



REPUBLIC OF KENYA



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Nzoka aka Benson Musa Nzioka v Mutuku (Environment and Land Appeal E045 of 2023) [2025] KEELC 7328 (KLR) (28 October 2025) (Judgment)

Neutral citation: [2025] KEELC 7328 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL E045 OF 2023
NA MATHEKA, J
OCTOBER 28, 2025

BETWEEN

MUSA NZOKA AKA BENSON MUSA NZIOKA APPELLANT

AND

ELENA NDINDA MUTUKU RESPONDENT

JUDGMENT

1. The Appellant above named, being aggrieved and dissatisfied by the Judgment of the Principal Magistrate, Hon. Daffline Nyaboke Sure, P.M, sitting in the Chief Magistrate's ELC. No. 44 of 2020 (formerly Machakos ELC. No. 320 of 2017) and dated 27th November, 2023, hereby appeals against the said Judgment and Decree to this court and sets forth the following principal grounds:
 1. The learned trial Magistrate erred in law and fact in finding that the Plaintiff has a good and valid title when this was not so, by failing to find and hold that the purported sale of the suit land to the Plaintiff (Respondent) in January, 2001 was illegal, null and void as the sellers had no valid legal capacity and competency to sell the land as they lacked a duly confirmed Grant of Letters of Administration to the deceased registered proprietors estate and the Plaintiff (Respondent) obtained no valid purchaser's interest or title.
 2. The learned trial Magistrate erred in law and fact in failing to find and hold that the said sale in January 2001 was invalid, illegal, bad in law, incompetent, null and void as stated at ground 1 above, and that the subsequent transfer and issue of title to the Plaintiff in 2015 vide a Grant subsequently issued after the sale in Machakos High Court Succession No. 275 of 2013 was invalid and incompetent to transfer a valid and clean title as the subsequent grant could not in law operate retrospectively.
 3. The learned trial Magistrate erred in law and fact in reaching a decision that was contrary to law, by dismissing the Defendant's case as to the legality of the Plaintiff's title and in failing to



note, find and hold that the Defendants had valid and protected rights against any eviction by virtue of overriding rights and interests as persons in actual long term possession, occupation and use of the suit land.

4. The learned trial Magistrate's findings and Judgment are contrary to evidence, the law and the established precedents on the issues of overriding rights and interests and the law on adverse possession of a deceased property, and grounded her Judgment upon extraneous and irrelevant matters that are prejudicial to the Appellant and unsupported by law.
 5. The learned trial Magistrate's findings and Judgment are against the weight of the evidence and conferred a title to the Plaintiff who by law was not a valid purchaser as the sellers were strangers to the deceased registered proprietor without a valid Grant of Letters of Administration at the time of the purported sale.
 6. The learned trial Magistrate erred in law and fact by failing to appreciate and sufficiently or at all consider the law on application of a trust in favour of the Defendants in light of the evidence on record.
2. The Appellant prays that this appeal be allowed with costs and the lower court Judgment be set aside and the Defendants retain possession, occupation and use of the suit land by virtue of their overriding interests as persons in land possession.
 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 13th January 2001 she purchased the suit property Kangundo/Isanga/869 for a consideration of Kshs. 270,000/= from her uncles David Muema Wambua and Reuben Wambua the sons on the legal proprietor of the land Kamwaki Mutavi. David Muema Wambua, the administrator of the estate of Kamwaki Mutavi petitioned for letters of administration through Machakos High Court Succession No. 275 of 2013 and a grant was issued to him. He thereafter legally transferred the land to the Plaintiff.
5. It is not disputed that the Plaintiff/Respondent is the registered proprietor of land parcel No. Kangundo/Isanga/869 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.”

10. The 2nd Defendant/Appellant stated that suit property of land parcel No. Kangundo/Isanga/869 belonged to Mbula Nzoka his mother since 1968. That the Plaintiff is a distant relative. That he is not aware of the sale agreement nor the succession cause. That he is not related to David Muema. That



Wambua Kamaki sold the land to Wilson Yambu Mbuva and migrated to Masii. That Yambu later migrated to Makueni and sold the land to his grandfather Nzioka Mutavi. That his grandfather left this portion to his father Nzioka Nzoka and his mother Mbula Nzoka. However, during adjudication the Plaintiff's father Mutuku irregularly changed and registered it to his father Mutuku and later irregularly to his father Kamwaki Mutavi who was already dead. He claimed it was fraudulently hived off during adjudication. That Kamwaki held the suit land in trust. DW3 Timothy Mutua Mbithi corroborated the 2nd Defendant's evidence and stated that he is not aware of any sale agreement.

11. The Plaintiff testified that on 13th January 2001 she entered into an agreement for the purchase of land parcel No. Kangundo/Isanga/869. She produced the sale agreement. That the said land devolved to her uncles and her father Francis Mutuku Wambua upon the death of their father Wambua Kamwaki Mutavi who died in September 1974. That a grant was issued in High Court Succession Cause 275 of 2013 to David Muema Wambua who transferred the land to the Plaintiff. Her title was issued on the 7th July 2015 and the same was also produced in court. The Appellant maintains that the Plaintiff's title deed was obtained fraudulently. I find no fraud as the grant was issued by an order of the court and the land transferred legally to the Plaintiff. The Defendants never challenged the succession cause. From the green card produced in court it is clear that the first registered owner was Kamwaki Mutavi by an entry dated 3rd March 1978.
12. I find that the Appellant has not established the any beneficial interest to the suit land. The suit land 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, that any trust existed and/or the existence of adverse possession.
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:

16. 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.

17. 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.

18. 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 acquired land parcel No. Kangundo/Isanga/869 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 28TH DAY OF OCTOBER 2025.

N.A. MATHEKA

JUDGE

