



REPUBLIC OF KENYA



**Munguti v Nzomo (Environment and Land Appeal E011 of 2023)
[2025] KEELC 7365 (KLR) (29 October 2025) (Judgment)**

Neutral citation: [2025] KEELC 7365 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL E011 OF 2023
NA MATHEKA, J
OCTOBER 29, 2025**

BETWEEN

ANGELINA MUNGUTI APPELLANT

AND

ALICE KAMENE NZOMO RESPONDENT

JUDGMENT

1. The Appellant above named being dissatisfied with the Judgment of the Senior Principal Magistrate Hon. Anne Nyoike sitting at Machakos in her ELC No. E023 of 2020 and delivered on 27th July, 2023 appeals to this Honourable Court against the said Judgment on the following principal grounds;
 1. The learned Magistrate erred in law and fact by allowing the Respondent's Plaintiff without considering all evidence on record.
 2. The learned Magistrate erred in law and fact by dismissing the Appellant's Counter-claim without considering all evidence on record.
 3. The learned Magistrate erred in law and fact by failing to consider all material facts relevant to the case.
 4. The learned Magistrate erred in law and fact by ruling that Plot No.106 belonged to the Plaintiff without evaluating all the evidence on record.
 5. The learned Magistrate erred in law and fact by failing to appreciate that the Respondent's together with her witnesses gave contradictory evidence as to whether the Appellant was on Plot No. 106 or not.
 6. The learned Magistrate erred in law and fact by failing to note that whereas the Respondent alleged that the Appellant got into the land after the Appellant's mother died in the year 2011, she also admitted that the Appellant has been on the land long before her mother died.



7. The learned Magistrate erred in law and fact by failing to appreciate that from the totality of the evidence on record that the Appellant was at all times in occupation of the suit land as the owner of Plot Nos. 104 and Plot No. 105 owned by her sister Margaret Ndunge Munguti.
8. The learned Magistrate erred in law and fact by failing to appreciate that the Respondent's witnesses were not truthful as their evidence was challenged by the Appellant as coached and false.
9. The learned Magistrate erred in law by failing to take note that PW 2 testified that the Appellant allegedly got in the Plot and started clearing it whereas all the evidence point to the fact that the Plot is developed with residential houses which PW3 confirmed that the Appellant has been leasing out to tenants.
10. The learned Magistrate in arriving at the said finding erred in law and fact by failing to note that though the Respondent alleges that the Appellant entered into the premises in the year 2011 no action was taken until the year 2020.
11. The learned Magistrate erred in law and in fact by failing to appreciate that though there was evidence that the Appellant has been leasing out the houses on the land there is no claim for rent collected for all the years.
12. The learned Magistrate erred in law and fact in failing to appreciate that the Respondent admitted that the Appellant and her mother have been on the suit land since late 1980's.
13. The learned Magistrate erred in law and fact in failing to appreciate that the allegation that the Appellant's mother was a caretaker from the 1980's is an afterthought not based on the pleadings and remained an unsubstantiated claim aimed at defeating the Appellant's assertion that the houses developed on the suit land are on Plot Nos. 104 and 105 and not Plot Nos. 106 as claimed by the Respondent and were developed by the Appellant together with her mother and that the Appellant and her family have been in occupation from the time it was constructed where they operate a shop and collect rent from the other rooms.
14. The Learned Magistrate erred in law and fact by failing to appreciate that the Certificate of Confirmation of Grant produced by the Respondent refers to an unsurveyed Plot at Machinery in Mtito Andei and not at Mbiuni in Machakos County.
15. The Learned Magistrate erred in law and fact by failing to appreciate that in the Certificate of Confirmation of Grant referred above all the assets therein were to be registered in the joint names of the Respondent and Lilian Kamene Nzomo whereas the Plot being claimed is registered in the sole name of the Respondent.
16. The learned Magistrate erred in law and fact by failing to appreciate that the Appellant's evidence was cogent and supported their claim that the developed plot was on Plot Nos. 104 and 105.
17. The Learned Magistrate erred in law and facts by failing to acknowledge that the Plaintiff did not challenge the existence of Plot Nos. 104 and 105.
18. The Learned Magistrate erred in law and fact by failing to appreciate that surveyed Plots bought by the Appellant's mother were first to be bought in the year 1985 and were also first to be surveyed and registered as Plot Nos 104 and 105.



19. The learned Magistrate in law and fact by failing to appreciate that the Appellant and her sister Margaret Ndunge Munguti have been paying rent for Plot Nos. 104 and 105 from the year 2013.
2. The Appellant prays that;
 - a. The appeal herein be allowed and the Lower Court's Judgment delivered on 27th July, 2023 be set aside.
 - b. This Honourable Court be pleased to re-assess and re-evaluate the entire evidence on record and arrive on its own independent conclusion and enter Judgment in favour of the Appellant as per the Reliefs sought in the Counter-claim.
 - c. Any other orders the Honourable Court may deem fit.
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 v 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 12th August 1986 her late husband David Nzomo Kimeu purchased an unsurveyed plot from Kimangi Ndote and Patrick Kivuva Kimangi. The County Government of Machakos in a letter dated 2nd October 2020 confirmed the plot as Plot No. 106 measuring 44 by 100 feet and was registered under the Respondent's name. the Respondent produced a bundle of receipts under her name. PW2 and PW3 witnessed the sale agreement by the Respondent's husband. That he developed the property and later employed Beatrice Mukonyo Munguti the Appellant's deceased mother as a caretaker. That the said Beatrice Mukonyo Munguti was present and was a witness to the sale.
5. It is not disputed that the Plaintiff/Respondent is the registered owner of plot No. 106 Mbiuni Market as per the records of Machakos County after purchasing the same through a sale agreement. 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.

6. In *Harris JA in Garvey v 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.”

7. The Defendant/Appellant stated that her late mother Beatrice Mukonyo Munguti bought land in Mbiuni Market from the Late Philomena Mutua through a sale agreement dated 1985. It measured 58 by 100 feet and she paid a total sum of Kshs. 10,000/= . That her late mother constructed on the piece of land and passed away in 2011. The County Council initiated the registration of the land which was registered in 2012 as plots No. 104 and 105 under her name. she produced receipts confirming she has been paying land rent and rates for the same. The Appellant stated that the signature in the Plaintiff’s document is not her mothers and is a forgery. In their submissions the Appellant states that parties did not produce the cadastral map or any survey report and it is not possible to determine where plot No. 106 is located. That plot No. 106 sits on plots No. 104 and 105.

8. The Plaintiff testified that in 1986 her husband entered into an agreement for the purchase of an unsurveyed portion of land at Mbiuni Market and after the survey it became plot No. 106. She produced the sale agreement. That the said land devolved to her upon the death of husband who died in 1998. That a grant was issued in High Court Succession Cause 2316 of 1999 and the land was registered in her name. The Appellant maintains that in the Plaintiff’s sale agreement the purported signature of her mother is a forgery.

9. I find that the Appellant has not established any beneficial interest to the suit plot No. 106. The suit plot belongs to the Plaintiff/Respondent as per the documentary evidence produced in court. No evidence has been adduced by the Appellant to prove any fraud and or that the signature in the sale agreement does not belong to her mother. No evidence has also been produced to prove the location of the plot No.106 sits on her Plots No. 104 and 105 and/or whether they are overlapping.

10. 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.”



11. The well-known mantra “he who asserts must prove.” Was well pointed out by the Court of Appeal in *Jennifer Nyambura Kamau v 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.”

12. In *James Muigai Thungu v 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.”

13. 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. 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 29TH DAY OF OCTOBER 2025.

N.A. MATHEKA

JUDGE

