

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ELC APPEAL NO. E006 OF 2024

LYDIAH JENNY KATUKU MUTHUSI (Suing as the Administrator of the Estate of Jackson Muthusi Mwano (Deceased)).....APPELLANT
-VERSUS-

AIMI MA KILUNGU.....1ST RESPONDENT
EVELYNE KATHINI KATULE..... 2ND RESPONDENT
(Being an appeal from the judgment of Hon. F. O. Makoyo, PM delivered on 5th October, 2023 in Kilungu MC ELC No. E011 of 2023)

JUDGMENT

1. The Appellant had filed a case against the Respondent at Kilungu Principal Magistrate's court in which she sought the following reliefs:
 - a. **Declaration that the estate of the late Jackson Muthusi Mwano is the *bonafide* shareholder number 683.**
 - b. **An order directing the 1st Defendant to rectify its list of shareholders to indicate Jackson Muthusi Mwano as shareholder number 683.**
 - c. **An order do issue compelling the 2nd Defendant to surrender Agricultural plot Number 942 and commercial plot 1414 to the rightful shareholder number 683.**
 - d. **In the alternative, the 1st Defendant be compelled to allocate the estate of the late Jackson Muthusi Mwano an agricultural plot and a commercial plot and/or compensate the Plaintiff an agricultural plot and a commercial plot at the current market value upon the Plaintiff topping up an equivalent of 19 shares.**
 - e. **Cost of the suit.**
 - f. **Any other relief as this honourable court may deem fit and just to grant.**

2. The Appellant who is the administrator of the estate of her late husband Jackson Muthusi Mwano (deceased) stated before the trial court that the deceased was a member of the 1st Respondent where he had purchased six (6) shares on 27th May, 1978. It was her evidence that the shares of the deceased were fraudulently transferred in 1996 into the name of the husband of the 2nd Respondent who in turn transferred the shares to the 2nd Respondent.
3. The 1st Respondent did not defend the suit. The 2nd Respondent stated that she was a widow of Fredrick Kingola Katule who had six (6) shares at the 1st Respondent. Her husband had taken the shares using the name of Ngeka Katule. When the 1st Respondent asked its members to add their shares to 25 shares, her husband bought an additional 19 shares making a total of 25 shares. When her husband died, she wrote to the 1st Respondent to change the shares to her name which was done.
4. The 2nd Respondent then balloted and was given an agricultural plot No. 942 measuring 10 acres and a commercial plot No. 1414 measuring $\frac{1}{8}$ of an acre. The 2nd Respondent later asked the 1st Respondent to transfer her shares into the name of her son James Muthusi Katule which was done.
5. After a full hearing, the trial magistrate found that the Appellant had not proved her case. He proceeded to dismiss the Appellant's suit with no orders as to costs. This is what triggered the Appellant to file an appeal to this court in which she raised the following grounds:
 - 1) **That the learned trial magistrate erred in law and fact in dismissing the Appellant's suit.**
 - 2) **That the learned trial magistrate erred in law and in fact in failing to fully analyze and evaluate the evidence on record thus reaching the wrong decision.**

- 3) That the learned trial magistrate erred in abdicating his statutory duty in failing to address the substantial issues raised thus causing miscarriage of justice and reaching a wrong verdict.
 - 4) That the learned trial magistrate erred in law and in fact in finding in favour of the Respondents when the letter from the 1st Respondent dated 4th September, 2013 clearly stated that the deceased's share were transferred to the 2nd Respondent without any explanation to it.
 - 5) That the learned magistrate erred in law in holding that the Appellant failed to show the root of her late husband's membership with the 1st Respondent.
 - 6) That the learned trial magistrate erred in law and fact in finding that the Appellant had not proved her case against the Respondents and granted judgment in their favour.
6. This being a first appeal to this court, my duty is to re-evaluate the evidence and reach my own conclusion. This duty was stated in the case of **Selle and Another –vs- Associated Motor Boat Co. Ltd & Others (1968) EA 123** as follows:
- “....An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either it has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence of if the impression**

based on the demeanor of a witness is inconsistent with the evidence in the cases generally”.

7. The court directed the parties to dispose this appeal by way of written submissions. The Appellant filed her submissions dated 15th September, 2025. The 2nd Respondent filed her submissions dated 21st October, 2025.
8. I have carefully considered the evidence which was adduced before the trial court as well as the submissions filed herein. The issues which emerge for determination are firstly, whether the deceased was a member of the 1st Respondent holding six (6) shares. Secondly, whether the deceased's shares if any were fraudulently transferred to the 2nd Respondent's husband. Thirdly, was the Appellant entitled to reliefs in her claim. Fourthly which order should be made in this appeal.
9. On the first issue, the evidence which was adduced before the trial court is that the deceased bought six (6) shares on 27th May, 1978. What the Appellant produced before the trial court in support of the alleged purchase of six (6) shares is a receipt which was issued under the letter head of Kilungu Development Fund. The 1st Respondent's name was written on this receipt and it was stated that official receipt was to follow. There was no evidence which was adduced to show the relationship between 1st Respondent and Kilungu Development Fund or that an official receipt was later issued as indicated on this document issued on 27th May, 1978.
10. There was no share certificate issued to the deceased to show that he had purchased six (6) shares. There was no receipt issued for entrance fees of Kshs.50/=. There was no membership number given to the deceased. The Appellant produced another document dated 10th February, 1979 in which the deceased is said to have accepted to purchase six (6) shares and comply with Articles of Association of the 1st Respondent. Again there was no membership number shown in this document.

11. The only document which came close to identifying the deceased as a member of the 1st Respondent is a document produced by the Appellant which shows that a search by perusal on the records held by the office of the Attorney General, Business Registration Service which showed that as at 3.30 pm on 2nd October, 2012 the deceased held three (3) shares of Kshs.1,000/= each.
12. It is therefore clear that in the absence of any credible evidence that the deceased purchased six (6) shares from the 1st Respondent, the trial magistrate had no evidence upon which he could make a finding that the deceased was a shareholder of the 1st Respondent.
13. On the second issue, there is no clear evidence which was adduced to show when the deceased died. The only document produced is a certificate of confirmation of grant dated 18th February, 2013 which does not show when the deceased died. It is only a grant which would have shown when the deceased died. However, the evidence on record shows that the Appellant alleges that the transfer of shares of the deceased was done barely 7 months after his death. If this be the case, the deceased must have died on or around November, 1984 as the alleged transfer took place on 1st June, 1985.
14. The only document which the Appellant relied on to impute fraud on the part of the husband of the 2nd Respondent was a letter dated 4th September, 2013 from the 1st Respondent. This letter was written by one of the directors of the 1st Respondent. This director was not called to testify before court and shed light on how the alleged transfer took place. When the Registrar of companies called the directors of the 1st Respondent to go and shed light on the inconsistencies in the register, none went to do so.
15. The source of the list of shareholders of the 1st Respondent which was produced by the Appellant is not known. The list is per the record as at 31st December, 1978. As per this list, the deceased had three (3) shares. If this be the case, then the husband of the 2nd Respondent cannot be said to have

transferred six (6) shares on 1st June, 1985 which shares the deceased never had.

16. The 2nd Respondent gave chronology of how her husband acquired six (6) shares on 1st June, 1985. When the 1st Respondent asked shareholders to increase their shareholding to 25 shares, the 2nd Respondent purchased ten (10) shares on 9th March, 1996 making a total of 25 shares. The 2nd Respondent gave evidence on how she balloted and was given agricultural plot No. 942 and commercial plot No. 1414. She later transferred the two plots to her son. In all these process, there was no fraud on her part. During balloting, share number 693 changed to 1778.

17. It is the Appellant who was pleading fraud and the burden of proof was on her to adduce evidence to prove that. In the case of **S. O. & Another –vs- Nathan Murugu & 6 others (2019) KECA 709 (KLR)** the Court of Appeal cited the case of **Vijay Morjaria –vs- Nansingh Madhusingh Derbar & Another (2000) eKLR** where it was stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved and it is not allowable to leave fraud to be inferred from the facts”.

18. The Appellant did not adduce any evidence to show that there was fraud on the part of either the 1st and 2nd Respondent. The director of the 1st Respondent who authored the letter of 4th September, 2013 was not called to substantiate his allegations particularly given the fact that in their own records which were unverified, the deceased had three (3) shares when he is alleged to have paid for six (6) shares.

19. The trial magistrate properly analyzed the evidence which was before him and arrived at a proper conclusion that the Appellant had not proved her case as required. The letter of 4th September, 2013 without more was not enough to show fraud on the part of the Respondents. The deceased appears to have been a learned person who had accounts outside the country if the certificate of confirmation is anything to go by. One wonders why such a learned person would pay his Kshs.6050/= on a receipt belonging to a different company and be promised that an official receipt was to follow. Again one wonders why the deceased was undertaking to purchase six (6) shares on 10th February, 1979 if indeed he had purchased six (6) shares on 27th May, 1978.

20. From the above analysis, it is clear that the Appellant did not adduce any credible evidence that the deceased had purchased six (6) shares which were transferred to the husband of the 2nd Respondent. There is absolutely no evidence of fraud proved as required. I therefore find that the Appellant's appeal is devoid of merit. The appeal is dismissed with costs to the Respondent.

.....
HON. E. O. OBAGA

JUDGE

JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 12TH DAY OF FEBRUARY, 2026.

IN THE PRESENCE OF:

Ms. Musa for 2nd Respondent.

Mr. Mugo for Appellant.

Court assistant – Steve Musyoki

ORIGINAL