



Kimiti Farmers Co-operative Society Limited v Makau & 2 others (Environment and Land Appeal E005 of 2024) [2025] KEELC 3484 (KLR) (29 April 2025) (Judgment)

Neutral citation: [2025] KEELC 3484 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL E005 OF 2024**

NA MATHEKA, J

APRIL 29, 2025

BETWEEN

KIMITI FARMERS CO-OPERATIVE SOCIETY LIMITED APPELLANT

AND

JOSEPH MUNGUTI MAKAU 1ST RESPONDENT

JULIUS MANTHI 2ND RESPONDENT

CHARLES MUTUKU 3RD RESPONDENT

JUDGMENT

1. The Appellant, Kimiti Farmers Co-operative Society Ltd being dissatisfied with the Judgment of Hon. Daffline Nayboke Sure Principal Magistrate delivered on the 29th January, 2024 wishes to appeal against the whole judgment on the following grounds;
 1. That the learned trial Magistrate erred in law and in fact in disregarding the Appellant's evidence on record and erroneously made the wrong finding.
 2. That the learned trial Magistrate erred in law and fact in finding that the 1st Respondent was the rightful owner of the Plot 99 against the weight of evidence.
 3. That the learned trial Magistrate erred in failing to appreciate the evidence of the defence witnesses and dismissing it without due regard to the law.
 4. That the learned trial Magistrate erred in finding that the Appellant had created the road on the 1st Respondent's plot when there was no evidence to support that finding.
 5. That the learned trial Magistrate erred in finding that the Appellant was responsible for the actions of the 2nd and 3rd Respondents and unlawfully awarded the damages against the Appellant who had not actively played any role in the events leading to the cause of action.



6. That learned trial Magistrate erred in law and in fact in awarding the general damages and damages for mental stress and anguish against the Appellant when no specific prayers for such award were pleaded and or contrary to the law.
 7. That learned trial Magistrate erred in law and in fact in holding the Appellant vicariously liable for actions of independent parties contrary to the established principles of law.
 8. That the learned trial Magistrate erred in law and in fact in failing to establish the adequacy of the service of summons to the Appellant.
 9. That learned trial Magistrate erred in law and in fact in failing to appreciate the relevant land and planning laws and arrived at the wrong decision.
2. The Appellant prays that the appeal be allowed and:-
1. The court be pleased to set aside the judgment delivered on the 29th January, 2024 and substitute it with an order dismissing the suit against the Appellant.
 2. The court be pleased to award cost of the Appeal and the lower court to the Appellant
 3. The courts do order any other relief or further relief as it may deem fit or necessary to grant.
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;
- “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.”
4. The matter began by a plaint dated 30th June 2021 where the Plaintiff/1st Respondent stated that he purchased the suit property Plot Number 99 Kamiti Farmers Cooperative Society from Pius Kyalo vide a sale agreement dated 12th August 1997. He paid consideration of Kshs. 12,000/= and was given vacant possession. Pius Kyalo was a shareholder and a founding member of Kamiti Farmers Cooperative Society. The Plaintiff paid the requisite transfer fees and in 2006 he was authorized to construct by the Appellant. In 2021 when he attempted to construct the 1st and 2nd Defendants chased his workers away and destroyed the Plaintiff's building materials stating that the Plaintiff was constructing on a road reserve. the Plaintiff moved to court and filed the suit. The 1st and 2nd Defendants filed a statement of defence but the Appellant filed no appearance despite being served with pleadings.
 5. The Appellant stated that they were not served with summons to enter appearance but where only served with orders to produce maps which were not in their hands but with the Director of survey after they were found to be erroneous. That the Plaintiff did not apply for judgement in default against the Appellant. That they became aware of the same after judgement. That the court after ordering a survey to determine whether the plot was on a road reserve or not abandoned the same after the report could not be produced.



6. It is the Plaintiff's contention that the Defendants despite being duly served with summons to enter appearance have failed to file a Defence within the requisite period and hence judgment should be entered in default of Defence.

7. Order 7, rule 1 of the Civil Procedure Rules provide that:

"Where a defendant has been served with a summons to appear he shall, unless some other or further order be made by the court, file his defence within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the defence and file an affidavit of service."

8. In the current scenario the Court takes judicial notice of the fact that the Defendants were duly served with summons to enter appearance through their advocates messrs Kinyanjui Njau Advocates on 26th May, 2017 but todate they have never filed a Defence and have neither divulged the reasons as to their failure to do so.

9. Further Order 10 rule 9 of the Civil Procedure Rules provides as follows:

"Subject to rule 4, in all suits not otherwise specifically provided for by this Order, where any party served does not appear the plaintiff may set down the suit for hearing."

Order 10 rule 10 of the Civil Procedure Rules further provides that

The provisions of rules 4 to 9 inclusive shall apply with any necessary modification where any defendant has failed to file a defence.

From the Plaint, the Plaintiff prays for judgement to be entered against the Defendants for:

1. A Declaration that the plaintiff is the legal and rightful owner of property known as Plot Number 99 Kimiti Farmers Cooperative Society Ltd.
2. An order of permanent injunction do issue restraining the Defendants by themselves, their servants, their agents or their proxies and representative from interfering with construction work, harassing and or intimidating workers thereon, trespassing thereon, interfering with possession thereto, trespassing thereon on all property known as plot No 99 Kimiti Farmers Cooperative Society Ltd.
3. In the alternative, an order do issue against the 3rd defendant, that it reimburses the plaintiff with a similar plot or land of equal value or reimburse the plaintiff as per the current market value of plot No 99 Kimiti Farmers Cooperative Society Ltd.
4. General Damages.
5. Special damages of kshs. 28,080/=.
6. Costs of the suit."

10. I have perused the affidavit of service dated 14th July 2021 sworn by Joseph Mutinda Munyasia and I am satisfied that the 3rd Defendant/Appellant was served but failed to enter appearance. From the prayers sought in the Plaint there was no claim for the liquidated. Insofar as the Defendants failed to file their Defence, I opine that this is a claim for both liquidated and unliquidated damages and since it is a land matter it was essential for the same to be set down for hearing on its merits which was done.



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;
14. 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.
15. In Harris JA in *Garvey v Richards* [2011] JMCA 16 the court in considering the essential components of a contract reflected the following principles;

“t 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;

“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.”
17. I am satisfied that the Plaintiff entered into a valid legal contract for the purchase of plot 99 Matuu Market from the said Pius Kyalo. The Plaintiff produced the sale agreement PEx1 and the transfer fee receipts PEx2. I have perused the court file and find that DW3 Gerald Katuku Kiswii, the Chairperson



of the Appellant gave evidence supporting the 1st and 2nd Defendants' evidence and participated in the trial. The Appellant cannot therefore state that they were unaware of the court case. From the exhibits produced the Plaintiff produced a receipt from the Appellant that Plot 99 Matuu Market was transferred to him. He also produced a letter dated 21st October 2006 from the Appellant authorizing him to build a shop on the suit plot. DW3 stated that the plot the Plaintiff bought does not exist as it is a road. He does not dispute that the Plaintiff bought a plot from Pius Kyalo and hence they offered him another plot elsewhere. DW1 Julius Mathii, the Chief testified that the suit plot is a 9 meter road. That the survey could not be done as there were eras with the maps which were returned to the survey office. DW2 Charles Mutuku, is the market chairman stated he stopped the construction by the Plaintiff as it was on the road to the church. The Defendants' defence is that plot 99 is a road reserve and not a plot.

18. 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."

19. The well-known mantra "he who asserts must prove." Was well pointed out by the Court of Appeal in Jennifer Nyambura Kamau vs 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."

20. 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.

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."



21. In the instant case I find that it was not for the Plaintiff to provide a survey report but the Appellant who was in possession of the maps of the said area and who did the subdivision. PW3 Simon Musau Kioko the founding Chairperson of the Appellant testified that indeed Pius Kyalo sold the suit plot to the Plaintiff and the management committee of the Appellant approved the same. At the material time the same was not a road reserve. it would appear to me that the plots were resurveyed in 2016 as per the sketch map of Matuu Trading Center. I find that the Appellant ought to compensate the Plaintiff if the said plot was no longer available. I find that the trial Magistrate did not err in finding that the Appellant had created the road on the Plaintiff's/1st Respondent's plot. I find that the appeal is not merited and is dismissed with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 29TH DAY OF APRIL 2025.

N.A. MATHEKA

JUDGE

