



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Ngugi & another v Kioko (Environment and Land Appeal
42 of 2023) [2025] KEELC 5716 (KLR) (29 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5716 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL 42 OF 2023**

NA MATHEKA, J

JULY 29, 2025

BETWEEN

NANCY WANJIRU NGUGI 1ST APPELLANT

**MUKA MUKUUFFARMERS CO-OPERATIVE SOCIETY LIITED 2ND
APPELLANT**

AND

JOHN KIOKO RESPONDENT

(Being an Appeal from the Judgment of the Chief Magistrate's Court at Kangundo of Hon. D. Sure delivered on 27th November, 2023 in Kangundo Environment Land Cause No. 48 of 2019)

JUDGMENT

1. The Appellants Nancy Wanjiru Ngugi and Muka Mukuu Farmers Co-operative Society Limited appeal to the Environment and Land Court at Machakos against the Judgment of the Chief Magistrate's Court at Kangundo of the Hon. D. Sure delivered on 27th November, 2023 in ELC. Cause No. 48 of 2019 on the following grounds:
 1. The learned Magistrate erred in law and fact by failing to consider all evidence on record.
 2. The learned Magistrate erred in law and fact by failing to consider all material facts relevant to the case.
 3. The learned Magistrate erred in law and fact by failing to appreciate that at the time of Respondent was registered as the owner in Title Deed No. Donyo Sabuk/Donyo Sabuk West Block 1 /2619 on 17th April, 2018 he had purchased only a portion of land measuring approximately 2.4 acres.



4. The learned Magistrate erred in law and fact by failing to appreciate that the plot measuring 1.2 acres purchased by the Respondent on 28th April, 2018 could not be deemed as covered under Title Deed No. Donyo Sabuk/Donyo Sabuk West Block 1/2619.
 5. The learned Magistrate erred in law and fact by making a finding that the Respondent had purchased a total of 3.6 acres covered under Title Deed No. Donyo Sabuk/Donyo Sabuk West Block 1/2619 contrary to Appellant's evidence that the portion of land measuring approximately 1.2 acres purchased on 28th April, 2018 was unallocated to date.
 6. The learned Magistrate erred in law and fact by failing to appreciate that the 1st Appellant had bought and was entitled to two portions of land covered under Title Deed No. Donyo Sabuk/Donyo Sabuk West Block 1/2619 measuring approximately 2.4 acres which had been purchased long before the Title Deed was issued in favour of the Respondent.
 7. The learned Magistrate erred in law and fact by making a finding that the 1st Appellant was entitled to only 1.2 acres under Title Deed No. Donyo Sabuk/Donyo Sabuk West Block 1/2619.
 8. The learned Magistrate erred in law and fact by failing to appreciate that the 1st Appellant and the Respondents were each entitled to half share of the land covered under Title Deed No. Donyo Sabuk/Donyo Sabuk West Block 1/2619.
 9. The learned Magistrate erred in law by failing to properly interpret and apply the rules of evidence.
2. The Appellant prays that this Honourable Court be pleased to issue orders:
1. That the Appeal be allowed and the orders issued by the learned Magistrate on 27th November, 2023 set aside.
 2. That the Honourable Court do evaluate all the evidence on record and Appellants' Counter-claim dated 22nd November, 2018 be allowed.
 3. That the Appellant be granted the costs of the Appeal.
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. The matter began by a plaint dated 31st October 2008 where in the trial court the Plaintiff/Respondent stated that he is the registered proprietor of a parcel of land known as Donyo Sabuk/Donyo Sabuk West Block 1/2619. That on or about the 19th October 2013 he entered into an agreement for the purchase of plot number 34 measuring 1.2 acres held by the 2nd Defendant. On the 20th March 2014 he entered into another agreement for the purchase of plot number 2432 measuring 1.2 acres held by



the 2nd Defendant. On the 28th April 2018 he entered into the last agreement for the purchase of plot number 2149 measuring 1.2 acres held by the 2nd Defendant. These three plots were consolidated and issued with the single title. That the 2nd Defendant allotted the suit property to the 1st Defendant hence interfering with his quiet possession.

5. The 1st Defendant submitted that she purchased part of the suit property from Thomas M. Mutisya who at the time was a member of the 2nd Defendant. She produced plot allocation letter dated 27th April 2018 for plot No. Transformer No. 47 for share No. 806 and took possession. That she also produced plot allocation letter dated 27th April 2018 No. 48 for share No. 2510 and transfer form and this plot is adjacent to plot No. 2419 which is now part of the suit property. That the survey by Boma Surveys showed that the ground coverage of parcel of land known as Donyo Sabuk/Donyo Sabuk West Block 1/2619 was 4.8 acres and the present occupants were the 1st Defendant/Appellant and the Plaintiff/Respondent and should be divided equally.

6. 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.”

7. 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.”

8. 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:

9. 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.

10. 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.”

11. 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.”

12. The Plaintiff/Respondent stated that he is the registered proprietor of a parcel of land known as Donyo Sabuk/Donyo Sabuk West Block 1/2619. I find that the Plaintiff has produced documentary evidence to establish that on or about the 19th October 2013 he entered into an agreement for the purchase of plot number 34 measuring 1.2 acres held by the 2nd Defendant. On the 20th March 2014 he entered into another agreement for the purchase of plot number 2432 measuring 1.2 acres held by the 2nd Defendant. The seller was Peter Mutisya who held shares with the 2nd Defendant. He produced the sale agreements dated 19th October 2013 and 20th March 2014 (PEX 1&2). He also produced the receipt from Boma Surveys dated 30th September 2014, Demarcation Sketch Plan dated 9th December 2014 and the Application for consent to transfer form for both plots (PEX3 to 6). Total acreage is 2.4 acres and this is not in dispute.

13. PW1 testified that he entered a further sale agreement dated 11th April 2018 for plot 2149 and produced the said agreement. He produced a document of transfer dated 28th April 2018 from the vendor and signed by the 2nd Defendant. I have perused the certificate of search dated 5th October 2018 and the same states that the Plaintiff was registered on the 17th April 2018 and the title deed issued on the 11th May 2018 (PEX13) This is a material discrepancy. It seems like the transfer was done after the title had been registered. The search by the 2nd Defendant dated 11th April 2018 confirmed that the share number of Kamau Munene was 2149 but with a rider that Kamau Munene had initially been allocated the plot but it was occupied by someone else and he was to seek a fresh allocation. I find that the said plot was not available for sale at the material time.



14. I find that the Plaintiff has established the ownership of 2.4 acres of the suit land Donyo Sabuk/Donyo Sabuk West Block 1/2619 and not 3.6 acres as alleged. The balance of the suit land belongs to the 1st Defendant/Appellant as per the documentary evidence produced in court. I find that the Plaintiff was fraudulent in adding the third agreement when he knew very well that the plot was allocated and not available for sale.

15. 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.”

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 Evidence Act Chapter 80 Laws of Kenya succinctly states:

17. Whosoever 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.

18. 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.

19. Be that as it may, 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.”

20. The Appellant/1st Defendant testified that she acquired Land Parcel No. 47 measuring 1,2 acres which is part of the title Donyo Sabuk/Donyo Sabuk West Block 1/2619 after purchasing it from Thomas M. Mutisya who is member No. 797 in the year 2016. She is also the owner of Land Parcel No. 48 allocated under share No. 2510 which she bought in the year 2015 and is adjacent to Plot No. 47. She produced the allocation letter dated 27th April 2018 for share No. 806 and 2510 signed by the 2nd Defendant showing she was the owner of plot No. 47 & 48 (DEx2). She produced the two transfer forms dated 27th June 2015 and 15th May 2015. DW2 the Chairman of the 2nd Defendant states that the Plaintiff's title deed was obtained fraudulently as it covers a larger area than what the Plaintiff purchased. That the additional plot purchase by the Plaintiff on the 28th April 2018 is yet to be allocated. That the Plaintiff was only entitled to 2.4 acres.
21. I find that the Plaintiff has established the ownership of 2.4 acres of the suit land Donyo Sabuk/Donyo Sabuk West Block 1/2619 and not 3.6 acres as alleged. The balance of the suit land belongs to the 1st Defendant/Appellant as per the documentary evidence produced in court.
22. Section 80 of the *Land Registration Act* provides as follows;
 - “ 80. Subject to subsection (2), the court may order the rectification of the register
 - (1) by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.
 - (2). The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.”
23. This section gives the court powers to order for rectification of a register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake. I have perused the survey report dated 9th March 2018 by Boma Surveys Ltd which confirmed that the Plaintiff and the 1st Defendant were both on the suit land and the same should be divided into two equal portions of 2.4 acres each as the title was only in the names of the Plaintiff. I find that the Plaintiff has proved ownership of 2.4 acres and the balance should be transferred to the Defendant. In the instant case I find that the Plaintiff has failed to prove his case on a balance of probabilities and the trial magistrate erred in arriving at the said conclusion that he owned 3.6 acres. I find that the appeal is merited and I make the following orders;



1. The orders issued by the Trial Court on the 27th November 2023 are set aside.
2. An order cancelling the Title Donyo Sabuk/Donyo Sabuk West Block 1/2619 held by the Plaintiff John Kioko and the same be rectified accordingly to reflect the Plaintiff John Kioko owns 2.4 acres and the 1st Appellant Nancy Wanjiru Ngugi 2.4 Acres therein.
3. Costs of the lower court and this appeal to the Appellants

It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 29TH DAY OF JULY 2025.

N.A. MATHEKA

JUDGE

