



**Katiti v Katiti (Environment and Land Appeal E035 of 2021)  
[2025] KEELC 4723 (KLR) (24 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 4723 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND APPEAL E035 OF 2021**

**NA MATHEKA, J**

**JUNE 24, 2025**

**BETWEEN**

**MORRIS KISAMBU KATITI ..... APPELLANT**

**AND**

**PATRICK KISAMBU KATITI ..... RESPONDENT**

**JUDGMENT**

1. The Appellant herein being dissatisfied with the whole of the Judgment and Orders of the Hon. Alfred G. Kibiru, Chief Magistrate, delivered on the 28<sup>th</sup> day of July, 2021 in Machakos Civil Suit No. 101 of 2014, appeals against the said Judgment and orders on the grounds that:
  1. The learned Chief Magistrate grossly erred in law and misdirected himself in failing to find that the Appellant is the lawful owner of all that parcel of land known as title number Machakos/Katheka-Kai Block 4/157 measuring 20 acres.
  2. The learned Chief Magistrate grossly erred in law and misdirected himself in failing to find that the Appellant has acquired prescriptive rights over the suit land.
  3. The learned Chief Magistrate grossly erred in law and misdirected himself in failing to consider and appreciate that in the circumstances of the matter before him in that by the time Aaron Wambua Makau, deceased, died in 2004 the Appellant was in possession of the whole 20 acres and has never received any objections from Aaron Wambua Makau, the Respondent, any other member of the Respondent's family, Mr. Nathan Kathuku Nthanga or anyone else.
  4. The learned Chief Magistrate grossly erred in law and misdirected himself in failing to consider and appreciate that in the circumstances of the matter before him, following the death of the said Aaron Wambua Makau, deceased, the Respondent and his late brother Abednego Aaron Makau filed for Letters of Administration and distribution of the Estate of the deceased and



the distribution was done and the suit property was never at any time indicated as being part of the Estate of the said deceased Aaron Wambua Makau.

5. The learned Chief Magistrate grossly erred in law and fact in failing to note that the transaction between the Appellant's deceased mother, the Appellant's brother and the said deceased Aaron Wambua Makau had nothing to do with the transaction between the Appellant and the deceased Aaron Wambua Makau.
  6. The learned Chief Magistrate misdirected himself and erred in law and in fact by failing to appreciate the proceedings in Central Division (Machakos) Lands Dispute Tribunal Case No. 14 of 2007 where the Tribunal found out that Aaron Wambua Makau had bought the suit land from Nathan Kathuku Nganga and the Appellant do continue to occupy the suit land measuring 20 acres and not 3 acres.
  7. The learned Chief Magistrate grossly erred in law and in fact by finding in favour of the Respondent without production of clear evidence on the transactions/transfers of the suit land from the registry records of Katheka-Kai and only letters of the basis of "to whom it may concern" were relied and the said letters were never copied to Nathan, Aaron or the Appellant herein and were never utilized in previous proceeding over the suit land.
  8. The learned Chief Magistrate grossly erred in law and misdirected himself in arriving at a Judgment in favour of the Respondent in circumstances where the authenticity of receipts and other documents was questionable and key witnesses were never availed by the Respondent.
  9. The learned Chief Magistrate erred in law and in fact in allowing himself to be influence by irrelevant factors and in failing to consider relevant matters and the unique aspects of the matter before him before arriving at the impugned Judgment and Decree.
  10. On the whole, the learned Chief Magistrate failed to properly apply his mind on the matter before him and the applicable constitutional and statutory provisions and further failed to exercise his discretion judicially and as a result thereof arrived at a Judgment and Decree that amounted to a travesty of justice.
2. The Appellant prays for Judgment against the Respondent for orders that:
- a. The Appeal be allowed.
  - b. The Judgment and the Decree of the trial Court delivered on 28<sup>th</sup> day of July, 2021 in Machakos Civil Suit No. 101 of 2014 be set aside/vacated.
  - c. This Honourable Court be pleased to finally determine the suit by dismissing it with costs and granting the prayers sought in the Defence and Counter-claim by the Appellant.
  - d. Costs of this Appeal be to the Appellant.
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 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.”

4. The matter began by a plaint dated 30<sup>th</sup> January 2014 where in the trial court the plaintiff/respondent stated that he is the registered proprietor of a parcel of land known as Machakos/Katheka – Kai Block 4/157 measuring 20 acres. He testified that the suit originally belonged to one Nathan Kathuku Nthanga who sold the entire property to his father Aaron Wambua Makau (Deceased) and that the plaintiff is the administrator of the estate. That the Defendant’s mother had given his father money to get her land but when he was unsuccessful they agreed she would be given three acres from the suit land. This was done and beacons were placed to that effect. That in a meeting held on 29<sup>th</sup> September 2004 the plaintiff, defendant, his mother and other family members present it was agreed that the defendant is only entitled to three acres. And an agreement was executed to that effect. However, the defendant removed the beacons and occupied the entire land. This led to the filing of a case at the Land Disputes Tribunal by the initial proprietor Nathan Kathuku Nthanga in case number 14 of 2007 which was determined on the 28<sup>th</sup> October 2008 in his favour and the award adopted before the Chief Magistrates Court at Machakos in CM Misc Application No. 162 of 2008.
5. The appellant/defendant stated that he is the beneficial owner of land known as Machakos/Katheka – Kai Block 4/157 measuring 20 acres. He testified that the he bought it from the plaintiff’s father Aaron Wambua Makau in the year 1998 and he took possession and has resided there ever since. He resided there with the knowledge of the respondent until 2007 when Nathan Kathuku Nthanga filed a case at the Land Disputes Tribunal claiming a balance of kshs. 50,000/=. That it was during the said proceedings that he was directed to demand the land from the estate of the late Aaron Wambua Makau.
6. The [Land Registration Act](#) is very clear on issues of ownership of land and Section 24(a) of the [Land Registration Act](#) provides as follows;

“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto .”
7. Section 26 (1) of the [Land Registration Act](#) states as follows;

“The Certificate of Title issued by the Registrar upon registration ... 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... 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.”
8. 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;

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:
9. While Section 38 (1) of the *Land Act* states;

“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.
10. In *Harris JA in Garvey vs Richards (2011) JMCA 16* the court in considering the essential components of a contract reflected the following principles;

“It 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.”
11. The Supreme Court of United Kingdom in *RTS Flexible Systems Ltd vs 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”.
12. The appellant/defendant stated that he is the beneficial owner of land known as Machakos/Katheka – Kai Block 4/157 measuring 20 acres. He testified that the he bought it from the plaintiff’s father Aaron Wambua Makau in the year 1998 and he took possession and has resided there ever since. He has not produced any documentary evidence to prove the same.
13. 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.”



14. 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.”

15. In *James Muigai Thungu vs 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.

16. 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.

17. Be that as it may, Section 26 of the *Land Registration Act* which guarantees the concept of indefeasibility of title does not extend to any property that has been found to have been unlawfully acquired. The Court of Appeal in *Attorney General vs Torino Enterprises Limited (Civil Application 84 of 2012)* (2022) KECA 78 (KLR) (4 February 2022) (Judgment) held that;

“We have considered the provisions of section 26 of the *Land Registration Act* (repealed) in light of the provisions of Article 40 of the *Constitution* which guarantees protection of right to property and it is our considered view that the concept of indefeasibility of title is subject to Article 40 (6) of the *Constitution* which states that: “The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.” Guided by the provisions of Article 40 (6) of the *Constitution*, we hold that the concept of indefeasibility or conclusive nature of title is inapplicable to the extent that title to the suit land was unlawfully acquired. See *Denis Noel Mukhulo & Another v. Elizabeth Murungari & Another* [2018] eKLR.”



18. I find that the plaintiff has produced documentary evidence to established that they are the legitimate proprietors of the 17 acres of the suit property and hence entitled to the said orders in the plaint. They produced correspondence from the society, subdivision and transfer fees receipt and the proceedings of the Central Division Dispute Tribunal. That the claim that he had acquired prescriptive rights of adverse possession as he had occupies the suit land cannot stand as he claimed to have been a purchaser and hence would have entered the land with the permission of the plaintiff the seller.

19. Section 80 of the [Land Registration Act](#) provides as follows;

80.

(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

(2). The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.”

20. This section gives the court powers to order for rectification of a register by directing that any registration be cancelled of amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake. I find that the plaintiff has proved ownership of 17 acres and the balance should be transferred to the Defendant. In the instant case I find that the plaintiff proved his case on a balance of probabilities and the trial magistrate did no err in arriving at the said conclusion and I find that the appeal is not merited and is dismissed with costs to the respondent.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 24<sup>TH</sup> DAY OF JUNE 2025.**

**N.A. MATHEKA**

**JUDGE**

