquired the same from one Emmanuel Mutuku Munavu who had acquired the suit land from the registered owner Benjamin Nzioki Kyungu. The said Benjamin Nzioki Kyungu died before effecting the transfer to the appellant herein.
 3. The Respondents submitted that the Appellant is a beneficiary of the estate of the deceased Benjamin Nzioki Kyungu. That she now claims part of the estate as hers. That she has not produced any sale agreement and has raised the claim after 17 years after her father's demise. That the suit land is occupied by her mother and other family members.
 4. 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.”

5. In the trial court, the Appellant averred that the registered proprietor of Land Parcel Donyo Sabuk/ Komarock Block 1/3837 is the late Benjamin Nzioki Kyungu who was her father. That she acquired it from one Emmanuel Mutuku Munavu who had acquired the suit land from the registered owner Benjamin Nzioki Kyungu who had some financial difficulties. She bought the land from Emmanuel Mutuku Munavu who is her brother in law. She produced the search certificate dated 26th November 1997. A copy of the sale agreement dated 14th May 2004 between the Benjamin Nzioki Kyungu and Emmanuel Mutuku Munavu. A copy of the sale agreement dated 15th January 2019 between the Emmanuel Mutuku Munavu and herself. Having produced a search certificate of title, the Appellant established Benjamin Nzioki Kyungu as the registered proprietor of the suit property. A certificate of title is conclusive evidence of proprietorship. I find that he is the absolute and indefeasible owner of the suit property. Section 26 of the [Land Registration Act](#) states;

The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor 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, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, 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.”

6. The Respondent DW1 has stated that his father was very sick with cancer and the sale agreement is a forgery and none of the other family members were aware of the transaction. That his father had taken a loan and it had been paid in full. That the land belongs to the family. DW2 his brother corroborated his evidence. The parties are all siblings and/or related.

7. The main issue in this appeal is whether the Appellant had discharged the burden of proving that she purchased the suit land and it was the burden of the Appellant 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.

8. 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 v 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.

9. 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.



10. The testimony of PW 1 and PW 2 establishes that PW2 sold the suit property to PW1 but did PW2 have the capacity to do so? The late Benjamin Nzioki Kyungu as the registered proprietor is protected by the doctrine of indefeasibility of title as established under the Torrens system of registration anchored on Section 26 of the *Land Registration Act*. His title to the suit property as a registered proprietor remains indefeasible unless it is shown otherwise. The Appellant has not produced any documentary evidence that the seller had capacity to sell the suit land to her. Indeed, it is in evidence that the sale agreement between the Benjamin Nzioki Kyungu and Emmanuel Mutuku Munavu was dated 14th May 2004 and the sale agreement between the Emmanuel Mutuku Munavu and the Appellant was dated 15th January 2019, meaning, that the seller Emmanuel Mutuku Munavu sold the suit land long before he had acquired it. The Appellant also never pursued the transfer from 2019 until after 2006 when her father had died. I find that the Appellant did not present enough evidence before the learned magistrate to challenge the Respondent's title to the suit property within the confines of the law. The learned magistrate did not err in finding the Plaintiff is not the legal owner 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 Respondent.

It is so ordered.

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

N.A. MATHEKA

JUDGE

