



REPUBLIC OF KENYA



**KENYA LAW**  
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**Too & 2 others v Too & 2 others (Environment & Land Case 287 of 2009)  
[2022] KEELC 13346 (KLR) (27 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 13346 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 287 OF 2009  
NA MATHEKA, J  
SEPTEMBER 27, 2022**

**BETWEEN**

**EMMA TOO ..... 1<sup>ST</sup> PLAINTIFF  
JANE TOO ..... 2<sup>ND</sup> PLAINTIFF  
EDWIN TOO ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**VERONICA CHEPWAMBOK TOO ..... 1<sup>ST</sup> DEFENDANT  
ELIZABETH CHEBET ORCHARDSON ..... 2<sup>ND</sup> DEFENDANT  
ATTORNEY GENERAL ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiffs claim that their mother who is the 1<sup>st</sup> defendant herein was up to the March 25, 2009 the registered proprietor of all that plot of land known as sub-division No 4311, Title No CR 41071. The plaintiffs state that the 1<sup>st</sup> defendant developed a family house on Plot No 1901 /III/MN. The said piece of land is adjacent to the suit property. The plaintiffs state that they have a beneficial interest on both the suit property and Plot No 1901/III/MN as indeed the plaintiffs are the children of the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant holds the title of the said 2 plots (and other lands) on her own behalf and in trust for the 3 plaintiffs as the suit property and the other lands belong to the family of the 1<sup>st</sup> defendant. The plaintiffs state that they recently discovered that the 1<sup>st</sup> defendant entered into an Agreement for Sale of the suit property with the 2<sup>nd</sup> defendant sometimes in 2008 and proceeded to sell and transfer the said suit property to the 2<sup>nd</sup> defendant. The 2<sup>nd</sup> defendant was duly registered by the 3<sup>rd</sup> defendant as the proprietor of the suit property on March 25, 2008 under registration No CR/41071/2. The plaintiffs state that the registration of the 2<sup>nd</sup> defendant as the owner of the suit property was fraudulent, illegal and amounts to a nullity in law.



2. That as the suit property falls in a land control area and as required by the *land Control Act*, cap 302 of the Laws of Kenya, the consent of the Kilifi land control board was a necessary prerequisite to the said registration. The plaintiffs state that no valid land control board consent was issued and further that if any such consent was issued, the same was also wrong and illegal. That the plaintiffs as beneficial owners were not notified of the said sale. The plaintiffs are not and were not ready to sell the suit property either to the 2<sup>nd</sup> defendant or any other person. That the plaintiffs discovered the aforesaid circumstances recently and protested to the 1<sup>st</sup> defendant who acknowledged to them that a mistake had been done in the manner that the suit property had been disposed without involving them. That the 1<sup>st</sup> defendant agreed to refund to the 2<sup>nd</sup> defendant the money that the 2<sup>nd</sup> defendant had paid as purchase price to the 1<sup>st</sup> defendant the consequence whereof M/S Gikandi & Company Advocates acting for the plaintiffs sent an appropriate letter to the 1<sup>st</sup> and 2<sup>nd</sup> defendants dated March 25, 2009. A statutory notice dated March 25, 2009 was also sent to the 3<sup>rd</sup> defendant.
3. The plaintiffs are apprehensive that the 2<sup>nd</sup> defendant may start developing the suit property and hence the plaintiffs pray for an injunction order to restrain the 2<sup>nd</sup> defendant from interfering with the suit property. The plaintiffs pray for judgment against the defendants for:-
  1. A permanent injunction order restraining the 2<sup>nd</sup> defendant or her agents from occupying, developing, alienating or in any other manner from dealing with Plot No 4311/III/MN, title No 41071.
  2. A declaratory order that the transfer of Plot No 4311 /III/MN to the 2<sup>nd</sup> defendant by the 1<sup>st</sup> defendant is a nullity by virtue of the same being in violation of the *Land Control Act*, cap 302 of the Laws of Kenya.
  3. That the 3<sup>rd</sup> defendant be ordered to expunge the registration of the suit property in the 2<sup>nd</sup> defendant's name and restore Plot No 4311/III/MN to the original owner that is the 1<sup>st</sup> defendant.
  4. Costs of this suit.
4. The 1<sup>st</sup> defendant states that an agreement for sale was entered into on March 14, 2008 between the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant and clause 7 (v) of the said agreement, states inter alia; clause 7(v) land control board consent or such other consents and documents necessary to procure registration of the transfer in favour of the purchaser. The 1<sup>st</sup> defendant avers that this clause was never complied with and the sale and transfer is void *ab initio*. The 1<sup>st</sup> defendant further states he is ready and willing to refund the purchase price to the 2<sup>nd</sup> defendant.
5. The 2<sup>nd</sup> defendant avers that the 1<sup>st</sup> defendant was the registered proprietor of the suit property up to the March 25, 2008 when the suit property was legally transferred to the 2<sup>nd</sup> defendant. The 2<sup>nd</sup> defendant avers that the plaintiffs have no beneficial interest in the suit property. The proprietary interests of the 1<sup>st</sup> defendant were extinguished when she voluntarily sold and transferred the suit property to the 2<sup>nd</sup> defendant and therefore the plaintiffs' purported beneficial interest, if at all, could not subsist beyond that of the 1<sup>st</sup> defendant's interest as they can only claim through the 1<sup>st</sup> defendant. The 2<sup>nd</sup> defendant avers that the suit property was not customary land having been acquired by the 1<sup>st</sup> defendant in 1988 in her personal capacity for her own benefit, and therefore the 1<sup>st</sup> defendant was free to deal with the property as she wishes. The 1<sup>st</sup> defendant was not bound to hold the suit property in trust for the benefit of the plaintiffs as alleged. The said interest, whether by trust or otherwise was not captured in the agreement for sale or in the title document and is accordingly an afterthought by the plaintiffs. The 2<sup>nd</sup> defendant avers that the plaintiffs were at all times privy to the discussions between



the 1<sup>st</sup> and 2<sup>nd</sup> defendant's culminating in the execution of the agreement for sale of the suit property. The plaintiffs were fully aware and were present in some of the meetings which were held at the 1<sup>st</sup> defendant's Vipingo home.

6. The 3<sup>rd</sup> defendant avers that they were not a party to the alleged sale agreement between the 1<sup>st</sup> and 2<sup>nd</sup> defendant and whatever allegations the plaintiffs have to the said transactions concerning the 3<sup>rd</sup> defendant is misconceived.
7. This court has considered the evidence and the submissions therein. The plaintiffs are children to the 1<sup>st</sup> defendant, who sold the suit property to the 2<sup>nd</sup> defendant. The plaintiffs claim that the said sale was fraudulent and illegal on the ground that there was no valid land control board consent issued and that the subsequent transfer and registration was null and void. The plaintiffs prayed for a permanent injunction restraining the 2<sup>nd</sup> defendant from dealing with Parcel No 4311/III/MN, a declaration that the transfer of title from the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant was a nulling and an order that the same be cancelled and title to retrieve back to the 1<sup>st</sup> defendant.
8. The 1<sup>st</sup> defendant concurred with the plaintiffs' suit and further stated that she did not attend a land board control at Kilifi and hence the subsequent transfer was done in haste to deprive her of her title in the suit property. She prayed that the plaintiffs suit be admitted and the 2<sup>nd</sup> defendant's suit be dismissed with costs. The 2<sup>nd</sup> defendant maintained that she is the registered proprietor of the suit property after lawfully purchasing the same from the 1<sup>st</sup> defendant on 14<sup>th</sup> March 2008 with the knowledge of the plaintiffs. She denied any illegality of fraud. The 2<sup>nd</sup> defendant denied that the transfer was a nullity and maintained that she was a bonafide purchaser for value and holds an indefeasible title in the suit property.
9. The first issue to be determined is whether Land Parcel No 4311/III/MN is agricultural land which required a land control board consent before transfer could be effected. The 1<sup>st</sup> defendant, Veronica Chepwambok, was the registered proprietor of the suit property as seen DEX 1 a Certificate of Title No CR 41071 in reference to LR4311/III/MN dated November 17, 2006. On March 14, 2008, the 1<sup>st</sup> defendant entered into an agreement of sale with Elizabeth Chebet Orchardson, for the sale of the suit property for Kshs 1,500,000/=, reference is made to DEX2. Clause 7 of the agreement and special condition 2 of the agreement of sale obligated the vendor to obtain land control board consent for the purposes of registering the transfer in favour of the purchaser. consent from the land control board is derived from section 6 of the *Land Control Act* cap 302 which provides as follows:
  - (1) Each of the following transactions that is to say—
    - (a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;
    - (b) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 (L.N. 516/1961) for the time being apply;
    - (c) the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area, is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.



10. The Court of Appeal interpreted the above provisions in *David Sironga Ole Tukai v Francis Arap Muge & 2 others* [2014] eKLR, and held that;

“All transactions involving agricultural land situated in a land control area are void for all purposes unless the land control board within that land control area has sanctioned them and where the transaction is ultimately void for lack of consent, any money or consideration paid by a would be purchaser is recoverable as a debt.”

11. The court proceeded to hold that the rationale of seeking consent was to regulate transactions in agricultural land to among other things avoid subdivision of land holdings into uneconomical units thus undermining agricultural production. The suit property is located at Takaungu trading centre within Kilifi District as seen from its deed plan dated September 13, 2002, (reference is made to DEX4 page 16). A reading of section 2 (a) (iii) of the *Land Control Act* cap 302 shows that the suit property is not an agricultural land since its located in a trading centre. During cross examination by Mr Kimathi for the 1<sup>st</sup> defendant, PW1 stated that:

“There was no land board control consent. The land is within the municipality.”

12. From this statement, it is clear that the suit property was not agricultural land within the meaning of the law, which defines agricultural land to mean:

- (a) land that is not within—
  - (i) a municipality or a township; or
  - (ii) an area which was, on or at any time after the July 1, 1952, a township under the Townships Act (Cap. 133, 1948 now repealed); or
  - (iii) an area which was, on or at any time after the 1st July 1952, a trading centre under the Trading Centres Act (cap. 278, 1948 now repealed); or
  - (iv) a market;
- (b) land in the Nairobi Area or in any municipality, township or urban centre that is declared by the Minister, by notice in the gazette, to be agricultural land for the purposes of this Act, other than land which, by reason of any condition or covenant in the title thereto or any limitation imposed by law, is subject to the restriction that it may not be used for agriculture or to the requirement that it shall be used for a non-agricultural purpose;

13. Therefore, having found that the suit property is situated in a trading centre within the meaning of section 2 (1)(ii) of the *Land Control Act*, the vendor was therefore not obligated to obtain a Land Control Board consent to perfect the agreement of sale dated March 14, 2008.

14. The second issue for this court to determine is whether the 2<sup>nd</sup> defendant was a *bonafide* purchaser for value. In *Katende v Haridas and Company Limited* (2008) 2 EA, the Court of Appeal in Kampala held that;

“For clarity I propose to start with examining the term fraud and the doctrine of bonafide purchaser for value without notice. Fraud is a very serious allegation. It means actual fraud, which means dishonesty of some sort but not constructive fraud. Fraud must be pleaded specifically and proved. The standard of proof required is higher than the usual balance of probabilities in civil matters. However, the standard of proof is not so high to require proof



beyond reasonable doubt. ...Fraud can be participatory by this I mean the party participates in the fraudulent dealings. However, fraud can be imputed on a person, that is where he or she is aware of the fraud and condoned it, or benefited from it or used it to deprive another of his rights. In short all those who actually participate in the fraudulent transaction and who had knowledge of it are privy and have notice of fraud. This leads me to the doctrine of bonafide purchaser for value without notice which is a complete defence to allegations of fraud. ...For the purpose of this appeal, it is suffice to describe a bonafide purchase as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bonafide doctrine as was held in the case of Hannington Njuki v William Nyanzi High Court civil suit number 434 of 1996, must prove:

1. he holds a certificate of title;
2. he purchased the property in good faith;
3. he had no knowledge of the fraud;
4. he purchased for valuable consideration;
5. the vendors had apparent valid title;
6. he purchased without notice of any fraud;
7. did not take part in the fraud.

A *bonafide* purchaser of a legal estate for value without notice has absolute unqualified and answerable defence against the claim of any prior equitable owner. The burden to establish or prove the plea lies on a person who sets it up. It is a single plea and is not sufficiently made out by proving purchase for value and leaving it to opposite party to prove notice if he can.”

15. The particulars of fraud as pleaded by the plaintiffs in their plaint claim that the registration of the title in the 2<sup>nd</sup> defendant’s name is fraudulent and illegal for lacking consent from the land control board. As determined by this court, in first issue, the suit property was not agricultural land and did not require consent from the land control board, therefore the agreement of sale and subsequent transfer cannot be claimed to be fraudulent on the basis of consent from the land board.
16. On the issue of beneficial interest the plaintiffs averred that the 1<sup>st</sup> defendant held the title of the suit property on her behalf and in trust for them as her children since the same belonged to the family. The plaintiffs therefore claim that their consent was never sought when the suit property was sold to the 2<sup>nd</sup> defendant.
17. In the case of *Pius Mugo Njogu v Kirwera Njogu* [2015] eKLR the court held that;  

“Trust is a matter to be determined from the evidence on record – see Mbothu & others v Waitimu & others 1986 KLR 173 where it was held that the Court never implies a trust save in cases of absolute necessity. A party relying on the existence of a trust must lead evidence to prove the same.”
18. The PW1 produced her statement dated April 7, 2014 during examination in chief, where she stated that initially herself, her siblings and the 1<sup>st</sup> defendant lived in Eldoret. After the 1<sup>st</sup> defendant got into an accident, it necessitated them to acquire land in Kilifi a warmer climate. It is the plaintiffs’ case, that the 1<sup>st</sup> defendant used the proceeds from their family land in Eldoret to purchase the suit property. PW1



- maintained that she and her siblings, have contributed to the payment of land rates, farm labourers and the developments on the suit property. PW1 contended that the suit property, is a subdivision of the larger farm that the 1<sup>st</sup> defendant bought when the family relocated to Kilifi from Eldoret.
19. PW1 produced the plaintiffs' supplementary bundle of documents dated October 19, 2021 (PEX 2) and October 27, 2021 (PEX 3), to establish before court that the 1<sup>st</sup> defendant held the suit property in trust for her children. PW2, Joel Kuria Kipkemboi the maternal uncle to the plaintiffs and brother to the 1<sup>st</sup> defendant, stated in examination in chief that it was agreed within the family that the 1<sup>st</sup> defendant sells her portion of her inherited land in LR No 6107 Eldoret Municipality/Block 15/4 in Kipkenyo Farm and relocate to Kilifi for health reasons. This was subsequently confirmed vide a letter of allotment dated October 25, 1988, from the Commissioner of Lands who allocated the 1<sup>st</sup> defendant 31.71 ha and issued with a certificate of title for MN/111/1076 dated November 29, 1988 (page 3 of PEX2). PW1 and PW2 both testified that the farm MN/111/1076 has been subdivided and sold over the years with the consent of the family to enable the 1<sup>st</sup> defendant meet her medical bills, upkeep and pay fees for the plaintiffs. However, they both maintain that the 1<sup>st</sup> defendant did not seek the consent of the family prior to selling the suit property to the 2<sup>nd</sup> defendant.
20. The 1<sup>st</sup> defendant (DW1) herself confirmed in her evidence during cross examination by the plaintiffs' counsel that the Kshs 120,000/= she used to purchase the suit land was from her family, to enable her move to a warmer climate. She further maintained that she held the suit land in trust of her children, and sought their consent whenever she subdivided and sold portions of the larger parcel of land over the years. From the evidence, PEX2, the 1<sup>st</sup> defendant's father was a shareholder in Kipkenyo Farm Limited (reference is made to page 41 PEX2).
21. PW2 claimed on cross examination by counsel for the 2<sup>nd</sup> defendant that the 1<sup>st</sup> defendant was given Kshs 120,000/= by the family to buy the land in Kilifi. The 1<sup>st</sup> defendant acknowledged, on cross examination by Counsel for the plaintiff that she was given Kshs 120,000/=. The monies were proceeds from her share of the family land in Kipkenyo to enable her move to a warmer climate. The 1<sup>st</sup> defendant gave birth to all the plaintiffs in Eldoret in the 1970s as seen from the plaintiffs' certificates of birth (page 40-42 of 1<sup>st</sup> DEX1). From the evidence, the 1<sup>st</sup> defendant only relocated to Kilifi, and acquired MN/111/1076 on November 29, 1988.
22. DW1, stated that she had every intention of creating a trust in favour of the plaintiffs, over the parcel of land. The 1<sup>st</sup> defendant is the registered proprietor of the suit property, which is a subdivision of the larger MN/111/1076. She has maintained that she intended to create a trust over the suit land in favour of the plaintiffs. In the case of *Pogendra Purshottam Patel v Pascale Mireille Baksh (Nee Patel) & 2 others* (2006) eKLR, the court held that;
- “The doctrine of resulting trust is said to be based on the unexpressed but presumed intention of the true purchaser or purchasers of the property. So the purpose of the parol evidence is to show the intention of the purchasers that they intended to create a trust. The existence of the trust is established once and for all and crystallises on the date on which the property is acquired.”
23. Therefore, there is an implied customary trust in favour of the plaintiffs over the suit property. Rights under customary law that exist prior to registration are overriding interests recognised by section 28 (b) of the *Land Registration Act*, 2012. Be that as it may, the question would then be whether the consent of the plaintiffs was sought during the sale and transfer of the suit property. The 2<sup>nd</sup> defendant in her statement of defence dated July 16, 2021 stated that the 1<sup>st</sup> defendant as the registered owner was free to deal with the suit land and further maintained that she was a *bonafide* purchaser for value



without notice and holds an indefeasible title. In her examination, she testified that she met the 1<sup>st</sup> defendant around 1987 while conducting research in the area and showed interest in buying the suit property. In her statement, which she produced before court she claimed that she reconnected with the 1<sup>st</sup> defendant in 2006 through the 3<sup>rd</sup> plaintiff. She then negotiated with the 1<sup>st</sup> defendant for the sale of the suit property with the full knowledge of the plaintiffs. The 2<sup>nd</sup> defendant argued that she was in good terms with the 1<sup>st</sup> defendant after the sale and made frequent visits. In 2009, the 1<sup>st</sup> defendant requested her to exchange the suit property with another, to enable the 1<sup>st</sup> defendant consolidate it with her family home into one plot, which the 2<sup>nd</sup> defendant refused hence the suit against her. PW1 during cross examination stated that she knew the 2<sup>nd</sup> defendant as her mother's friend. She however contradicted herself when she stated on one hand that the 2<sup>nd</sup> defendant was to use the land to help the needy and then stated that the 1<sup>st</sup> defendant did not seek the consent of the family before selling the suit property. Based on the circumstantial evidence before court, it is our view that the plaintiffs were fully aware of the sale of the suit property and only backed out when they realised the price had appreciated. The 1<sup>st</sup> plaintiff stated that she was a major financier of the home and even produced evidence of her payment of the land rates as seen from the cheque dated April 29, 2010 (reference is made to page 20 of PEX3). It is evident that the 1<sup>st</sup> defendant negotiated the sale, instructed advocates, executed the sale agreement and transfer with the knowledge and consent of the plaintiffs. The plaintiffs did not oppose the process of acquisition of title at the time of execution of the sale or transfer to express their dissatisfaction with the sale. This court finds that the plaintiffs have failed to demonstrate to court that they never consented to the sale of the suit property. I find no probable justification for this court to cancel the title of the 2<sup>nd</sup> defendant and I further find no merit in the plaintiffs' suit, which I hereby dismiss with costs to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 27TH DAY OF SEPTEMBER 2022.**

**N.A. MATHEKA**

**JUDGE**

