



**Muinde v Muinde (Environment and Land Appeal 17 of 2019)  
[2023] KEELC 21360 (KLR) (6 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21360 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND APPEAL 17 OF 2019  
CA OCHIENG, J  
NOVEMBER 6, 2023**

**BETWEEN**

**KIVUVA MAUNDU MUINDE ..... APPELLANT**

**AND**

**MUSAU M. MUINDE ..... RESPONDENT**

*(Being an Appeal from the Judgment of Machakos Chief Magistrate's Court in Civil Case No. 490 of 2011 delivered on 10th April, 2019 by Hon. A.G. Kibiru (CM))*

**JUDGMENT**

**Introduction**

1. By a Memorandum of Appeal dated the 7<sup>th</sup> May, 2019 and filed on even date, the Appellant appealed against the Judgment of Hon. A. G. Kibiru, Chief Magistrate made on the 10<sup>th</sup> April, 2019 in Machakos CMCC NO. 490 of 2011 between Kivuva Maundu Muinde v Musau Muinde. The genesis of this Appeal is the Judgment by Hon. A. G. Kibiru, Chief Magistrate where he dismissed the Appellant's suit and entered Judgment in favour of the Respondent as per the Counter-claim.
2. The Appellant being dissatisfied with the whole of the said Judgment filed a Memorandum of Appeal dated the 7<sup>th</sup> May, 2019, which contains the following grounds:
  1. That the Learned Trial Magistrate erred in law and in fact by not considering the evidence adduced by the Plaintiff/Appellant, its weight and disregarded the same without any reason or justification and gave more weight to the Defendant/Respondent case as to the ownership and acquisition of Machakos/Kiandani/1683 hence arriving at a wrong and unjust decision.
  2. That the trial Magistrate erred in law and in fact by failing to interpret and analyze the agreement dated 7<sup>th</sup> January, 1975 which state clearly that the Appellant was purchasing the



suit land and the Respondent was a mere witness amongst others and thereby arriving at a wrong decision.

3. That the trial Magistrate erred in law and in fact by construing that the Appellant and the Respondent jointly bought the suit property whilst no evidence was led to that fact or presumption and thereby arriving at a wrong finding.
4. That the learned trial Magistrate erred in law and in fact by making a finding of existence of partnership business between the parties herein whilst none existed or no evidence of the alluded partnership was ever adduced thereby arriving a wrong decision.
5. That the learned trial Magistrate erred in law and in fact in holding that land parcel Machakos/Kiandani/1683 (suit land) was subdivided to give rise to Plot No. 10 and 10 whilst no evidence was adduced as to the subdivision since the process of subdivision in relation to the land was not followed as there was no consent to subdivide acquired as per the law, no mutations drawn and registered, no amendment of the map done, no cancellation of the number Machakos/Kiandani/1683 to give rise to new numbers thereby totally ignored the law as to subdivision thereby arrived at a wrong decision.
6. That the trial Magistrate erred in law and in fact by holding that oral evidence could supersede written evidence since the trial court believed the evidence of the Respondent and his witnesses than that of the Plaintiff and the produced agreement dated 7<sup>th</sup> January, 1975 thereby arriving at unjust decision.
7. That the trial Magistrate erred in law and in fact but holding that the Appellant had allowed the Respondent to dwell and develop on his land and yet acknowledged that the Appellant had as early as 2003 demanded the vacation of the Respondent from the land including reporting the Respondent at the Police Station seeking Police assistance to have the Respondent vacate the suit land hence arrived at a wrong decision.
8. That the learned trial erred in law and in fact by holding that the Respondent was paying rates in relation to Plot Number 11 whilst no evidence was ever adduced as to how the said subdivision came about and further the relation between the two Plot 10 and Plot 11 in relation to Machakos /Kiandani /1683 whilst the two plots are indicated as Manza which is a distinct place without calling for evidence to relate the two thereby arriving at a wrong decision.
9. That the learned trial Magistrate erred in law and in fact by relying on the provisions of Section 26(1) of the [Land Registration Act](#) to order the cancellation of the Plaintiff's title to the land and ordering joint registration whilst no evidence of misrepresentation was alluded or adduced or proved by the Respondent in the case hence arrived at a wrong decisions.
10. That the learned trial Magistrate erred in law and in fact by ordering cancellation of the Plaintiff's title whilst no evidence was led by the Respondent as to joint purchase and relied on the provisions of the law especially Section 26(1) of the [Land Registration Act](#) and interpreted the same to suit the Respondent case without any iota of evidence thereby arriving at an erroneous decisions.
11. That the trial Magistrate erred in law and in fact by failing to consider that the relationship of the parties herein since they are brothers by holding that the Appellant had allowed the Respondent to be on the land without a just cause hence arriving at a wrong decision.

Reasons Wherefore the Appellant prays that the lower court Judgement delivered on 10th April 2019 be set aside and in place this court do entered Judgment that:



- a. The Applicant is the bona fide owner of land parcel Machakos/Kiandani/1683.
  - b. That the Respondent be evicted from Machakos/Kiandani /1683 immediately.
3. The Appeal was canvassed by way of written submissions but it is only the Appellant who filed his.

## Submissions

### Appellant's Submissions

5. The Appellant in his submissions provided the background of the dispute herein and contended that the Learned Magistrate failed to consider the evidence he tendered which included the Sale Agreement, and disregarded the said evidence without any justification. He argued that the Trial Magistrate erred in law and fact by holding that the oral testimony supersedes written evidence. He further submitted that there existed no partnership agreement between them and that there was no evidence that the Respondent had tendered to prove he contributed towards the purchase of the suit land. He further submitted that no evidence was presented to prove the suit land was subdivided into two as alleged by the Respondent. Further, the obtaining of consent to subdivide, cancellation of the old title, issuance of the new numbers and consequent amendment to the map was not explained. He reiterated that the trial court found that he had misrepresented the facts when he obtained registration yet there was no evidence adduced to that effect. Further, that parties are bound by their pleadings. To support his averments, he relied on the following decision: *Daniel Otieno Migore v South Nyanza Sugar Co. Ltd* [2018] eKLR.

### Analysis and Determination

6. Upon consideration of the many grounds set out in the Memorandum of Appeal, Record of Appeal and submissions, the following are the issues for determination:
- a. Whether the Appellant solely purchased the suit land or the Respondent contributed to its acquisition.
  - b. Whether the Appellant was holding half of the suit land in trust for the Respondent.
  - c. Whether the Appeal is merited.
7. This being a first appeal from the Magistrate's court, and since I did not have a chance to see when the witnesses testified, I am guided by principle established in the case of *Selle and Another v Associated Motor Boat Company Ltd & Others* [1968] EA 123 where it stated that the duty of the first Appellate court is to reconsider the evidence presented, evaluate it and arrive at its own conclusion. The Appellant as the Plaintiff in the Lower Court filed a Plaint dated the 12<sup>th</sup> July, 2011 where he sought for the following Orders:
- a. A declaration that the Defendant is a trespasser over Land Registration No. Machakos/Kiandani/1683.
  - b. An order that the Defendant be evicted from the premises known as Machakos/Kiandani/1683.
  - c. General damages for trespass.
  - d. Costs of the suit.
  - e. Any other or further relief as this Honourable Court may deem fit and just to grant.



8. The Respondent as the Defendant filed a Defence including Counter-claim dated the 2<sup>nd</sup> August, 2011 where he sought for the following Orders:
  - i. A declaration that Plot No. Machakos/Kiandani/1683 is jointly owned by the Plaintiff and the Defendant in equal Shares.
  - ii. A declaration that the Plaintiff holds half of Plot No. Machakos/Kiandani/1683 in trust for the Defendant.
  - iii. A declaration in the Alternative that the Defendant owns half of Plot No. Machakos/Kiandani/1683 by way of adverse possession.
  - iv. An order directing the District Land Registrar, Machakos, to subdivide into two equal parts Plot No. Machakos/Kiandani/1683 and to register one half in the name of the Defendant.
  - v. An order for injunction barring the Plaintiff by himself, his servants, agents or howsoever from interfering with the Defendant's enjoyment of half of Plot No. Machakos/Kiandani/1683; which is known as Plot No. Manza Market.
  - vi. Costs of the suit.
9. After considering the evidence tendered by both parties and analyzing the exhibits, the Learned Trial Magistrate proceeded to dismiss the Appellant's suit and entered Judgment in favour of the Respondent in the following terms:
  1. That a declaration be and is hereby issued that the Plaintiff and the Defendant are joint owners in equal share of land parcel No. Machakos/Kiandani/1683.
  2. That a declaration be and is hereby issued that the Plaintiff holds half of Plot No. Machakos/Kiandani/1683 in trust for the Defendant.
  3. That an order be and is hereby issued directing the Land Registrar, Machakos, to subdivide into two equal parts Plot No. Machakos/Kiandani/1683 giving consideration to the respective developments by the parties and ;-
    - a. Cancel the title No. Machakos/Kiandani/1683
    - b. Issue respective Title Deeds to the parties.
  4. That the parties shall share equally the cost of sub division and each party shall bear costs of the registration to their respective parcels.
  5. That either party be at liberty to apply.
  6. That the Plaintiff do bear half costs of the suit and counterclaim to the Defendant together with interests at the court's rate of 12% from date of this Judgment.
10. The Appellant being aggrieved with the said Judgment filed the instant Appeal.
11. As to whether the Appellant solely purchased the suit land or the Respondent contributed to its acquisition.
12. The Appellant claimed to have solely purchased the suit land but the Respondent as DW1 insisted he contributed to its acquisition. DW1 testified that they jointly purchased the suit land together with Sammy Maweu, his brother-in-law, the Appellant and himself. He claimed that they ran a joint business with the Appellant and he allowed the Appellant to purchase the land on their behalf. The Appellant



as PW1 testified that he solely purchased the suit land and produced the Sale Agreement as well as a Certificate of Title to that effect. From the Sale Agreement which was at Page 20 of the Record of Appeal, the Purchaser is Kivuva Maundu. I note the Respondent Musau Muinde signed as a witness on 7<sup>th</sup> January, 1975. From the testimony of DW1 he claims he identified the suit land and sent his elder brother Kivuva to do the transaction on their behalf, who did the Agreement in his name but he had no problem. He claimed he started residing on the suit land in 1982 and they developed it together. DW1 except for the said averments, never tendered any evidence on the monetary contribution he made towards acquisition of the suit land. DW2 in his testimony claimed the four of them jointly bought the suit land. I wish to reproduce a portion of the testimony of DW2 tendered during cross-examination:

“I know the land in issue. I have a share there. Our portion with their brother is 1752. The parcel for the parties in court is 1868. (Shown pexhibit 2). It is MKS/Kiandani/1883. The two parcels were one parcel of 100x 100Ft and was subdivided into two. We obtained Title Deed later during survey. I know the Sale Agreement. I cannot recall if I signed (Shown Pexhibit1 (a)). I do not know this agreement what I know we were four and Plaintiff and their elder brother Sammy Maweu Kivuva were leading while we looked for money. I know an agreement was made but I did not follow. It is Sammy Maweu who kept the agreement. I have my title deed for my portion for L.P. 1570 held by Maweu Maundu. It is in our joint names. It is true parcel before court is in the name of one person. I cannot recall when survey came.”

13. From the testimony of DW2, I find that there were several contradictions as he was quoted different parcel numbers which were allegedly purchased. I note the trial Magistrate in his wisdom proceeded to disregard the Sale Agreement produced as an exhibit, by accepting the oral testimony of DW1 and DW2 in respect to the joint purchase of the suit land. In the case of *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd* (2001) eKLR, it was held that:

“A Court of law cannot rewrite a contract between the parties. The parties are bound by the terms of the contract.”

14. In the foregoing, I find that the Sale Agreement between Simeon Nzyuko and Kivuva Maundu made on 7<sup>th</sup> January, 1975 for purchase of suit land indeed superseded the oral evidence adduced by DW1 and DW2 respectively in respect to their alleged contribution to the purchase price.

15. 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.”

16. In *Jennifer Nyambura Kamau v Humphrey Mbaka* Nandi NYR CA Civil Appeal No. 342 of 2010[2013] eKLR, the Court of Appeal held that:

“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.”

17. In relying on the legal provisions I have cited as well as the decision quoted, since the Respondent had filed a Counter-claim claiming he contributed to the purchase of the suit land, the burden of proof was upon him to prove this position, but from his testimony including exhibits, I find that he failed to discharge it.
18. As to whether the Appellant was holding half of the suit land in trust for the Respondent.
19. The Respondent claimed he occupied half portion of the suit land as the Appellant was holding it, in trust for him. DW1 in his testimony insisted that the suit land had been subdivided, he had paid rates and that he occupied half of it. I note the Appellant purchased the suit land in 1975, and fully paid for the purchase price as indicated in the Sale Agreement. Further, he was registered as the owner of the suit land on 27<sup>th</sup> September, 1989. The Respondent produced various receipts from the Municipal Council of Machakos in respect to payment of plots. The Respondent claimed the land had been subdivided but never produced the Consent of the Land Control Board, Mutation Forms, revised Registry Index Map and the new parcel numbers to confirm this position. Further, I note the Appellant still held the original title. DW2 said the land was surveyed and subdivided but was not sure when this was done. The Appellant as PW1 confirmed when he purchased the suit land and had allowed the Respondent to reside on a portion of it since he was homeless. Further, that the Respondent later constructed houses thereon without his consent, attempted to sell a portion of the land which culminated in his reporting the Respondent to the Police. The Respondent on the other hand insisted that the Appellant was holding the land in trust for him. From a perusal of the Sale Agreement and Title, there is no indication the Appellant purchased the suit land to hold in trust for any party. I note the Respondent was issued with demand notices in 2003 but still continued to reside and develop a portion of the suit land. On the issue of the receipts produced as to payment of rates, it does not demonstrate the nexus of plot 10 and 11 with the suit land. Further, even for subdivision, it does not indicate whether it is the suit land that was being subdivided. It is trite that under the Registered Land Act (now repealed), subdivision could only occur where there was consent from the Land Control Board to subdivide. Further, a Local Government did not have capacity to subdivide privately owned registered land. If indeed the Respondent paid for subdivision as claimed, then this was a mistake. On the issue of holding land in trust, the Court of Appeal in Juletabi African Adventure Limited & another v Christopher Michael Lockley [2017] eKLR held that:

“It is settled that the onus lies on a party relying on the existence of a trust to prove it through evidence. That is because:- “The law never implies, the Court never presumes, a trust, but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.” Emphasis mine
20. Based on the facts before me, noting that in the Sale Agreement and Certificate of Title, there is no indication of trust, I find that the Respondent failed to discharge his burden of proof on the said averment. I opine that the Respondent was a mere licensee who sought to take advantage of the brother who invited him to the suit land but he declined to move out when he was directed to do so. In associating myself with the decision quoted, I find that the Appellant was not holding the suit land in trust for the Respondent or any party, as claimed.
21. In the foregoing, I find that the Learned Trial Magistrate erred in law and in fact by not considering the evidence adduced by the Appellant, hence arriving at a wrong decision. Further, that he failed to analyze



the agreement dated 7<sup>th</sup> January, 1975 and wrongly construed that the Appellant and the Respondent jointly bought the suit property. I find that the Learned Magistrate erred on finding that there existed a partnership business between the parties herein as no evidence of the alleged partnership was ever adduced. I further find that the learned trial Magistrate erred in law and in fact in holding that land parcel Machakos /Kiandani/1683 (*suit land*) was subdivided to give rise to Plot No. 10 and 10 whilst no evidence was adduced as to the subdivision process.

22. In the circumstances, I find the Appeal merited and will make the following final Orders:
- i. The Judgment in Machakos CMCC No. 490 of 2011, delivered on the 10<sup>th</sup> day of April, 2019, be and is hereby set aside.
  - ii. The Appellant be and is hereby declared the bona fide owner of land parcel Number Machakos/Kiandani /1683.
  - iii. The Respondent be and is hereby directed to grant vacant possession from a portion of land parcel number Machakos/Kiandani/1683 after 120 days from the date hereof, failure of which eviction orders do issue.
  - iv. Each party to bear their own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 6TH DAY OF NOVEMBER, 2023**

**CHRISTINE OCHIENG**  
**JUDGE**

