



REPUBLIC OF KENYA



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**Amboga v Ndeithi & 2 others (Environment and Land Appeal
E016 of 2023) [2025] KEELC 6233 (KLR) (23 September 2025) (Judgment)**

Neutral citation: [2025] KEELC 6233 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL E016 OF 2023
NA MATHEKA, J
SEPTEMBER 23, 2025**

BETWEEN

CALEB AMBOGA APPELLANT

AND

MARGARET WANJIRU NDEITHI 1ST RESPONDENT

MWANZA MUUTU MUTISYA 2ND RESPONDENT

THE REGISTRAR OF LANDS - MACHAKOS 3RD RESPONDENT

JUDGMENT

1. The Appellant herein Caleb Amboga being dissatisfied with the Judgment of Hon. D.N. Sure Principal Magistrate delivered on 14th August, 2023 in Kangundo CMCC No. 188 of 2018 appeals against the said Judgment on grounds that;
 1. The learned trial Magistrate erred in law and fact in failing to find that the Appellant is the true proprietor of the whole of land parcel Donyo Sabuk/Komarock Block 1/18279.
 2. The learned trial Magistrate erred in law and fact in failing to find that the Appellant has a genuine claim to the whole of the suit parcel of land namely Donyo Sabuk/Komarock Block 1/18279.
 3. The learned trial Magistrate erred in law and fact in trying to allude that the Appellant title deed was acquired either fraudulently, or through misrepresentation or vide a corrupt scheme.
 4. The learned trial Magistrate erred in law and fact in not finding that the Appellant is an innocent purchaser for value.
 5. The learned trial Magistrate erred in law and fact in finding that the Sale Agreement dated the 8th of February, 2005 was a valid Sale Agreement.



6. The learned trial Magistrate erred in law and fact in failing to find that the 2nd Respondent had no authority to sell the suit property to the Plaintiff.
 7. The learned trial Magistrate erred in law and fact in alluding that the issue of succession was raised as an afterthought by the Appellant.
 8. That the learned trial Magistrate erred in law and fact in disregarding the Appellant's evidence and submissions.
2. The Appellant prays that this Honourable Court for orders that:
- i. The Judgment of the learned trial Magistrate together with all other consequential orders arising therefrom be set aside.
 - ii. The costs of the Appeal be provided for.
 - iii. Such further orders that may be made by this Honourable Court as it may deem fit and just 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 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 6th August 2018 where in the trial court the Plaintiff/Respondent stated that on or about the 8th February 2005 she entered into an agreement for the purchase $\frac{3}{4}$ acres out of parcel of land known as Donyo Sabuk/Komarock Block 1/203 from the 2nd Defendant for Kshs. 150,000/= . After completion of the sale the 2nd Defendant informed her that the 1st Defendant had transferred her portion together with his name and obtained title No. Donyo Sabuk/Komarock Block 1/18279. The Plaintiff produced the sale agreement (PEX1) and letters from the Ministry of Interior and National Government dated 22nd December 2016 and 30th May 2017 showing that efforts were made to resolve the dispute but all was in vain (PEX2 and 3).
5. The 1st Defendant submitted that in 2003 he purchased part of the suit property 1acre from Simeon Mutuu Mutisya the registered owner of parcel of land known as Donyo Sabuk/Komarock Block 1/203. In 2004 he entered into a verbal agreement with him to purchase $\frac{3}{4}$ acre that was next. Unfortunately, the vendor died on 3rd October 2004 before he could receive payment of the additional piece. Before then he had instructed the surveyor to begin subdividing and issue titles to the buyers. The buyers went to court due to delays by the administrators and he received his title No. Donyo Sabuk/Komarock Block 1/18279 for 1 $\frac{3}{4}$ acre in 2016. In 2018 he was informed that he had fraudulently alienated the Plaintiff's land and he was required to return the same. He produced the second agreement dated 10th November 2018 for the additional $\frac{3}{4}$ acres and he also produced the title for land parcel No. Donyo Sabuk/Komarock Block 1/18279 dated 6th April 2015. DW2 Henry Mutisya Muutu testified that the 1st Defendant had not paid the balance of $\frac{3}{4}$ to their father. That they sold the



¾ acre to the 1st Defendant and took the money but at that time they did not know there was a case in court. Their brother was sick and they took the money. DW3 Julius Kaloki Muutu corroborated DW2's evidence. He stated that they knew that Mwanzia had sold the land to the Plaintiff. They both state Mwanzia was not there during the transaction and they had an emergency as their brother was sick.

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."

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."

7. 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:

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.



8. 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."

9. 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".

10. The 1st Defendant/Appellant stated that he is the registered proprietor of a parcel of land known as Donyo Sabuk/Komarock Block 1/18279. The Appellant has stated that in 2003 he purchased 1acre from Simeon Mutuu Mutisya the registered owner of parcel of land known as Donyo Sabuk/Komarock Block 1/203. In the 2004 he entered into another agreement for the purchase of an additional $\frac{3}{4}$ acre adjacent to the first one. The Appellant, DW1 testified that he entered a further verbal sale agreement in 2004 to purchase $\frac{3}{4}$ acre that was next. I have perused the title deed and find it was issued on the 6th April 2015. The sale agreement for the additional $\frac{3}{4}$ acre is dated 2018! This is a material discrepancy. It seems like the sale agreement and payment of the purchase price for the same was done after the title had been registered and during the pendency of this case. This case was filed on the 6th August 2018. It is curious that the first agreement was in writing but the second one was verbal. I find that the said $\frac{3}{4}$ acre parcel was not available for sell as the same had been sold to the Plaintiff in 2005.
11. The Plaintiff testified that on 8th February 2005 she entered into an agreement for the purchase $\frac{3}{4}$ acres out of parcel of land known as Donyo Sabuk/Komarock Block 1/203 from the 2nd Defendant for Kshs. 150,000/= . She produced the sale agreement. She states that the 1st Defendant's title deed was obtained fraudulently as it covers a larger area than what the he purchased.
12. I find that the Appellant has established the ownership of only 1 acre of the suit land Donyo Sabuk/Komarock Block 1/18279 and not $1\frac{3}{4}$ acres as alleged. The balance of the suit land belongs to the Plaintiff/Respondent as per the documentary evidence produced in court. I find that the Defendant was fraudulent in adding the second agreement when he knew very well that the plot was not available for sale.



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.

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.

16. 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.”

17. Having found the 1st Defendant has established the ownership of only 1 acre of the suit land No. Donyo Sabuk/Komarock Block 1/18279 and not 1¾ acres as alleged. The balance of the suit land belongs to the Plaintiff/Respondent as per the documentary evidence produced in court.
18. 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.”
19. This section gives the court powers to order for rectification of a 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.
20. I find that the learned Honourable Trial Magistrate did not err in law and in fact in finding that the Plaintiff had proved on a balance of probabilities that she is the legal/lawful owner of ¾ acres of land from land parcel Donyo Sabuk/Komarock Block 1/18279. I find that this appeal is not merited and I dismiss it with costs.
21. It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 23RD DAY OF SEPTEMBER 2025.

N.A. MATHEKA

JUDGE

