



Mochache v Kidiavai and Muhenge (Administrators of the Estate of Godfrey Muhenge Kivanze - Deceased) & 2 others (Civil Appeal 357 & 360 of 2019 (Consolidated)) [2025] KECA 1021 (KLR) (30 May 2025) (Judgment)

Neutral citation: [2025] KECA 1021 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 357 & 360 OF 2019 (CONSOLIDATED)
M NGUGI, FA OCHIENG & AO MUCHELULE, JJA
MAY 30, 2025**

BETWEEN

KENSO ORINA MOCHACHE APPELLANT

AND

**KENNETH GUNGU KIDIAVAI & SHALOM NAOMI MUHENG
(ADMINISTRATORS OF THE ESTATE OF GODFREY MUHENG KIVANZE
(DECEASED) 1ST RESPONDENT**

WILFRED KEGONYE BABU 2ND RESPONDENT

**LIBERTY CARE CENTRE CHILDREN'S HOME (THROUGH ITS TRUSTEES
NELSON MUSUNGU, LYDIA ANGAYA CHIRANDE, VINCENT LULESA &
DICKSON KILONZO) 3RD RESPONDENT**

(Being an appeal from the judgment and decree of the Environment and Land Court at Machakos (O. Angote, J.) dated 15th February 2019 in ELC No. 320 of 2009)

JUDGMENT

1. Under Rule 31(1)(a) of the Court of Appeal Rules, 2022, this Court's jurisdiction on first appeal is to - reappraise the evidence and to draw inferences of fact."

In *Simon Towett Maritim v Jotham Muiruri Kibaru*, Nakuru Civil Appeal No. 292 of 2005 it was reiterated that our mandate on first appeal is to re-evaluate the evidence tendered before the superior Court, asses it and make our own conclusions while remembering that we neither saw nor heard the witnesses who testified before the court.

2. It is also trite that trial courts are considered finders of fact, and, therefore, their findings of fact are given a high degree of deference by the higher courts. This is why, on appeal, the appellate court will only



overturn a conclusion of fact if the trier of fact's decision was clearly erroneous. In *Attorney General v David Marakaru* [1960] EA 486, it was held that a decision is erroneous if it is one to which no court could reasonably come.

3. This appeal arises from the decision by the Environment and Land Court (Angote, J.) at Machakos. The learned Judge dismissed the suit by the appellant, Kenso Orina Mochache. The Court also dismissed the Statement of Admission by the 2nd respondent, Wilfred Kegonye Babu. At the same time, the Court allowed the counterclaim by the 3rd respondent, Liberty Care Centre Children's Home, who were represented by their Trustees Nelson Musungu, Lydia Angaya Chirande, Vincent Lulesa and Dickson Kilonzo. Costs of the suit and of the counterclaim were awarded to the 3rd respondent, and were to be paid by the appellant and the 2nd respondent.
4. The appellant was aggrieved by the decision and filed the Appeal No. 357 of 2016 on eighteen (18) grounds summarized inter alia: the learned judge erred in judgment by concluding that the appellant had presented evidence to the effect that the 3rd respondent had trespassed onto the suit property; the learned judge erred in his decision that the children home was registered in 2006 when from the document, the children's home was registered in 2008; the learned judge erred in law and fact in admitting the witness statements of the deceased whereas the witness who wished to have the same adopted by the court said that he knew nothing about the information and or facts contained in the said witness statement; the learned judge erred in law and fact in his decision that the appellant was a beneficiary of four (4) plots despite overwhelming evidence that all partners, the appellant, the 1st and 2nd respondents all received two (2) plots each; the learned judge erred in the decision that the Children Home had occupied the title no. 13302/43 since 2006; and the learned judge erroneously and without facts made a decision that the appellant and the 2nd respondent were beneficiaries of some plots out of the 29 without paying for them.
5. While vide Civil Appeal No. 360 of 2019, the 2nd respondent proffered an appeal against the above decision on twenty (20) grounds which have been summarized inter alia: the 2nd respondent faults the learned judge for failing to consider, evaluate and analyze the evidence produced by the parties before the court with respect to the contract of purchase of the suit property, the registration of the partnership, the parties to the agreement and payment of the consideration; the learned judge erred in totally ignoring and entirely relying on the judgment of another tribunal to make its own judgment, failing to discharge its role; the learned judge misdirected himself to presume a trust on the partnership property purchased before the 3rd respondent was formed; and the learned judge erred by being biased and acting in favour of the 1st and 3rd respondents at the expense of other parties and failed to discharge his judicial duty of properly analyzing the evidence before him.
6. The two appeals were consolidated by the order of this Court.
7. The appellant initially filed this suit against the 1st respondent, Godfrey Muhenge Kivanze, and the 2nd respondent. On 14th November 2014, the 3rd respondent was joined into the suit. The 1st respondent died in the course of the trial and the administrators of his estate Kenneth Gungu Kidiavai and Shalom Naomi Muhenge took his place in the suit.
8. The appellant's plaint was dated 22nd October 2009. His case was that he together with the 1st and 2nd respondents were business partners trading as Mlolongo Care Investment and had been jointly registered as the owners of LR No. 13302/43 (the suit property) which was a subdivision of LR No. 13302/5; and that the 3rd respondent had on 11th October 2005 unlawfully invaded the appellant's portion of the suit property and had started putting up structures. The portion measured 0.7778 Hectares. The suit was filed for a permanent injunction to restrain the respondents from interfering



with the suit property by subdividing it or selling off portions of it. It was also sought that the suit property be subdivided into three (3) equal portions amongst the three of them.

9. The 1st respondent's defence was in agreement with that of the 3rd respondent; he was the founding member and chairman of Liberty Care Centre Children's Home (the Home), which was formerly known as Mlolongo Care Centre Self-Help Group; that the Home was squatting on a plot belonging to NSSF. The said plot was sold to Oil Com Ltd, and the Home was resettled on LR. No. 13302/5, which was 5 acres and belonged to NSSF. The resettlement was financed at Kshs.150,000/= by Oil Com Ltd. Subsequently, NSSF offered to sell this land to the Home at the price of Kshs.7,000,000/=. To raise the purchase price, the 1st respondent approached several contributors, including the appellant and the 2nd respondent. In return, the contributors were to get sub-plots measuring 1/8 of an acre each, depending on their contributions. The 1st respondent received plots Nos. 13 & 14 measuring 2 acres, while the appellant received plots Nos. 16-19 for his contribution of Kshs.400,000/= and the 2nd respondent received plot Nos. 26 & 27 for offering legal services to the 1st respondent with respect to the land transactions. The 2nd respondent was supposed to register the 2 acres (now the suit property) into the name of the 3rd respondent, but instead registered it in the joint names of the appellant, the 1st respondent and his (the 2nd respondent) as tenants in common. This is why in the 3rd respondent's counterclaim, it was pleaded that the suit property should go to the Home to which it belonged. It was that the 2nd respondent was in deed in breach of his fiduciary duties with respect to his professional ethics and standards while representing the 1st respondent in the land transactions.
10. The case by the 2nd respondent was that appellant, the 1st respondent and himself, were business partners who jointly bought the 5 acres from NSSF for Kshs.7,000,000/=; and that the appellant raised Kshs.400,000/= and the 2nd respondent raised Kshs.300,000/= towards the 10% required as deposit; the 1st respondent was unable to raise any money towards the deposit. It was agreed that they subdivide the 5 acres into 29 plots, which they sold to members of the public to raise the balance of the purchase price. Each partner got 2 plots from the 29 plots, and the rest were sold. Lastly, it was agreed that the 2 acres (the suit property) be kept in the joint names of the partners to be shared equally among them. The appellant produced the certificate of Mlolongo Care Investment Company, the sale agreement for the 5 acres dated 14th January 2007, the original grant for the suit property and the list of the people who benefited from the 29 plots. The appellant and the 2nd respondent claimed that the 1st respondent and the Home were squatting on a portion of the suit property, which belonged to the said appellant and the 2nd respondent.
11. The trial court in all received the evidence of the appellant, that of Kennedy Gundu Kidiavai (DW 1) who was the brother of the 1st respondent who is deceased, DW 2 (Wanjiru Gicheru who is the matron of the Home), DW 4 (Nelson Musungu Lusala) who is the Trustee of the Home) and the respondent. Based on their evidence and the written submissions by the respective counsel, the trial court accepted the version by the 1st respondent and the officials of the 3rd respondent and disbelieved the version by the appellant and the 2nd respondent.
12. When this appeal came before us for hearing, learned counsel Mr. Manyara was holding brief for learned counsel Mr. Mogire for the appellant, while learned counsel Mr. Gesicho was holding brief for learned counsel Mr. Kamanda for the 3rd respondent. Learned counsel Mr. Wauna Oluoch represented the 3rd respondent.
13. It was submitted on behalf of the appellant that the learned Judge had erred by ignoring the fact that there was no contest that the suit property was jointly owned by him, the 1st respondent and the 3rd respondent; that under the sale agreement dated 23rd January 2007, the three, being officials



- of Mlolongo Care Investment Company, had bought the 5 acres from NSSF; and that the three had executed the transfer documents as joint tenants. It was argued that the learned Judge had erred by finding that the three could not share the suit property and that the suit property belonged to the 3rd respondent when there was no evidence led to show how he 3rd respondent had acquired the property; and that there was no evidence to show how the three joint tenants had transferred their shares to the 3rd respondent. Further, learned counsel blamed the learned Judge for inferring a trust in favour of the 3rd respondent when no such trust had been pleaded or proved in the case.
14. While agreeing with the submissions on behalf of the appellant, learned counsel Mr. Gesicho argued that the learned Judge offended the doctrine of res judicata when he retried the issue of the participation of the 2nd respondent in the transaction as an advocate, yet the ruling of the disciplinary tribunal of the Law Society of Kenya was not a subject of the appeal before the court. It was pointed out that the disciplinary tribunal had discharged the 2nd respondent of the charges that had been levelled against him regarding the transactions. Learned counsel submitted that the 2nd respondent was one of the joint owners of the suit property, as he had contributed to its acquisition.
 15. Learned counsel Mr. Wauna Oluoch supported the findings by the learned Judge which, according to counsel, were based on the evidence tendered. Learned counsel urged that the issue of res-judicata had not been raised in the trial court and that no determination had been made on it to be the subject of the appeal.
 16. We have anxiously considered the appeal and its grounds, the evidence that the learned Judge contended with to be able to reach the judgment and the submissions by learned counsel. We seek to determine whether, given the evidence, the learned Judge's conclusion that the suit property belonged to the 3rd respondent, and not the three parties jointly, was properly arrived at.
 17. From the record, it is evident that Mlolongo Care Centre was registered on 17th June 2003. A certificate of registration was produced. Vide a letter dated 15th December 2005 addressed to the 1st respondent (Care of Liberty Care Centre Children's Home – 3rd respondent), NSSF offered him to purchase all that property known as LR No. 13302/5 Mavoko Municipality which measured 5 acres, for a consideration of Kshs.7,000,000/=. This letter of offer was accepted by the letter dated 29th December 2005 by the 2nd respondent having received instructions from the 3rd respondent to act for them. We produce the letter as follows:

“Re: Purchase Plot L.r No. 13302/5 Mavoko Municipality (5 Acres) Our Client Liberty Care Centre Children's Home Mlolongo

The above matter refers.

Instructions from our above-named client who have forwarded your letter dated 15th December 2005 with reference No. SF/A/10/293 Vol. 1 to act on their behalf.

Our clients have given acceptance to your reserved price Kshs.7million. However, owing to the fact that they are a charitable home which its funds are drawn from donors, they have the following requests to make- (i) that the Trustee Fund consider them a soft terms and conditions of payment. (ii) that the Trustee Fund accord them a better and reasonable period for the making payment so that they can meet and learn the care centre and at the same time pay you...”
 18. There are minutes for the meeting held on 1st January 2006 that was attended by the 1st respondent, the appellant, the 2nd respondent in his capacity as an advocate, and other people, in which it was resolved



that the 2nd respondent be paid 5% of the purchase price of the 5 acres as legal fees. It was further discussed as follows:-

“Land issue

Pastor informed the committee that plans were underway to officially acquire the five (5) acre plot that NSSF had temporarily issued to the home, which is valued at Sh. 7,000,000. Our organization is to pay 10% of the total value as an instalment. It was not very clear about a Mr. Baraza borrowing money from his bank and clearing the whole amount...”

19. In a letter dated 15th February 2006, the 2nd respondent, with instructions from the 3rd respondent, was seeking indulgence of the NSSF to extend the payment period by two weeks to enable the payment of the 10% deposit by the 3rd respondent. There is letter dated 18th March 2006 in which the appellant was resigning from Mlolongo Care Centre for the following reasons:-

“I wish to tender my resignation from the above- mentioned organization due to the following reasons:

- a. I was misled to be a member assuming that *the constitution* was in place to guide the alleged home to find out very late that the home had no constitution at all but a self- help group.
- b. The name of Mlolongo Care Centre was changed to Liberty Care Centre without consultation and the name is used as the home name without a constitution and a registration certificate.
- c. The property that Liberty Care Centre is soon acquiring from NSSF has no account of its own but wants to use Mlolongo Care Centre account which is totally wrong and dangerous.
- d. The directors of Liberty Care Centre are not known and cheques to be drawn under that name have no bank account of its own.
- e. The home is run like a family organization with no rules and regulations governing it, so I do not want to be a hindrance at all.
- f. I see a danger ahead because of the clients’ money being diverted to an unregistered home as demanded by Mr. Muhenge, the Director.

Due to the above listed reasons, I wish to withdraw forthwith from the organization and need to be refunded all the money owed to me by the Director.

Please be informed that I shall by all means withdraw all the cheques sent to the NSSF and return to the owners immediately.

Thank you. Yours faithfully,

Kenso Orina Mochache.”

20. The appellant denied the existence of the minutes of 1st November 2006, and denied that the three of them had bought the suit land for the home. He, however, admitted that, of the 5 acres that was bought, 3 acres was subdivided into 29 plots that they and other members of the public bought. He testified that they kept the 2 acres, the suit property, for their use. His evidence agreed with that of the 1st respondent that he gave Kshs.400,000/= and the 2nd respondent gave Kshs.300,000/= towards the deposit to NSSF, and that each of them was allocated plots from the 29 plots. The appellant admitted during cross-examination that he and the 2nd respondent were not involved in the setting up of the



Home. This was the 1st respondent's project. The Home was already in place when they came into the picture. The appellant did not deny the correspondence dated 15th November 2005 between the 1st respondent and NSSF regarding the offer and acceptance of the 5 acres, and the fact that he 2nd respondent was acting for the 1st respondent in the transaction. The appellant denied that he authored the resignation letter, but the trial court disbelieved him. In the letter, the transaction between the 1st respondent and NSSF over the purchase of the 5 acres is acknowledged. The fact is that the land was not being bought for the three of them but for the school. It is clear that the 2nd respondent was offering legal services for which he was being remunerated.

21. Given this evidence, we find that the trial court was right. Despite the fact that the 2 acres were registered in the names of the appellant, the 1st respondent and the 2nd respondent, the parcel actually belonged to the Home, to the knowledge of all the three. This is how the trial court proceeded in its judgment:-

“ 59. The evidence before this court shows that by the time L.R No. 13302/5 was transferred to the Plaintiff, the 1st Defendant and the 2nd Defendant on 12th September, 2008, the Children's Home had already taken possession of L.R. No. 13302/43 measuring 2 acres. Indeed, the re-location of the Children's Home to the suit land was facilitated by the Oil Com (K) Limited, amongst other well-wishers.

60. The Plaintiff in this matter knew that the 1st Defendant was running a Children's Home, and so was the 2nd Defendant. Indeed, the Plaintiff admitted in evidence that he had given to the 1st Defendant money in the year 2004 to assist in the running of the Home. The Plaintiff and the 2nd Defendant also knew that the said Children's Home, which was being run by well-wishers under the name Mlolongo Care Centre, had re-located on a portion of L.R. No. 13302/5 prior to the transfer of the said land to them.

61. Having being aware that the sub-division of L.R. No. 13302/5 into two portions was for Residential and a Children's Home purposes, the Plaintiff and the 2nd Defendant cannot now claim that the Children's Home, whose name changed from Mlolongo Care Centre to Liberty Care Centre Children's Home on 19th June, 2008, are not entitled to L.R. No. 13302/43 which the Home has occupied since the year 2006.

62. The conduct of the Plaintiff and the 2nd Defendant all along shows that they knew that they were buying the suit land from NSSF on behalf of the Home. Having sub-divided a portion of L.R. No. 13302/5 and sold portions thereof to raise the balance of the purchase price, and having benefited from the 29 sub-plots without paying for them, the Plaintiff and the 2nd Defendant will be abdicating their fiduciary duty to the Children's Home by claiming that they should have L.R. No. 13302/43 to themselves.”

We fully agree with the findings by the trial court, and the orders granted.

22. That being the case, we find no merit in the appeal which we dismiss with costs to the appellant.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF MAY 2025.

MUMBI NGUGI

JUDGE OF APPEAL



.....
F. OCHIENG

JUDGE OF APPEAL

.....
A.O. MUCHELULE

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.

