



REPUBLIC OF KENYA



**Kingwaa v Ikulume (Environment and Land Appeal E020 of 2022)  
[2025] KEELC 4943 (KLR) (3 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 4943 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
ENVIRONMENT AND LAND APPEAL E020 OF 2022**

**EO OBAGA, J**

**JULY 3, 2025**

**BETWEEN**

**AGNES NDUNGE JULIUS KINGWAA ..... APPELLANT**

**AND**

**MESHACK KIIO IKULUME ..... RESPONDENT**

*(Being an appeal from the judgment and decree of Hon. G. Sagero,  
Senior Resident Magistrate, Makueni delivered on 18th October, 2022  
in Chief Magistrate's Court, Makueni in MC ELC E036 OF 2021)*

**JUDGMENT**

**Introduction**

1. The Appellant had sued the Respondent before Makueni Chief Magistrate's Court in which she sought the following reliefs:
  - a. An order of permanent injunction prohibiting the Defendant from trespassing or in any way interfering with the Plaintiff's ownership and possession of land parcel Number Nzaiu/Mumbuni/21.
  - b. General damages for trespass.
  - c. Costs of this suit.
  - d. An order that the Officer Commanding Station (OCS) Makueni Police Station does ensure compliance with prayer No. 1.
2. The Respondent filed a defence and raised a counterclaim in which he sought the following reliefs:
  - i. A declaration be issued that the Defendant is the legal and rightful owner of a portion measuring three acres comprised in Nzaiu/Mumbuni/827.



- ii. An order do issue compelling the Plaintiff to execute all relevant transfer documents in favour of the Defendant within thirty (30) days from the date judgment and in the alternative, the executive officer to sign all necessary documents for effective and final transfer.
  - iii. Costs and interest of the counterclaim.
  - iv. Any other and/or further relief that this honourable court deems fit to grant.
3. After a full hearing, the trial magistrate dismissed the Appellant's suit and allowed the Respondent's counterclaim. This is what triggered the Appellant to file this appeal in which she raised the following grounds:
1. The learned trial magistrate erred in law and in fact in finding that the Respondent's alleged purchase of the suit land from the Appellant's deceased husband was legally enforceable when the same was not.
  2. The learned trial magistrate erred in law and in fact in finding that the Respondent purchased from the Appellant's deceased husband, the parcel of land claimed in the Respondent's counterclaim yet the purported seller had no interest in the said land capable of being passed on the Respondent.
  3. The learned trial magistrate erred in law and in fact in arriving at conclusions that offend the provisions of the law under Sections 25 and 26 of the *Land Registration Act* No. 3 of 2012 as severally enforced by the superior courts.
  4. The learned trial magistrate erred in failing to appreciate that the alleged sale of land between the Respondent and the Plaintiff's late husband, if any was null and void for want of consent from the land control Board as required under the provisions of the *Land Control Act*, Chapter 302 Laws of Kenya.
  5. The learned trial magistrate erred in law in failing to uphold the Appellant's registration as the absolute proprietor of the suit land contrary to the provisions of the law under Section 35 and 26 of the *Land Registration Act* No. 3 of 2012 as severally enforced by the superior courts.
  6. The learned trial magistrate erred in law when, having found as he did on the legality of the sale between the Respondent and the Appellant's deceased husband, failed to hold that he had no jurisdiction to determine issues touching on the property of a deceased person otherwise than within the provisions of the *Law of Succession Act*.
  7. The learned trial magistrate erred in law in equating possession which in any event was not proven, to amount to proprietary rights capable of passing interest in land in absence of any such proprietary rights.
  8. The learned trial magistrate erred in dismissing the Appellants' claim as he did.
  9. The learned trial magistrate erred in allowing the Respondent's counterclaim as he did.
  10. The learned trial magistrate erred in law and in fact in holding that both the Appellant and the late husband had beneficial interests in the suit property capable of being transferred to the Respondent yet no such interest existed.
  11. The learned trial magistrate erred in law and in fact for holding that the sale agreements were valid and legally binding yet they were entered into by someone devoid any interest capable of being transferred.



12. The learned trial magistrate erred in law and in fact for holding that the Appellant did not have any proprietary interests in the suit property contrary to the provisions of Section 23 of the *Land Registration Act* No. 3 of 2012 as severally enforced by the superior courts.
13. The learned trial magistrate erred in law failing to evaluate the totality of the evidence tendered by the Appellant.

## **Background**

4. A perusal of the record of appeal reveals the following facts which form the background of this appeal. On 27<sup>th</sup> February, 1973, the register in respect of LR No. Nzai/Mumbuni/21 was opened in the name of Kituku Makali. The land measured 8.0 hectares. On 18<sup>th</sup> October, 2007 the title deed in the name of Kituku Makali was surrendered and a fresh title was issued in the name of Joel Makali Mbuli. On 22<sup>nd</sup> June, 1980, Joel Makali Mbuli had entered into a sale agreement with Julius Kingwaa Mwanja for the purchase of LR. No. Nzai/Mumbuni/21 at a consideration of Kshs.33,000/=. Julius Kingwaa Mwanja is the husband of the Appellant. He died on 29<sup>th</sup> September, 2017.
5. On 6<sup>th</sup> January, 2010, the Respondent purchased one acre from Julius Kingwaa Mwanja. Again on 4<sup>th</sup> April, 2012, he purchased two acres from Julius Kingwaa Mwanja making a total of three acres. The Respondent was put in possession of his three acres which he had purchased.
6. After the demise of the Appellant's husband on 29<sup>th</sup> September, 2017, the Appellant approached Joel Makali Mbuli and asked him to transfer the land which her husband had purchased to her. Joel Makali Mbuli made a demand that the Appellant had to purchase the land afresh. As the Appellant had no option, she was forced to enter into an agreement with Joel Makali Mbuli for the purchase of the land at Kshs.200,000/=. The agreement was signed on 29<sup>th</sup> May, 2019.
7. On 1<sup>st</sup> October, 2019, the Appellant filed a suit against Joel Makali Mbuli where she sought an order of specific performance of the agreement of 29<sup>th</sup> May, 2019. An order of specific performance was given in favour of the Appellant on 11<sup>th</sup> August, 2020. The order was registered against the title on 17<sup>th</sup> August, 2020 paving way for the registration of the land in the Appellant's name on the same day. On 16<sup>th</sup> November, 2020, title for LR No. Nzai/Mumbuni/21 was closed on subdivision and resulted into Nzai/Mumbuni/827 (suit property) and Nzai/Mumbuni/828.
8. It is after the Appellant had secured title in her name that she moved to file a suit against the Respondent which suit she lost and the Respondent succeeded in his counterclaim.

## **Submissions**

9. The parties were directed to file written submissions on 5<sup>th</sup> February, 2024. The Appellant was to file and serve written submissions within 21 days. The Respondent was to file submissions within 21 days of being served. The Appellant filed her submissions dated 11<sup>th</sup> December, 2024. As at the time of writing this judgment on 12<sup>th</sup> June, 2025 the Respondent had not filed his submissions.
10. The Appellants reiterated the evidence adduced by the parties before the trial court. The Appellant identified two issues on which she submitted. The first is whether the Respondent was owner of 3 acres comprised in the suit property. The 2<sup>nd</sup> is whether an injunction ought to have been issued against the Respondent.
11. The Appellant submitted that the trial court's finding that the Respondent owned 3 acres within the suit property was an error which ought to be reversed. It was submitted that the seller had no capacity to sell the 3 acres.



12. The Appellant relied on Sections 24, 25, 26 and 28 of the *Land Registration Act*. She also relied on Section 107 of the *Evidence Act*. It was submitted that the burden of proof was on the Respondent to prove that he not only purchased land from the appellant's husband but also that her husband had the capability of selling it as its owner. The Appellant submitted that the suit property was all along registered in the name of Joel Makali Mbuli until it was transferred to her upon purchase vide agreement dated 29<sup>th</sup> May, 2019. She further submitted that the Respondent did not prove that her husband had purchased the suit property from Joel Makali Mbuli.
13. On the burden of proof, the Appellant relied on the case of Jennifer Nyambura Kamau –vs- Humphrey Mbaka Nandi (2013) eKLR where it was held as follows:

“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.”
14. The Appellant submitted that the trial magistrate's finding that her husband had beneficial interest in the land was wrong and was not based on evidence. The Appellant went on to submit that the particulars of fraud attributed to her by the Respondent were never proved and that the transfer of the suit property into her name was pursuant to a court order and further that the Respondent did not prove that there was a previous sale between her husband and Joel Makali Mbuli. The Appellant relied on the cases of Ndolo –vs- Ndolo (2008) 1KLR 742 and Vijay Morjaria –vs- Nansingh Madhusingh Darbar & Another (2000) eKLR.
15. The Appellant further submitted that if the Respondent had any claim, he should have pursued it against the estate of her late husband not against herself. The Appellant went on to submit that even if the Respondent had any claim against her husband, the agreement between the two was null and void as there was no consent of the Land Control Board. The Appellant relied on the case of Isaac Ngatia Kihagi –vs- Paul Kaiga Githui (2017) eKLR where the court held as follows:

“.....The provisions of Section 8(1) of the *Land Control Act* that provides that the High Court may notwithstanding that the period of six months having expired extend that period where it considers that there is sufficient reason to do so, upon such conditions, if any, as it thinks fit. The Plaintiff has not made any application seeking to extend time.

From the foregoing, it is apparent that the sale agreement between the Plaintiff and Defendant has been voided by failure of the parties to seek the consent of the Land Control Board within six months as prescribed by law..... The transaction herein is void and the Defendant cannot claim mesne profits based on the voided transaction. The transaction herein having become void the Plaintiff has no business remaining on the Defendant's land”.
16. On the issue of injunction, the Appellant submitted that she had proved that she is the registered owner of the suit property and that the Respondent has been interfering with it. She therefore submitted that the appeal ought to be allowed and an injunction issued in her favour as per the prayers in the lower court. The Appellant relied on the cases of Commercial Bank of Africa –vs- Hezekiah Kipkorir Maritim & 10 others 2019 eKLR where the Court of Appeal referred to the case of Nguruman Limited –vs- Jande Bonde Nielsen & 2 others (2014) eKLR and Mrao Ltd –vs- First American Bank of Kenya Ltd & 2 others (2003) eKLR.



## Analysis and Determination

17. I have considered the evidence adduced by the parties before the trial court, the grounds in the memorandum of appeal as well as the submissions by the Appellant. The issues which emerge for determination are firstly, whether the Appellant had proved that she was entitled to orders of injunction and general damages. Secondly, whether the Respondent had purchased 3 acres comprised in the suit property from the Appellant's husband and if so whether the Respondent could be compelled to transfer the 3 acres to the Respondent.
18. As a first appellate court my duty was well set out in the case of *Selle & Another –vs- Associated Motor Boat Co. Ltd & Others* (1968) EA 123 where it was held as follows:

“An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hammed Saif vs Ali Mohamed Sholan* (1955), 22 E.A.C.A. 270”.
19. The Appellant's claim before the trial court was based on alleged trespass to LR No. Nzaiu/Mumbuni/21 by the Respondent which trespass began in the year 2020 after the demise of her husband in 2017. It was her evidence that she was not aware of any agreement between her late husband and the Respondent. She testified that she was only aware of a loan which her late husband had taken from Respondent and which loan had not been repaid as at the time of her husband's demise.
20. It is her evidence that some documents were brought to her to sign which documents she signed. She stated that she did not know how to read but according to her the documents related to a loan which had been advanced to her husband by the Respondent. It was her evidence that her husband had no land to sell to the Respondent. She stated that she purchased the suit property from Joel Makali Mbuli on 29<sup>th</sup> May, 2019 and a title deed was issued to her through a court order.
21. The Respondent produced two agreements showing that he purchased one acre from the Appellant on 6<sup>th</sup> January, 2010 and two more acres on 4<sup>th</sup> April, 2012. During the first purchase, the price of an acre was Kshs.50,000/=. He paid a down payment of Kshs.26,000. The agreement was witnessed by the Appellant and one of her sons Mathew K. Kingwaa. The balance of Kshs.24,000/= was to be cleared by two instalments of Kshs.14,000/= and Kshs.10,000/=. The balance was cleared on 22<sup>nd</sup> January, 2010 and 2<sup>nd</sup> March, 2010 respectively.
22. During the second purchase of two acres, on 4<sup>th</sup> April, 2012, the purchase price per acre was Kshs.50,000/=. The Respondent paid a down payment of Kshs.76,000/=. Among the witnesses was the Appellant and her son David Nthuli. On 20<sup>th</sup> May, 2012 a further payment of Kshs.15,000/= was paid. The balance of Kshs.9,000/= was paid on 29<sup>th</sup> May, 2012.
23. The Respondent having cleared all what was due and having been put in possession, he could not be called a trespasser who was liable to be enjoined from accessing his 3 acres. The Appellant was seeking to enjoin the Respondent from LR No. Nzaiu/Mumbuni/21. She filed the suit before the lower court on 22<sup>nd</sup> September, 2021. As at this time, this property was non-existent the same having



- been closed on subdivision on 16<sup>th</sup> November, 2020 and new titles issued being Nzai/Mumbuni/827 (suit property) and Nzai/Mumbuni/828. There was no injunction which will have been issued as prayed by the appellant as court orders are never given in vain. No general damages would have been awarded against the Respondent as he was not trespassing on to a nonexistent parcel.
24. Even after the Respondent amended his counterclaim to show the correct position, the Appellant did not amend her plaint to reflect the correct position on what she wanted in her pleadings. The Appellant produced an order given on 28<sup>th</sup> July, 2020 and issued on 11<sup>th</sup> August, 2020 in MC ELC No. 2 of 2019 (Agnes Ndunge Julius Kingwaa –vs- Joel Makali Mbuli). This is the order which vested LR No. Nzai/Mumbuni/21 on the Appellant by way of specific performance.
  25. In the Respondent’s submissions before the trial court, the Respondent annexed a copy of the plaint in MC ELC 2 of 2019. In the plaint, the Appellant had averred that her husband had purchased parcel 21 at Kshs.33,000/= on 22<sup>nd</sup> June, 1980. When the Appellant approached Joel Makali Mbuli to transfer the land which her husband purchased, Joel told her that she had to purchase it afresh. This explains how she entered the agreement dated 29<sup>th</sup> May, 2019. It is therefore the height of dishonesty when she turns around to claim that her husband never purchased parcel 21 from Joel Makali Mbuli.
  26. DW2 Albert Mutiso Ndolo was the area chief in the year 2010 when the first agreement for sale between the Appellant’s husband and the Respondent was made. He signed the agreement of 6<sup>th</sup> January, 2010 as was the Appellant and her son Mathew Kingwaa. The Respondent called him to witness the agreement of 4<sup>th</sup> April, 2012 but he was unable to because he was engaged elsewhere. This agreement was however brought to his knowledge when the Appellant’s family went to him when they wanted to refund the money which the Respondent had paid.
  27. From the evidence adduced by the Respondent and his witnesses, he purchased 3 acres from the Appellant’s husband. The Appellant claimed that what she signed was relating to a loan which her husband had taken from the Respondent. This is not true as the agreements are clear on what was being sold. The Appellant claimed that she was illiterate and did not know how to read. This may be true but her sons were present and signed the two agreements. There is no evidence on record that they too did not know how to read.
  28. It is clear that the Appellant and her children particularly those who were privy to the agreements later turned and signed a letter addressed to the assistant chief in which they were alleging that the Respondent was trespassing on the Appellant’s land. They wanted to refund a loan allegedly taken by their father from the Respondent. This was part of the conspiracy by the Appellant and her children to disown the agreements signed in 2010 and 2012.
  29. The Appellant was trying to disinherit the Respondent by entering into the agreement of 29<sup>th</sup> May, 2019 and claiming that the Respondent started trespassing on her land in 2020 after the demise of her husband. The evidence on record shows that the Respondent had been in occupation of the suit property since 2010 when he purchased the first acre and all through to 2012 when he purchased the additional two acres.
  30. The registration of the suit property in the Appellant’s name did not defeat the interest of the Respondent which had crystallized before the Appellant’s husband died. This is a clear case where the doctrine of constructive trust is applicable. Black’s Law Dictionary, 9<sup>th</sup> Edition defines a trust as “the right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary).”



31. In the case of Charles Kangayia –vs- Alfred Musavi & another (2020) eKLR it was held as follows:

“.....a constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit... for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment.....”

32. The Appellant is trying to unjustly enrich herself by claiming that there was no sale between the Respondent and her husband yet, her husband was paid a total of Kshs.150,000/= for the three acres which the Appellant is trying to call a loan. A court of law cannot allow the Appellant to try to unjustly enrich herself in a transaction she was much aware of.

**Disposition**

33. From the above analysis, it is clear that the Appellant’s appeal is devoid of merit. The same is dismissed with costs to the Respondent.

**JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 3<sup>RD</sup> DAY OF JULY, 2025.**

.....

**HON. E. O. OBAGA**

**JUDGE**

In The Presence Of:

Ms. Kinuthia for Respondent.

Court assistant – Steve Musyoki

