



REPUBLIC OF KENYA



KENYA LAW
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**Nzau v Musyoka (Environment and Land Appeal E001 of 2024)
[2025] KEELC 5669 (KLR) (30 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5669 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL E001 OF 2024**

NA MATHEKA, J

JULY 30, 2025

BETWEEN

MUEMA NZAU APPELLANT

AND

DOROTHY MUEMA MUSYOKA RESPONDENT

JUDGMENT

1. Muema Nzau being dissatisfied with the Judgment and Decree of Honourable Ole Keiwua K.D, Chief Magistrate delivered on 27th March, 2024 in Kangundo CM ELC No. 62 of 2019 appeals against the whole of the said Judgment and Decree on the following grounds;
 - a. That the learned Honourable trial Magistrate erred in law and in fact in finding that the Appellant/Defendant had proved on a balance of probabilities that he is/was legal/lawful owner of the suit property, Plot No. 71C, Kamiti Farmers' Society.
 - b. That the learned Honourable trial Magistrate erred in law and in fact in failing to uphold the Appellants' evidence on ownership of the property, Plot No. 71C, Kamiti Farmers' Society, having acquired it for value in 2007 and immediately developed a homestead on it and occupied it to date.
 - c. That the learned Honourable trial Magistrate erred in law and in fact by disregarding the evidence of the sons of the original owner (Wambua Nyunzu) of the suit property, Plot No. 71C, Kamiti Farmers' Society, namely Stephen Mutuku Wambua and Thomas Kaloki Wambua and that of the area chief who gave chronology of ownership of the property and who testified in support of the Appellant's case that Wambua Nyunzu sold the property to Ndungo Malinda who in turn sold it to Henry Muli Mutevu who resided on it and eventually sold it to the Appellant.



- d. That the Honourable trial Magistrate erred in law and in fact in upholding an alleged sale of the property Plot No. 71C, Kamiti Farmers' Society between one Patrick Kyalo Ndungo (who never owned the property in the first place) and the Respondent.
 - e. That the learned Honourable trial Magistrate erred in law and in fact in failing to consider and uphold the submissions made on behalf of the Appellant.
 - f. That the learned Honourable trail Magistrate erred in law and in fact in failing to take cognizance of the long occupation of the suit property, Plot No. 71C, Kamiti Farmers' Society by the Appellant.
2. The Appellant prays that;
- a. The Judgment and Decree of the Honourable trial Magistrate delivered on 27th March, 2024 in Kangundo CM ELC No. 62 of 2019 be set aside and in lieu thereof the Respondent's case in the lower court be dismissed.
 - b. Costs of the lower court proceedings and of this Appeal be borne by the Respondent.
 - c. Any other relief this Honourable Court may deem necessary to grant.
3. It is the Plaintiff's case that she purchased the suit land from Patrick Kyal Ngundo on the 13th February 2004 and ownership was transferred to her. That the original allottee was Wambua Nyunzu who sold it to Kyalo Ndungo. After the purchase she took possession and constructed a permanent house and allowed her brother Henry Muli Mutevu to occupy the house and till the land. Henry died in 2014. Before his demise the Defendant took possession of the land and the information was that he had rented the same.
4. 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.



5. 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.”

6. 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.”

7. The Plaintiff/Respondent produced the sale agreement between Kyalo Ndungo and Wambua Nyunzu dated 2nd May 2002 and the sale agreement between Patrick Kyalo Ndungo and herself dated 13th February 2004. She inter alia produced the Kimiti Farmers Cooperative Society Limited non member Certificate number KO432 for the suit land and receipts for the same. I find that the Plaintiff has produced documentary evidence to establish that on 13th February 2004 she entered into an agreement for the purchase of plot number 71C Kimiti Farmers Cooperative Society Limited, took possession and constructed a house. PW2 John Ndungo and PW3 Harrison Kioko Mutisya stated that they witnessed the sale agreement between Kyalo and the Plaintiff. PW4 the Plaintiff's husband corroborated the Plaintiff's testimony. PW5 Stephen Mutua Mwangangi delivered construction materials at the suit land for the Plaintiff and PW6 was the mason who constructed the house. PW7 Kyalo Ndungo confirmed selling the suit land to the Plaintiff on the 13th February 2004.

8. The Appellant/Defendant testified that he acquired plot 71C after purchasing it from Henry Muli Mutevu. He presented witnesses DW3, DW4, DW5 and DW6, who testified witnessing the sale. The Appellant has produced a land sale agreement dated 22nd July 2007 between himself and Henry Muli Mutevu. However, no ownership documents have been adduced to show that the said Henry Muli Mutevu owned the property prior to the sale and/or in what capacity he was selling it.

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.”



9. 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.”

10. 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.

11. In comparison, Section 26 of the *Land Registration Act* which guarantees the concept of indefeasibility of title does not extend to any property that has been found to have been unlawfully acquired. The Court of Appeal in *Attorney General vs Torino Enterprises Limited (Civil Application 84 of 2012)* (2022) KECA 78 (KLR) (4 February 2022) (Judgment) held that;

“We have considered the provisions of section 26 of the *Land Registration Act* (repealed) in light of the provisions of Article 40 of *the Constitution* which guarantees protection of right to property and it is our considered view that the concept of indefeasibility of title is subject to Article 40 (6) of *the Constitution* which states that: “The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.” Guided by the provisions of Article 40 (6) of *the Constitution*, we hold that the concept of indefeasibility or conclusive nature of title is inapplicable to the extent that title to the suit land was unlawfully acquired. See *Denis Noel Mukhulo & Another v. Elizabeth Murungari & Another* [2018] eKLR.



12. I find that the Plaintiff has established the ownership of plot 71C Kamiti Farmers' Society on a balance of probabilities. If at all the Appellant bought the suit land from Henry Muli Mutevu then the said Henry Muli Mutevu had no capacity to sell the same as he did not possess proprietary interest as he was a mere licensee. He had no capacity to sell and the Appellant should have exercised due diligence. 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 is the legal/lawful owner of the suit property, Plot No. 71C, Kamiti Farmers' Society. 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 30TH DAY OF JULY 2025.

N.A. MATHEKA

JUDGE

