

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC APPEAL NO. E011 OF 2024

RUTH WANYUA WACHIRA:.....APPELLANT

VERSUS

MONICA MBOGORI:.....1ST RESPONDENT

LAND REGISTRAR MACHAKOS:.....2ND RESPONDENT

AND

WATER SEWERAGE WELFARE ASSOCIATION (WASWA)

INVESTMENT COMPANY FORMERLY WASWA

DEVELOPMENT SOCIETY:.....INTERESTED PARTY

JUDGEMENT

The Appellant herein Ruth Wanyua Wachira being aggrieved by the Judgment and Orders of the learned trial Magistrate Hon. C.C. Oluoch (CM) in Mavoko CMCC No. 51 of 2019 delivered on 9th June, 2021, appeals against the entire Judgment to this Honourable Court on the following grounds;

1. The learned Magistrate erred in law and in fact in determining the Respondent's suit based on non-adduced/existent evidence.

2. The learned Magistrate erred in law and in fact in finding that the Respondent had proved its case on a balance of probabilities.
3. The learned Magistrate erred in fact and in law in making a finding of fact without any proper regard to the evidence in the Appellant's pleadings and submissions thus arriving at a wrong conclusion.

The Appellant prays that Judgment be entered as follows:

- a. That this appeal be allowed.
- b. That the Judgment and Orders of Honourable C.C Oluoch (CM) in Mavoko CMCC No. 51 of 2019 made on 9th June, 2021 be set aside and be substituted with an Order dismissing the Plaint with costs and interest to the Appellant.
- c. That the costs of this Appeal be awarded to the Appellant.

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.”

In the trial court the Plaintiff/Respondent stated that in 1995 she purchased the suit property Mavoko Town Block 3 (Wasaw) 4168 for a consideration of Kshs. 36,100/= from the Interested Party. When waiting for the title she discovered it had been issued to the 1st Defendant/Appellant. PW2, John Mwicigi corroborated the Plaintiff's evidence. He stated that they issued her with an allotment letter for plot 505/253 and she paid a total of Kshs. 36,100/=. She produced the allotment letter as an Exhibit. Subsequently survey of Kenya issued a number Mavoko Town Block 3 (Wasaw) 4168 for purposes of issuing a title deed.

It is not disputed that the 1st Defendant/Appellant is the registered proprietor of land parcel No. Mavoko Town Block 3/ Waswa/ 4168. 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.”

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.

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.”

The 1st Defendant/Appellant stated that she purchased the suit land Mavoko Town Block 3 (Wasaw) 4168 from Habitable Homes for Kshs. 150,000/= and was issued with a title deed on the 27th April 2009. She did not produce the sale agreement, Land Board Consent and/or transfer documents. She did not produce any documentary evidence to prove her claim. She stated that she did not know Waswa, that she fenced the land and was waiting to sell it.

PW2, the Secretary of Waswa stated that the plots were allocated to members of Waswa including the 1st Respondent who was an employee of the defunct Nairobi City Council. That the Survey of Kenya gave land reference numbers for purposes of allocation of title deeds, He produced the register of the land reference numbers and members allocated to them. In the register it is clear that the 1st Respondent/Plaintiff was allocated plot No. 4168. PW2 produced a map showing the said subdivision of the plots in Mavoko Town Block 3. I find that the allocation letter produced by the 1st Respondent/Plaintiff dated 24th June 1996 of Waswa Estate Lukenya - Ranch Plot No. 505/253 refer to one and the same parcel of land as Mavoko Town Block 3 (Waswa) 4168 and occupies the same position on the ground. The 1st Respondent/Plaintiff allotment letter for plot 505/253 of which she paid a total of Kshs. 36,100/= is dated 24th June 1996 while the Appellant's title

deed was issued on the 27th April 2009. The Plaintiff adduced documentary evidence of payment slips and acknowledgement of payments that she purchased the suit land from the Interested party. I find that the said suit plot was not available for sale in 2009 as it had already been allocated to the 1st Respondent/Plaintiff.

I find that the Appellant has not established legitimate ownership of the suit land. The suit land belongs to the 1st Respondent/Plaintiff as per the documentary evidence produced in court. No evidence has been adduced by the Appellant to prove otherwise.

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.”

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.”

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.”

I find that the learned Honourable Trial Magistrate did not err in law and in fact in finding that the Plaintiff had proved her case on a balance of probabilities that she acquired land parcel No. Mavoko Town Block 3/ Waswa/ 4168 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 26TH DAY OF
NOVEMBER 2025.**

N.A. MATHEKA

JUDGE