



**Makau & 2 others v Kilolo (Environment and Land Appeal
16 of 2019) [2022] KEELC 2483 (KLR) (13 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 2483 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND APPEAL 16 OF 2019**

TW MURIGI, J

JULY 13, 2022

BETWEEN

RICHARD MULWA MAKAU 1ST APPELLANT

THADEUS MWILU MATHEKA 2ND APPELLANT

SIMON MWEU KIMATU 3RD APPELLANT

AND

NDULULU KILOLO RESPONDENT

*(Being an Appeal against the Judgment and Decree of the Senior Principal
Magistrate's Court at Makindu in Civil Suit No. 3 of 2013 by Senior Principal
Magistrate Zachariah Joseph Nyakundi dated and delivered on 17th May 2019)*

JUDGMENT

1. By a Memorandum of Appeal dated 3rd July 2019, the Appellants herein appealed against the Judgment of Hon. Zachariah Joseph Nyakundi delivered on the 17th of May 2019 in Makindu Civil Case No. 3 of 2013 and set out five grounds of appeal.
2. The Appellants herein were the Plaintiffs in the trial Court while the Respondent was the Defendant. The Appellants instituted the suit in the trial Court vide a Plaint dated 22nd of January 2013 and sought for the following orders: -
 - a) A permanent injunction restraining the Defendants from interfering with the Plaintiffs quiet possession, use and/or quiet enjoyment of Plot No. 786 Kinyambu Settlement Scheme.
 - b) A declaration that Plot No. 786 Kinyambu Settlement Scheme belongs to the Plaintiffs.
 - c) An order for the cancellation of the title to Plot No. 786 Kinyambu Settlement Scheme in the name of Ndululu Kilolo and the same be registered in the name of the Plaintiffs.



- d) Costs of the suit.
3. The Appellants stated that they each purchased 5 acres comprised in the suit land from Robert Anthony Shepherd. The Appellants stated that Robert Anthony Shepherd had purchased 20 acres comprised in the suit land from the Respondent herein. They stated that the Respondent had during the demarcation process, fraudulently caused 15.5 acres sold to Robert Anthony Shepherd to be surveyed in her favour.
 4. The 2nd Respondent filed a Statement of Defence and Counter Claim on 21st of April 2015. The Defence was essentially a denial of the Plaintiffs' claim. By her Counter Claim the 2nd Respondent pleaded that she was the legitimate owner of the suit property and had not sold any portion to anyone including the Plaintiffs.
 5. The case proceeded for hearing on 23rd of November 2018 and the Plaintiffs closed their case. Subsequently, the hearing of the defence case proceeded on 27th of November 2018. After hearing evidence from both the Appellants and the Respondent, the trial Court dismissed the Appellants suit with costs to the Respondent.
 6. Being aggrieved with the said judgment, the Appellants filed this Appeal vide the Memorandum of Appeal dated 5th of June 2021 on the following grounds: -
 - i) The learned magistrate erred in law and fact in dismissing the Plaintiffs' suit with costs to the Defendant.
 - ii) The learned magistrate erred in law by completely disregarding the 3rd Plaintiff's claim in the entirety of his judgment.
 - iii) The learned magistrate erred in fact and law by holding that the Plaintiffs did not produce any document in the form of a written agreement to demonstrate that they bought five (5) acres each from Robert Anthony Shepherd yet they produced an agreement dated 02/08/2011.
 - iv) The learned magistrate erred in fact and law by making a finding that the Plaintiffs did not prove that they bought five acres each from Robert Anthony Shepherd.
 - v) The learned magistrate erred in fact and law by making a finding that the only person who had a claim against the Defendant is Robert Anthony Shepherd as per the agreement dated 02/08/2011.
 - vi) The learned magistrate erred in law and fact by making a finding that the Plaintiffs' claim only lies against Robert Anthony Shepherd for a refund of the excess amount paid or for the addition of the extra acreage, should the same be added by the Defendant.
 - vii) The learned magistrate erred in law by making a finding that the Plaintiffs' case was not proved on a balance of probabilities.
 7. On that account, the Appellants sought the following Orders: -
 - a) That the Appeal be allowed.
 - b) That the judgment and decree of the Honourable Magistrate delivered on 17th May, 2019 be set aside.
 - c) That this Honourable Court orders a retrial of the Plaintiffs' case before another trial Magistrate.



- d) That the costs of this Appeal as well as costs of the suit in the lower Court be provided for.
8. The Appeal was canvassed by way of written submissions and both parties filed their respective submissions.

The Appellants' submissions

9. The Appellants' submissions were filed on 23rd of February 2022. Counsel for the Appellants submitted that the issue for determination was whether the Appellants had proved their case on a balance of probabilities. Counsel submitted that vide an agreement for sale dated 2nd of August 2011, the 1st and 2nd Appellants purchased 10 acres comprised in the suit property known as Plot No. 786 Kinyambu Settlement Scheme from Robert Anthony Shepherd. Counsel submitted that the Appellants paid the entire purchase price for the 10 acres being Kshs. 300,000/-.
10. Counsel went on to submit that vide an agreement for sale dated 6th of April 1985 between Robert Anthony Shepherd and John Mutinda Kilolo, Robert Anthony Shepherd purchased 20 acres comprised in the suit land. Counsel stated that due to the rigid African customs that forbid registration of women on land, John Mutinda, a brother to the Respondent, transacted on her behalf with Robert Anthony Shepherd.
11. That vide an agreement dated 2nd of August 2011, the Respondent excised 20 acres from the suit land in favour of Robert Anthony Shepherd. Counsel maintains that at the time when John Mutinda was transacting on behalf of the Respondent, the suit land had not been registered in the Respondent's name. That the Respondent was subsequently registered as the owner of the suit property on 31st July, 2002.
12. Counsel contends that the trial Court acknowledged the fact that the Respondent had instructed her brother to sell a portion of the suit property to the Appellants. Counsel argued that the Appellants have been in occupation of the suit land until a dispute arose as to the acreage passed to Robert Anthony Shepherd by the Respondent. Counsel submitted that the lower Court did not consider the agreement for sale of 10 acres dated 2nd of August 2011 between Robert Anthony Shepherd and the 1st and 2nd Appellants. Counsel maintains that the Appellants purchased 15 acres comprised in the suit land.

The Respondent's submissions

13. The Respondent's submissions were filed on 12th of November 2021. Counsel for the Respondent identified the following issues for the Court's determination: -
- 1) Whether the Appellants had proved their case that they had each purchased 5 acres of land from the Respondent and or from Robert Anthony Shepherd on the balance of probability to justify the reliefs sought.
 - 2) Whether there was a valid and binding sale agreement between the Respondent and Anthony Shepherd and whether the Appellants could individually enforce the alleged sale agreement against the Respondent.
 - 3) Whether there was any procedural irregularity committed by the trial Court that could warrant an order for retrial.
 - 4) Who bears the cost of the Appeal?
14. Counsel for the Respondent submitted that the Appellants did not present evidence to establish that each of them had individually or jointly purchased land from the Respondent. Counsel further



submitted that the agreements for sale produced by the Appellants did not state the description of the land that was being sold or the purchase price of the same. In addition, Counsel submitted that the 3rd Appellant did not produce an agreement for sale to prove that he had purchased 5 acres from Anthony Robert Shepherd. Counsel went on to submit that the handwritten agreement dated 25/05/2012 did not constitute a sale agreement between the Respondent and Robert Anthony Shepherd or with the Appellants as it talks of a reward of Kshs. 10,000/- for taking care of the farm. Counsel maintains that none of the sale agreements presented before the trial Court proved that the Respondent had sold land to the Appellants.

15. Counsel for the Respondent contends that the Appellants did prove that the Respondent was the registered owner of land parcel No. Makueni/Kinyambu/785 which featured in the sale agreements presented before the trial Court.
16. Counsel submitted that there is no valid and binding agreement between the Respondent and Robert Anthony Shepherd in respect to the suit land. Counsel maintains that the Appellants claim lies against the proprietor of Plot No. 785 Kinyambu Settlement Scheme and not the Respondent. In addition, Counsel submitted that no privity of contract exists between the Appellants and the Respondent as they did not present evidence that the Respondent sold 20 acres comprised in the suit land to Robert Anthony Shepherd.
17. Counsel argued that for an order for re-trial to be granted the Appellant must demonstrate that the trial Court grossly misapplied the legal procedures while conducting the hearing which occasioned a miscarriage of justice. That in the present appeal, the Appellants did not plead in the memorandum of appeal the procedural omissions that occasioned the miscarriage of justice. He urged the Court to dismiss the appeal with costs to the Respondent.

Analysis and determination

18. I have considered the entire material on the record of appeal, the supplementary record of appeal and the submissions by the parties. Although the Appellants raised seven (7) grounds of appeal in the Memorandum of Appeal, the Court is of the opinion that the Appeal may conclusively be determined on the following four (4) grounds: -
 - a) Whether the trial Court erred by completely disregarding the 3rd Plaintiff's claim in its entirety.
 - b) Whether the trial Court erred in finding that the Appellants did not purchase land from Robert Anthony Shepherd specifically vide the agreement dated 2nd of August 2011.
 - c) Whether the trial Court erred in making a finding that the Robert Anthony Shepherd was the only person who had a claim against the Defendant as per the agreement dated 2nd of August 2011.
 - d) Whether the trial court erred in making a finding that the Appellants claim only lies against Anthony Robert Shepherd for a refund of the excess amount paid or for addition of the extra acreage should the same be added by the Defendant.
19. This being a first appeal, this Court has a duty to evaluate, assess and analyse the evidence on record and make its own decision. The principles which guide a first Appellate Court were discussed in the case of *Selle & Another Vs Associated Motor Boat Company and Others (1968) 1 EA 123* where the Court of Appeal set out the duty of Appellate Courts as follows;

“An appeal to this court from a trial court by the High Court is by way of a 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 itself and drive 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 finding 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 on the demeanour of a witness is inconsistent with the evidence in the case generally.”

20. Similarly, in the case of *Ephantus Mwangi & Another Vs Duncan Mwangi* 1982-1988 1 KAR 278 the Court of Appeal held that;

“A member of an appellate court is not bound to accept the learned Judge’s findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

21. The Court has considered the record of proceedings on the first issue. The record shows that the 3rd Appellant, Simon Kimatu testified before the trial Court on 27th of November 2018 and adopted his undated statement as his evidence. The 3rd Appellant informed the trial Court that he had purchased 5 acres of land from the white man’s agent. In his statement the 3rd Appellant stated that he purchased 5 acres of land comprised in Plot No. 785 Kinyambu Settlement Scheme from Robert Anthony Shepherd. He went on to state that the original seller Ndululu Kilolo wanted to evict them despite acknowledging the fact that she had sold the suit land to Robert Anthony Shepherd.

22. After hearing the evidence of both the Appellants and the Respondent, the trial Court in its judgment found that the 3rd Appellant did not present any evidence to support his claim that he had purchased 5 acres from Robert Anthony Shepherd. The trial Court in its judgment stated as follows;

“PW1 and PW3 have failed to produce any document in the form of an agreement to demonstrate that they bought 5 acres of land each from Robert Anthony. It is trite law that he who alleges must prove, there is no document adduced in court that could guide the court in making a finding that indeed PW1 and PW3 bought five acres of land each from Robert Anthony Shepherd.”

23. The 1st Appellant produced documents as per the list of documents dated 2nd of January 2013. The Appellants produced a letter of acceptance which confirms that Robert Anthony Shepherd is the legal owner of Plot number 785 Kinyambu Settlement Scheme. The letter is from the Ministry of Lands, Land Adjudication and Settlement Department. The Respondent on the other hand stated that she is the registered owner of Plot No. 786 Kinyambu Settlement Scheme. In that regard, she produced a certificate of title and a certificate of official search with regards to the suit property.

24. The third Appellant’s claim is premised on the sale agreement between himself and Robert Anthony Shepherd. The 3rd Appellant alleged that he purchased 5 acres of land from Robert Anthony Shepherd.

25. The elementary principle of law is that he who alleges must prove. This is stipulated in Section 107(1) (2) of the *Evidence Act* which provides that: -

- 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.



- 2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
26. It was therefore the duty of the 3rd Appellant to present evidence to prove that he purchased 5 acres of land from Robert Anthony Shepherd. It is evident from the record that the third Appellant did not produce any sale agreement or documentary evidence to prove that he purchased 5 acres of land from Robert Anthony Shepherd. The trial magistrate cannot therefore be faulted in making a finding that the 3rd Appellant did not prove that he had purchased land from Robert Anthony Shepherd.
27. The next issue for determination is whether the Court erred in making a finding that the Appellants did not prove that they purchased 5 acres each from Robert Anthony Shepherd specifically vide the agreement dated 2nd of August 2011.
28. The Appellants submitted that they purchased 5 acres each comprised in the suit land from Robert Anthony Shepherd. I have looked at the Plaintiff list of documents dated 22nd January 2013 and I find that document No. 7 is an agreement for sale dated 2nd of March 2011 between Thadeus Mwilu and Robert Anthony Shepherd. It is not clear from the record whether the said agreement was produced before the trial Court. The agreement states as follows;
- “Sale agreement between Thadeus Mwilu Matheka id xxxxx and robert shepherd of id xxxxxxx for 10 acres part of 20 acres sold by Ndululu Kilolo (on plot 786) Kinyambu settlement scheme.
- That i Mr. Shepherd have agreed to sell 10 acres of the above land to mr Thadeus Matheka for kshs 30,000/- per acre (i.e 300000) on a willing buyer willing seller basis.
- The whole amount of 300,000 i have received with the last amount of 20,000 paid to Mr Mwaiwa Micheal Mutinda on my behalf. that Mr Thadeaus will pay for the sub-division and survey.”
29. The agreement was executed by the parties therein in the presence of witnesses. The record shows that PW1(the 1st Appellant and PW3 (the 3rd Appellant) failed to produce documentary evidence to demonstrate that they had purchased 5 acres each from Robert Anthony Shepherd. It is therefore evident that the 2nd Appellant proved that he purchased 10 acres from Robert Anthony Shepherd. It is clear that the trial Court must have referred to the said agreement in arriving at its findings that the 1st and the 3rd Appellants did not produce any written agreement to support their claim
30. The Appellants faulted the trial Court for failing to acknowledge that they purchased land from Robert Anthony Shepherd vide the agreement dated 2nd of August 2011.The 1st Appellant referred the Court to the agreement dated 2nd of August 2011 that was produced as Exhibit No. 7. From the agreement dated 2nd of August 2011, it is clear that it was made between the Respondent and Robert Anthony Shepherd. The subject matter of the agreement is stated as follows;
- “Excising out the land of Tony Shepherd by Ndululu Kilolo – plot no 786 Kinyambu settlement scheme.”
31. In the agreement, Ndululu Kilolo the Respondent herein excised 20 acres from Plot Number 786 Kinyambu Settlement Scheme which she acknowledged to have sold together with her brother Mutinda to Robert Anthony Shepherd. According to the agreement the boundary between the Respondent and Robert Anthony was clearly marked by the elders and each party was satisfied. That



- the only issue that was pending was to bring in the surveyors to subdivide the land and to verify the measurements.
32. The agreement was executed by the parties therein in the presence of witnesses. The Appellants were not parties to the said agreement. The trial Court cannot therefore be faulted for finding that they were not parties to the agreement.
 33. The next issue for determination is whether Robert Anthony Shepherd was the only person who could claim against the Respondent as per the agreement dated 2nd of August 2011.
 34. The Appellants contends that vide an agreement dated 6th of April 1985 the Respondent sold 20 acres comprised in the suit land to Robert Anthony Shepherd. In that regard, PW 1 produced the sale agreement dated 6th of April 1985 between John Mutinda Kilolo and Anthony Robert Shepherd as Exhibit 2. That pursuant to the sale agreement, the Respondent vide an agreement dated 2nd of August 2011 excised 20 acres comprised in the suit land in favour of Robert Anthony Shepherd.
 35. The trial Court in its judgment stated as follows;

“The Court notes that PW1 in his examination in chief has produced as exhibits to demonstrate that Robert Anthony Shepherd purchased 20 acres of land from Ndululu Kilolo.”
 36. It is evident that pursuant to the sale agreement dated 6th of April 1985 (Exhibit 2), the Respondent and Robert Anthony Shepherd executed an agreement dated 2nd of August 2011. From the said agreement, it is evident that the Respondent excised 20 acres from Plot number 786 (the suit land) in favour of Robert Anthony Shepherd.
 37. It was the testimony of PW2 and PW3 that they were present when the boundary was marked. It is evident from the agreement dated 2nd of August 2011 that the boundary between Ndululu Kilolo the Respondent herein and Robert Anthony Shepherd was clearly marked by the elders and each party was satisfied. That what was pending was for the surveyors to subdivide and verify the measurement made by the elders.
 38. The agreement was executed by the Respondent and Robert Anthony Shepherd in the presence of the witnesses. The said agreement was in conformity with the provisions of Section 3(3) of the Law of Contract. The agreement is valid and binding upon the parties therein. It is crystal clear that there exists a valid agreement for sale between the Respondent and Anthony Robert Shepherd.
 39. Having found that a valid sale agreement exists between the Respondent and Robert Anthony Shepherd, the next issue for determination is whether the Appellants can enforce the said agreement.
 40. In the case of Agricultural Finance Corporation Vs Lengetia [1982-1988] 1KAR 772 the court held that;

“As a general rule, a contract affects only the parties to it and cannot be enforced by or against a person who is not a privy even if the contract is made for his benefit and purports to give him the right to sue or make him liable upon it. The fact that a person who is a stranger to the consideration of the contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract.”



41. What constitutes privity of contract has been described in Chitty on Contracts 2004 edition as follows;
- “The common law doctrine of privity of contract means that a contract cannot (as general rule) confer rights or impose obligations arising under it on any person except the parties to it.”
42. On whether the contract for sale between the Respondent and Robert Anthony Shepherd was enforceable by the Appellants, it is evident that the Appellants are not parties to the agreement. Since the Appellants were not parties to the sale agreement, they did not have any rights under the contract which they could lawfully enforce. The Appellants have no privity of contract with the Respondent.
43. The next issue for determination is whether the trial Court erred in finding that the only person who could claim against the Defendant was the Robert Anthony Shepherd. The Appellants submitted that after they purchased their respective portions from Robert Anthony Shepherd, they took possession of the land and have been in occupation ever since until a dispute arose as to the acreage passed to Robert Anthony Shepherd. It was their testimony that Robert had purchased 20 acres from the suit land. That it was later discovered that the Respondent passed to Robert Anthony Shepherd 4.2 acres instead of 20 acres. The trial Court in its findings stated as follows;
- “As to whether the land sold to Robert Anthony Shepherd fell short of the twenty acres, the only person who has a claim against Ndululu Kisololo is Robert Anthony Shepherd as per the agreement dated 2nd of August 2011.”
44. The trial Court based its finding on the agreement dated 2nd of August 2011.
45. It is crystal clear that the agreement was between the Respondent and Anthony Shepherd. The agreement was valid and binding on the parties therein. The trial Court cannot therefore be faulted in making a finding that the Appellants’ claim lay with Robert Anthony Shepherd and not with the Respondent herein.
46. The Appellants claim against the Respondent is for 15 acres comprised in the suit property. The Appellants stated that the dispute arose after it was discovered that Robert Anthony Shepherd got 4.2 acres instead of 20 acres from the suit property. From the evidence adduced in the trial Court, it is crystal clear that the Robert Anthony Shepherd purchased 20 acres comprised in the suit property. It is also clear that the agreement for sale was between him and the Respondent. The Court having established that there was no privity of contract between the Appellants and the Respondent, their claim only lies with the Robert Anthony Shepherd.
47. The trial Court in its judgment found that the Plaintiffs claim lay against Robert for the refund of the excess amount paid or for the addition of extra acreage should the same be added by Ndululu Kilolo. Thus, from the documentary evidence produced before the trial Court, and as correctly observed by the trial Court, the only recourse available to the Appellants is a claim against Robert Shepherd for refund of monies paid as purchase price for their respective parcels. The Appellants could also sue the said Robert Anthony Shepherd for specific performance of their respective agreements with him.
48. Consequently, I find that the Appeal is devoid of merit and I proceed to dismiss the same. Each party to bear its own costs.

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HON. T. MURIGI
JUDGE



JUDGMENT SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 13TH DAY OF JULY, 2022.

IN THE PRESENCE OF: -

Court Assistant – Mr. Kwemboi.

Musungu for the Respondents.

Wasolo for the Appellants.

