



**Muli v Kilonzo (Environment and Land Appeal E013 of 2020)
[2025] KEELC 8154 (KLR) (26 November 2025) (Judgment)**

Neutral citation: [2025] KEELC 8154 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL E013 OF 2020
NA MATHEKA, J
NOVEMBER 26, 2025**

BETWEEN

ZACHARY MULI APPELLANT

AND

RICHARD MULI KILONZO RESPONDENT

JUDGMENT

1. The Appellant herein being dissatisfied with the Judgment made in the Chief Magistrate's Court at Kangundo by the Honourable Senior Principal Magistrate D. Orimba in CMCC (ELC) No. 118 of 2019 (formerly CC 63 of 2015) delivered at Kangundo on October 7th, 2020 wish to appeal against the whole of that decision on the following grounds;
 1. The learned Senior Principal Magistrate erred in law in entering Judgment for the Respondent against the Appellant against the weight of evidence.
 2. The learned Senior Principal Magistrate erred in law and in fact by picking and choosing only evidence in favour of the Respondent's case while ignoring evidence that would weaken the claim.
 3. The learned Senior Principal Magistrate erred in law and fact by failing to record all evidence and testimony submitted at the main hearing.
 4. The learned Senior Principal Magistrate erred by not appreciating the evidence and submissions of the Appellant.
 5. The learned Senior Principal Magistrate erred by taking into account evidence and testimony that was not admissible.
 6. The learned Magistrate erred by recording and placing reliance on non-existent testimony while rendering Judgment in favour of the Respondent.



7. The learned Senior Principal Magistrate rendered his decision through wrong analysis and or ambiguous analysis of the same.
 8. The leaned Senior Principal Magistrate misapplied relevant case law by placing reliance by acts of omission as relates to evidence and testimony guiding application of the law to the facts or issues in question.
 9. The decision of the learned Senior Principal Magistrate is in the circumstances unjust and unfair.
 10. Such other and or further grounds as may be canvassed, adduced, proved and or emerge at the hearing of this Appeal.
2. The Appellant prays that;
- a. The Judgment entered against the Appellant in October 7th, 2020 be wholly set aside.
 - b. That this Honourable Court do conduct a fresh hearing to determine the case fairly to its logical conclusion taking into account that the dispute is longstanding.
 - c. That this Court do order the S.C.C.I.O Matungulu to produce its final report on the issue of fraud as pertains to the subject matter before this Court.
 - d. In the alternative to (b) above, this Honourable Court be pleased to refer the matter back to the Chief Magistrate's Court at a different court station for fresh hearing of the suit.
 - e. The costs and incidentals of this 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 the 5th July 1992 he entered into a sale agreement with the original owner over share and plot No. 1544 and plot No. 14 – 030. And produced the agreement as PEx 1 for a consideration of Kshs. 85,000 =. He approached his brother the Appellant as he could not raise the entire purchase price but in 2010 the Appellant started claiming the ownership of the entire property. The Respondent reported to Muka Mukuu Farmers Cooperative Society Limited who resolved to register the same as a joint share hence the case in the Trial Court.
 5. The Appellant's defence is that he purchased share No. 1544 Plot 14-030 solely. This is corroborated by the sale agreement dated 5th July 1992 where the Appellant was the purchaser and the Respondent was the witness. That the share transfer dated 31st May 1994 shows that the previous owner Athanus Munyambu Ngovi PW2 transferred the share to the Appellnat alone and also membership No. 1520 solely to the Appellant. That the Respondent and PW2 entered into a sale agreement and dated it



the same date between themselves in order to defraud the Appellant. The *akn ke act 1960 43 Law of Contract Act* clearly stipulates the requirements for a valid instrument to convey an interest in land. Section 3 (3) of the *akn ke act 1960 43 Law of Contract Act* (Cap 23 of the Laws of Kenya) stipulates that;

6. 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:

7. While Section 38 (1) of the *akn ke act 2012 6 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 Respondent produced the sale agreement dated 5th July 1992 between himself and PW2 for the sale of share No. 1544 Plot No. 14 -030 PEx1. It indicated the Respondent as the buyer and Athanus Munyambu Ngovi the seller and is signed by the Appellant. He produced the transfer form and a letter from Muka Mukuu cooperative stating the plot was jointly owned. PW2 corroborated the Plaintiff’s case. He confirmed selling the land to the Plaintiff as per the sale agreement PEx1. That the Defendant Appellant was present and it was the Plaintiff who paid him the money.
10. The Appellant testified that he bought the land from PW2 and produced the transfer form dated 31st May 1994 DEx1. The land was transferred to him and the Plaintiff was only a witness. That the Chief wrote a letter stating that the land belonged to him alone. That the society ordered him to return all the documents in his possession. that the search and the yellow card show that the suit plot belongs to the two of them.



11. DW2 attached to DCI investigated the matter and stated that the said Athanus Munyendo Ngovi sold the land twice to the two brothers. That the first buyer was Zachary Muli who bought it in 1992 and Richard Muli in 1993.
12. I have perused the documents adduced as evidence by both parties. The Plaintiff produced a sale agreement dated 5th July 19192 signed by all parties transferring the share and suit plot to him PEx1. PW2 confirms that he sold the suit plot to the Plaintiff. After the matter was referred to the Society the same conclusion was reached. DW2 stated that the seller sold the plot twice as per the two sale agreements. The share transfer form stating the share is jointly owned is dated 14th March 2012.
13. One wonders why the Defendant did not file a claim against him after he allegedly disowned the sale agreement with the Appellant and after the Appellant was asked to return all the membership documents to the society. I find that the Appellant has not established legitimate sole ownership of the suit land. The suit land belongs jointly to the Plaintiff Respondent and the Defendant Appellant as per the documentary evidence produced in court. No evidence has been adduced by the Appellant to prove otherwise.
14. Section 109 of the *akn ke act 1963 46 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 *akn ke act 1963 46 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 *akn ke act 1963 46 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 *akn ke act 1963 46 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 *akn ke act 1963 46 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.

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 his case 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 26TH DAY OF NOVEMBER 2025.

N.A. MATHEKA

JUDGE

