



REPUBLIC OF KENYA



**Makona (Filing on her own behalf and on behalf of PNM) – Minor &
2 others v Makona & another (Environment & Land Case 43 of 2013)
[2022] KEELC 12617 (KLR) (27 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 12617 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 43 OF 2013
AA OMOLLO, J
SEPTEMBER 27, 2022**

BETWEEN

**PENINA CHEPKESIS MAKONA (FILING ON HER OWN BEHALF AND ON
BEHALF OF PNM) – MINOR 1ST PLAINTIFF
MICHAEL MAGOA 2ND PLAINTIFF
BRIAN MAGOBA MAKONA 3RD PLAINTIFF**

AND

**CHARLES JOSEPH EGESA MAKONA 1ST DEFENDANT
WEST KENYA SUGAR CO. LTD 2ND DEFENDANT**

JUDGMENT

1. The plaintiffs herein commenced this suit *vide* a plaint dated June 17, 2013 stating that on or about February 4, 2012, the defendants secretly and fraudulently entered into a contract of sale of land over LR No Bukhayo/Matayos/262 measuring 10.362 ha. The plaintiffs pleaded that at the time of sale, the defendants knew or ought to have known that the land in question was matrimonial and family land in which the express consent of the family was a pre-requisite before such sale.
2. The plaintiffs levelled several grounds of fraud and corruption against the defendants thus;
 - a. Executing the transaction without the consent and knowledge of the plaintiffs.
 - b. Obtaining of payment and effecting of the payment by the second defendant without the knowledge of the plaintiff.
 - c. Purporting to obtain the consent of the land control board without the knowledge and participation of the plaintiffs.



- d. Executing the transfer forms secretly and clandestinely disposing of the land without the consent and knowledge/authority of the plaintiffs.
 - e. Obtaining the transfer of title without the requisite consent of the board allowing the transfer.
 - f. Secretly and clandestinely dispossessing the plaintiff of their rights, interests and benefits accruing from the land.
3. Their claim is that as a consequence of the acts of fraud, they have been adversely affected because a whopping portion of land measuring 10.362ha has been carved out of their original land and transferred to the 2nd defendant now registered as Bukhayo/Matayos/3946. They have asked the court to give the following reliefs.
 - a. An order of permanent injunction prohibition, restraining the defendants from selling/transferring/disposing of the said parcels to third parties.
 - b. A declaration that the sale/transfer is null and void.
 - c. An order of cancellation of the sale/transfer/revocation of the new titles/rectification of register.
 - d. Costs and interest of this suit.
 4. The 1st defendant entered appearance on June 25, 2013 but did not file a statement of defence. The 2nd defendant file its statement of defence on February 7, 2014. The 2nd defendant denied the allegations of fraud pleaded, denied that they knew or ought to have known that the land in question was matrimonial or family land which made the transaction to require the consent of the plaintiffs. Further, the 2nd defendant denied that the plaintiffs are entitled to the reliefs sought. They urged the court to dismiss the suit with costs.
 5. The hearing commenced and only the plaintiffs gave their evidence as none of the defendants called any witness. The first plaintiff's witness Dr John Ndege Makona gave his testimony on March 19, 2015. He introduced himself as a teacher working in USA That the 1st plaintiff is the wife to the 1st defendant who is his nephew (his brother's son) while the 2nd & 3rd plaintiffs are sons to the 1st defendant. PW1 stated further that the 1st plaintiff got married to the 1st defendant under Luhya customary law and was settled on parcel No. Matayos/262. That his father John Makona had six sons from his six wives and he gave each of the sons a portion of land. PW1 concluded that the land in question was given to Benedict who is the father to the 1st defendant and according to this witness, it is family land.
 6. In cross-examination by Ms Odek learned counsel for the 2nd defendant, PW1 said he was aware that the 1st defendant had two wives but he was not aware the 1st defendant and the plaintiff had separated. He did not know the entire size of parcel No 262 but knew the portion sold to the 2nd defendant was 25 acres. He admitted that the 1st defendant left a portion of the land for use by the plaintiffs. That at the time of sale, the 1st defendant was the registered owner of the suit land. PW1 said he was told 1st defendant was accompanied with the 2nd wife at the time of sale. That the 1st defendant sold a bigger portion and left the smaller portion to the plaintiffs. The witness was not aware the area chief was notified of the transaction. In re-examination, PW1 stated that the suit land belonged to the 1st defendant and his family but 2nd defendant lives on a different parcel of land.
 7. The 1st plaintiff gave evidence as PW2 on September 15, 2016. She is a resident of Bukhayo – Matayos and is mother to 2nd and 3rd plaintiff. That when the suit was filed, Patricia Wamulando was a minor but he has now attained 18 years. PW2 stated that she knew the 2nd defendant after she discovered it had



- bought their land No 262. That the said land is family land which the 1st defendant received from her father-in-law. It is PW2's evidence that she has been living on this land since she got married in 1990 and she has a home therein. That she only learnt of the sale when the 2nd defendant brought surveyors to demarcate the land. She visited the lands office and was given copies of the green card for 3946 and 3945 (Pex 1 & 2), mutation forms. She also produced a copy of the sale agreement between the defendants as Pex 4. That the 1st defendant did not seek their authority before selling and transferring land to the 2nd defendants and it was done secretly and fraudulently. That the 2nd defendant never tried to find how things were before buying the land. PW1 wanted her land back.
8. Brian Magoba Makona testified as PW3. He testified as that he was born in 1991 to the 1st plaintiff and the 1st defendant. The witness stated that this land was inherited from his grandfather and it is ancestral land. That none of their family members was involved during the sale transaction. PW3 added that almost the whole land was sold and they were never given any part of the money. That the land was sold in the year 2013. PW4 adopted the evidence of PW2 and 3. This brought to a close the plaintiffs case.
 9. The evidence as presented by the plaintiffs has not been contradicted. The plaintiffs have accused the defendants of colluding in the fraud. The particulars of fraud were set out in the plaint. The plaintiffs have provided evidence that they live on this land (have a home on it). From the evidence of PW1 which was corroborated with that of PW2 & 3, there is no doubt that the parcel No 262 is ancestral land vide an agreement dated February 4, 2012 (Pex 4), the 1st defendant sold part of this land measuring 9.29ha to the 2nd defendant. PW2 argues that the 2nd defendant would have known of their interests in the land if they did due diligence by doing a physical visit to the land.
 10. This court is called to determine whether or not the allegations of fraud have been proved. There is no dispute that the original title Matayos/262 was registered in the name of the 1st defendant. Did he require consent of the plaintiffs to dispose of this land? The plaintiffs are claiming matrimonial and family rights over the land. The 1st defendant having not denied these rights claimed by the plaintiffs, the next question is whether consent of the plaintiffs were a pre-requisite to any transaction over parcel No 262. The plaintiffs were living on this land by virtue of their relationship with the 1st defendant. The relationship in effect created a customary trust. Section 28 of the Land Registration states thus;

“Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register -

 - (a) spousal rights over matrimonial property;
 - (b) trusts including customary trusts.”
 11. Kemei J in Justus Maina Muruku v Jane Waitihira Mwangi (2018) eKLR at paragraph 35 quoted the Court of Appeal in Mbui Mukangu v Gerald Mutwiri Mbui CA No 281 of 2000 that; “customary trust is a concept of intergenerational equity where the land is held by one generation for the benefit of succeeding generations. The court also held that possession and occupation are key elements in determining the existence of a customary trust.”
 12. By virtue of this land being ancestral land, the 1st defendant although registered as the owner thereof, an inference is drawn that he held the title for the generation after him who in this case includes his children comprised in the 2nd and 3rd plaintiffs. He was thus under obligation whether separated from the 1st plaintiff or not to notify them of the intention to dispose of this land and affirm that their interests was not going to be prejudiced. Failure to do so was intended at dispossessing the plaintiffs of their rights in the land acquired through customary trusts.



13. At paragraph 7(j) of the plaint, it is pleaded that ... “to the extent that the plaintiffs were having a home on this land, the 2nd defendant would have established upon enquiry on the rights if any of the plaintiffs over the suit land.” No evidence has been provided to show that the 2nd defendant undertook due diligence which would then exclude their collusion in the defrauding of the plaintiff. The plaintiffs have elaborated that they live on this land and discovered there was a sale only after the 2nd defendant sent the surveyors to demarcate their land. In cross-examination of PW1, counsel for the 2nd defendant alluded to the 1st defendant being accompanied with his second defendant during the transaction. Yet it appears this 2nd wife of 1st defendant does not reside on the suit land. This action by the 1st defendant to involve a family member not living on the suit land clearly expresses an intention to defraud the plaintiffs of their rights.
14. In light of the foregoing, I am therefore satisfied the plaintiffs have made a case and so I enter judgment in their favour as prayed in the plaint. Costs awarded to the plaintiff to be paid by the 1st defendant.

DATED, SIGNED AND DELIVERED IN BUSIA THIS 27TH DAY OF SEPT., 2022.

A. OMOLLO

JUDGE

