



**Makero v Etyang (Environment & Land Case E010 of 2020)
[2025] KEELC 3211 (KLR) (7 April 2025) (Judgment)**

Neutral citation: [2025] KEELC 3211 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE E010 OF 2020**

BN OLAO, J

APRIL 7, 2025

BETWEEN

CHARLES EMODO MAKERO PLAINTIFF

AND

FEJENIA IKINYALA ETYANG DEFENDANT

JUDGMENT

1. Charles Emodo Makero (the Plaintiff) filed this suit on 5th November 2020 seeking judgment against Fejenia Ikinyala Etyang (the Defendant) in the following terms as per paragraphs 12, 13 and 14 of the plaint:
 1. A declaration that the Defendant's late husband one David Sebastian Etyang Emuria was jointly registered as proprietor of the land parcel No South Teso/Osurette/1011 in trust for the Plaintiff.
 2. An order for the cancellation or nullification of the registration made on the land parcel No South Teso/Osurette/1011 vide entries numbers 4 and 5 on the Register.
 3. An order for the cancellation of the name of Sebastian Etyang who is deceased and vacation of the restrictions placed on the Register by the Defendant in respect of the Plaintiff's land parcel No South Teso/Osurette/1011 vide entries numbers 1, 2 and 3 in the Register.
 4. Costs of the suit.**
 5. Any other relief the Court may deem fit and just to grant**.
2. The basis of the Plaintiff's case is that at all material times, he and the Defendant's late husband David Sebastian Etyang Emuria (deceased) were the joint registered owners of the land parcel No South Teso/Osurette/1011 (the suit land). That following the death of the Plaintiff's father one Omukero Okisegere Omungula, the deceased took advantage of the vulnerability of the Plaintiff's step mother



and the age of the Plaintiff who was a minor and registered himself as the proprietor of the suit land to hold in trust for the Plaintiff. At that time, the deceased was cohabiting with the Plaintiff's step mothers but when that relationship came to an end, the Plaintiff's step mother was married elsewhere and the Defendant's husband returned to his ancestral land in Totokakile where he lived with the Defendant until his demise in 2012. That the said David Sebastian Etyang died before de-registering himself from the suit land.

3. When the Plaintiff later visited the land Registry, he was dismayed to find that the same was registered in the joint names of himself and the Defendant who purported to have taken out Letters of Administration in respect to the Estate of the deceased in Busia Chief Magistrate's Court P&A Cause No 420 of 2016 after which he apportioned the suit land without the Plaintiff's knowledge or consent. The Plaintiff's application to revoke the grant and have the entries at the Land Registry cancelled was declined.
4. It is the Plaintiff's case that the deceased held the suit land in trust for him and it was therefore not part of his (deceased's) Estate. That the registration obtained by the Defendant in respect to the Estate of the deceased was premised on a mischievous grant and was therefore illegal and fraudulent.
5. Together with his plaint, the Plaintiff also filed a statement dated 26th October 2020 which is basically a rehash of his pleadings in the plaint.
6. The Plaintiff also filed the following documents in support of his case:
 1. Copy of Green Card for the land parcel No South Teso/Osurette/1011 in the joint names of the Defendant and Emodo Makelo each with ½ share.
 2. Copy of Confirmed Grant issued to the Defendant in respect to the Estate of David Sebastiano Etyang Emuria in Busia Chief Magistrate's Court Succession Cause No 420 of 2016 on 3rd August 2017.
 3. Copy of Grant of Letters of Administration Intestate issued to the Defendant on 18th January 2017 in respect to the Estate of Sebastiano Etyang Alias Sebastiano Emuria in Busia Chief Magistrate's Court Succession Cause No 420 of 2016.
 4. Copy of Certificate of Search for the land parcel No South Teso/Osurette/1011.

Although the Plaintiff listed a copy of his Identity Card as part of his documentary evidence, none was filed.
7. The Plaintiff also filed a statement of his witness one Odeki Eshiepeti Odera who however did not testify as he was reported to be unwell during the hearing on 6th February 2025. He also filed the statement of his other witness Cypriawo Indeke Ekiseger who also did not testify.
8. The Defendant, acting in person, filed a defence dated 11th December 2020 in which she denied that Omukero Okisegere Omungola was the Plaintiff's father. She denied that the suit land was registered in the name of the deceased to hold in trust for the Plaintiff or that the deceased cohabited with the Plaintiff's step mother. She admitted having filed for succession to protect her interest adding that the suit land belonged to the deceased.
9. Though served, the Defendant did not attend Court during the hearing on 14th December 2023 and so the hearing proceeded ex-parte.
10. The Plaintiff was led in his testimony by his counsel Mr Paul Juma. He adopted as his evidence the contents of his statement dated 1st October 2020 and which is a rehash of his pleading in his plaint.



He also produced as his documentary evidence the documents filed herein and which I have already referred to above.

11. Submissions were thereafter filed by his counsel Mr Paul Juma instructed by the firm of Paul Juma & Company Advocates.
12. I have considered the evidence by the Plaintiff, un-controverted as it is, and the submissions by his counsel. Counsel puts much premium on the fact that the Defendant having failed to attend Court for hearing, this Court must find in favour of the Plaintiff. This is what counsel has submitted in paragraph 9 of those submissions:

“9: Your Lordship it should not be forgotten that despite proper service on the Defendant, during hearing the Defendant nor her witness failed to attend Court to prosecute her defence and as such there is no evidence on the part of the Defendant to controvert the evidence that was tendered by the Plaintiff.”

Counsel then proceeds in paragraph 10 to cite the Judgment of Lessit J (as she then was) in the case of Motex Knitwear Mills Ltd where citing the case of Autar Bahra & Another -V- Raju Govind H.C.C.C. NO 548 of 1998, the Judge said:

“Where a party fails to call evidence in support of his case, that party’s pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleading. In the same vein the failure to adduce evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged.”

It is not in dispute that the Defendant did not call evidence to support the pleadings in her defence and therefore the Plaintiff’s evidence has not been controverted. Pleadings are not evidence by which any fact can be proved. This is well captured in the words of MADAN JA (as he then was) in the case of CMC Aviation Ltd -V- Cruisair Ltd (NO 1) 1978 KLR 103 [1976-80 1 KLR 835] as follows:

“...pleadings contain the averments of the parties concerned. Until they are proved or disapproved, or there is an admission of any of them or any of them by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. As stated in the definition of “evidence” in Section 3 of the *Evidence Act*, evidence denotes the means by which an alleged matter of fact, the truth of which is submitted to investigation is proved or disproved. Averments are matters the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain unproven. Averments in no way satisfy for example, the following definition of evidence in Casselle’s English Dictionary, P 394.”

The Defendant having elected not to testify in support of her pleadings, her defence amounts to mere averments which this Court will of course not consider in this judgment.



13. Having said so, however, notwithstanding the fact that the Defendant did not testify, the Plaintiff had a duty to prove his case. Section 107 (1) and (2) of the Evidence Act provides as follows:

- “ 107 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.
- (1)
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

Section 109 of the same Act reads:

- 109: 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 law that the proof of that fact shall lie on any particular person.”

It is not the law that where the Defendant fails to adduce evidence in rebuttal of the Plaintiff's case, that case must be considered as having been established. Even in a formal proof, the Plaintiff must prove his or her case to the required standard. In the case of *Charterhouse Bank Limited (under Statutory Management) -v- Frank N. Kamau* 2016 eKLR, the Court of Appeal addressed that issue in the following terms:

“ We would therefore venture to suggest that before the trial Court can conclude that the Plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the Defendant's failure to call evidence, the Court must be satisfied that the Plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the Defendant. Where the Defendant has subjected the Plaintiff or his witnesses to cross-examination and the evidence adduced by the Plaintiff is thereby thoroughly discredited, judgment cannot be entered for the Plaintiff merely because the Defendant has not testified.” Emphasis mine.

Therefore, the fact that the Defendant has not testified did not lessen the burden on the Plaintiff to prove his case. And that proof is on the balance of probabilities.

14. Guided by the above, the Plaintiff's case, as can be gleaned from his pleadings, is that the Defendant was registered as proprietor of the suit land through an illegal and fraudulent act by taking out a Grant in respect of the Estate of the deceased in Busia Chief Magistrate's Court P&A Cause No 420 of 2016. His attempt to have the Grant revoked was unsuccessful.
15. Having alleged fraud, the Plaintiff was obliged to specifically plead and prove those allegations to the required standard. The law on proof of fraud is now clear as buttressed in the case of *Vijay Morjaria -v- Nansingh Madhusing Darbar & Another* 2000 eKLR where TUNOIJ A stated that:

“ 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 as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

See also the case of Kinyanjui Kamau -v- George Kamau 2015 eKLR. Further in the case of Ndolo -v- Ndolo 2008 1 KLR (G&F) 742, it was held thus:

“We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities. In cases where fraud is alleged, it is not enough to simply infer fraud from the facts”. Emphasis mine.

With regard to the claim of fraud and illegality, this is what the Plaintiff said in his statement dated 26th October 2020:

“That the registration made on my aforesaid land parcel number South Teso/Osurette/1011 premised on the mischievous grant obtained (sic) the Defendant herein in respect of David Sebastian Etyang Emuria – Deceased was illegal and an act of fraudulent.”

Those allegations of illegality and/or fraud were not specifically pleaded and as is now clear, neither were they proved.

16. If the Plaintiff’s case of fraud is hinged on the claim that the succession proceedings in Busia Chief Magistrates Court P&A Cause No 420 of 2016 were not above board, the fact that his attempt to revoke the Grant through which the Defendant acquired a portion (½ share) of the suit land was dismissed in the Succession Court, is clear evidence that his allegations of fraud and illegality are far-fetched. The Succession Court must have been satisfied that the Defendant was a beneficiary to the deceased’s Estate. Where property is acquired through a legal Court process which was never overturned, an allegation of fraud or illegality cannot stand unless the Court process itself is proved to have tainted with illegality.

17. Finally, the Plaintiff also pleaded that the deceased held the title to the suit land in trust for him. This is what he has pleaded in paragraph 12 of his plaint:

12: “The Plaintiff’s claim therefore against the Defendant is a declaratory order that the Defendant’s late husband one David Sebastian Etyang Emuria – (Deceased) got registered jointly on land parcel number South Teso/Osurette/1011 in trust for the Plaintiff.”

The Plaintiff in paragraph 3 of his plaint has averred that he and the Defendant’s late husband David Sebastian Etyang Emuria were the joint registered proprietors of the suit land. So they were therefore tenants in common. That does not make the deceased a trustee. Each has a distinct share. As was held in the case of Peter Ndungu Njenga -v- Sophia Watiri Ndungu 2000 eKLR a Court will only imply a trust in a case of absolute necessity. I do not see this to be a case where such a trust can be implied. It is clear from all the above that the Plaintiff’s suit is for dismissal.

18. On the issue of costs, as the Defendant did not attend Court during the trial, the order that commends itself is to order that the Plaintiff meets his own costs.

19. Ultimately therefore, this Court makes the following disposal orders:

1. The Plaintiff’s suit is dismissed.**
2. No orders as to costs.



BOAZ N. OLAO

JUDGE

7TH APRIL 2025

**JUDGMENT DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS
7TH DAY OF APRIL 2025.**

Right of Appeal

BOAZ N. OLAO

JUDGE

7TH APRIL 2025

