



**Nyumu v Nyumu (Environment and Land Appeal E002 of 2024)  
[2025] KEELC 6198 (KLR) (23 September 2025) (Judgment)**

Neutral citation: [2025] KEELC 6198 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND APPEAL E002 OF 2024  
NA MATHEKA, J  
SEPTEMBER 23, 2025**

**BETWEEN**

**GEORGE MUINDE NYUMU ..... APPELLANT**

**AND**

**GEORGE MUTUKU NYUMU ..... RESPONDENT**

**JUDGMENT**

1. That the Appellant herein being dissatisfied with the Judgment of Hon. D.N. Sure on 25<sup>th</sup> March, 2024 appeals against the whole of the said Judgment on the following grounds namely;
  1. That the learned Magistrate erred in both law and fact by declaring that the Respondent is the registered of parcel title number Machakos/Nguluni/3074 and directing the District Land Registrar to remove the caution registered against the said parcel.
  2. That the trial Magistrate erred in both fact and law by not considering that the Respondent's alleged title deed had been obtained from the Estate of a deceased person before Succession proceedings were carried out amounting to intermeddling within the meaning of the *Law of Succession Act*. The sale was a nullity ab initio.
  3. That the learned Magistrate erred in law by making orders inconsistent with the law and statutes and contrary to the orders of the superior courts.
  4. That the learned Magistrate failed to consider and take into account the extensive material placed before her touching on the pertinent and substantial points of facts so as to arrive at a just and fair decision.
  5. That the learned Magistrate failed to analyze or and ignored the evidence and give judicial reasoning to all the evidence that was before the court.



6. That the trial court misdirected itself in all the issues relating to Succession Law and Practices hence arriving at a wrong decision that aggrieved the Appellant. The trial court is not versed with the issue regarding Succession on Laws and Practice.
2. The Appellant prays for the orders from this Honourable Court;
  1. That the Appeal be allowed.
  2. That the court's Judgment delivered on 25<sup>th</sup> March, 2024 be set aside and the court be pleased to determine the Appellant's case based on the proceedings on record.
  3. That the costs and interests of the Appeal be borne by the Respondent.
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. In the trial court the Plaintiff/Respondent stated that on or about the 15<sup>th</sup> September 2005 he purchased the suit property Machakos/Nguluni/3074 from the Appellant's brother. That the suit property arose out of the subdivision of Nguluni Adjudication No. 611 into 11 equal parts on the 3<sup>rd</sup> November 1999. Before then, the Appellant raised an objection that the land ought to be divided into three equal parts but his objection and appeal was dismissed and he was granted leave to file a civil suit within 60 days under section 30 of the [Land Adjudication Act](#) which he failed to do. Consequently, parcels No. 3073, 3074 and 3075 were registered in the names of Mutuku Nyumu, Alexander Muoki and Musau respectively. On the 15<sup>th</sup> September 2005 the brothers sold their respective parcels to the Respondent vide a sale agreement and later title deeds were issued to the Respondent. On the 22<sup>nd</sup> June 2022 the Appellant registered a caution against Machakos/Nguluni/3074 claiming he had beneficial interest hence this suit.
5. It is not disputed that the Plaintiff/Respondent is the registered proprietor of land parcel No. Machakos/Nguluni/3074 after purchasing the same from through a sale agreement. 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."

6. 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:

8. 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.

9. 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 Defendant/Appellant stated that suit property Machakos/Nguluni/3074 was originally part of Machakos/Nguluni/611 which belonged to his deceased father Muthini. That the deceased had three wives and 11 children including the Appellant. That the Respondent purchased a parcel Machakos/Nguluni/3074 from his brother yet the succession process had not been completed meaning the parcel was still the property of the deceased. He hence placed a caution on 22<sup>nd</sup> June 2011 claiming beneficial interest.
12. The Plaintiff testified that on 15<sup>th</sup> September 2005 he entered into an agreement for the purchase of land parcel No. Machakos/Nguluni/3074. He produced the sale agreement. The Appellant maintains that the Plaintiff's title deed was obtained fraudulently as it was subject to a succession matter in the High Court. I have perused the court record and indeed found that on the 20<sup>th</sup> February 2009 Justice Gacheche in High Court Succession Cause 413 of 2008 issued an injunction preserving the estate of Johnathan Nyumu Muthiani until the Petition is heard and finalized. However, in the same case on the 10<sup>th</sup> July 2015 Justice Njuguna closed the matter for want of prosecution. The sale agreement was on 15<sup>th</sup> September 2005 and the injunctive order was dismissed long before this suit was filed. I find that nothing barred the trial magistrate from adjudicating this matter. Indeed, the Plaintiff produced an agreement signed by the Appellant and other members of the family dated 18<sup>th</sup> February 1999 agreeing and signing the letter to the Nguluni Land Adjudication to the subdivision of the of Machakos/Nguluni/611 into 11 equal portions. The letter states this is with the full blessings of their parents. From the death certificate on record the said Jonathan Nyumu Muthiani died on the 25<sup>th</sup> April 2001. This means that at the time of adjudication their father Jonathan Nyumu Muthiani was still alive.
13. I find that the Appellant has not established any beneficial interest to the suit land. The suit land belongs to the Plaintiff/Respondent as per the documentary evidence produced in court. I find that the Defendant changed his mind after agreeing to the subdivision with the rest of the family members.
14. 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."
15. 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."



16. 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.

17. 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.

18. 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.

19. 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 he acquired land parcel No. Machakos/ Nguluni/3074 lawfully. I find that this appeal is not merited and I dismiss it with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 23<sup>RD</sup> DAY OF SEPTEMBER 2025.**

**N.A. MATHEKA**

**JUDGE**

