



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MAKUENI**

**ELC CASE NO. 21 OF 2017**

**SYLEE MATHEKA.....PLAINTIFF**

**VERSUS**

**ALFRED NTHIWA MATHEKA.....1<sup>ST</sup> DEFENDANT**

**PATRICK MUTHWII MATHEKA.....2<sup>ND</sup> DEFENDANT**

**AUSTIN MWANDIA MATHEKA.....3<sup>RD</sup> DEFENDANT**

**THE DISTRICT LAND REGISTRAR, MAKUENI.....4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. Sylee Matheka (*hereinafter referred to as the Plaintiff*) is one of the four (4) wives of Jonathan Matheka (*hereinafter referred to as the deceased*) who died intestate on the 13<sup>th</sup> September, 2011. By virtue of letters of administration *ad litem* issued on 30<sup>th</sup> May, 2015 in Machakos succession cause No.336 of 2015, the Plaintiff has brought this action against the Defendants where she seeks the following orders:-

**(a) A declaration that the properties known as Nzai/Mumbuni/686, Nzai/Mumbuni/687 and Nzai/Mumbuni/688 were illegally and/or unlawfully transferred in the names of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.**

**(b) A declaration that the purported transfers of the land parcels known as Nzai/Mumbuni/686, Nzai/Mumbuni/687, Nzai/Mumbuni/688 in the names of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants respectively registered against the titles of the three parcels are null and void.**

**(c) A declaration that the properties known as Nzai/Mumbuni/686, Nzai/Mumbuni/687 and Nzai/Mumbuni/688 belong to the estate of the deceased and be ordered to form part of the properties subject of High Court at Machakos, Succession cause No.219 of 2015 [in the Estate of Matheka Mutaiti-Deceased].**

**(d) An order of cancellation of any title deeds issued in the names of the three Defendant by the Registrar of Lands in respect of the purported transfers of the three parcels being Nzai/Mumbuni/686, Nzai/Mumbuni/687 and Nzai/Mumbuni/688.**

**(e) An order of permanent injunction restraining the Defendants either by themselves, their servants and/or agents howsoever from intermeddling, subdividing, cultivating, alienating, leasing, constructing, occupying and/or in any other manner dealing with the deceased's property, three parcels being Nzai/Mumbuni/686, Nzai/Mumbuni/687 and Nzai/Mumbuni 688.**

**(f) Costs of this suit.**

**(g) Any other relief this court may grant.**

2. Her claim is denied by the 1<sup>st</sup> three Defendants vide their joint statement of defence dated 07<sup>th</sup> March, 2017 and filed in court on even date. The 4<sup>th</sup> Defendant though served with summons to enter appearance and to file his defence failed to do so.

3. The Plaintiff's evidence in chief was that the 1<sup>st</sup> to the 3<sup>rd</sup> Defendants are some of the surviving sons of the deceased who have also been named in Machakos Succession cause No.219 of 2015 as some of the beneficiaries of the estate of the deceased. That at the time of his death, the deceased owned Nzai/Mumbuni/686, Nzai/Mumbuni/687, Nzai/Mumbuni/688 amongst others. That upon learning that some

of the properties of the deceased had been unlawfully transferred to some of the children of the deceased, the Plaintiff conducted search at Lands Registry in February, 2015 where she discovered the following:-

**(a) Nzaui/Mumbuni/686 was registered in the name of the 1<sup>st</sup> Defendant on 14<sup>th</sup> November, 2012 and title issued on 25<sup>th</sup> January, 2013.**

**(b) Nzaui/Mumbuni/687 was registered in the name of the 2<sup>nd</sup> Defendant on 14<sup>th</sup> November, 2012.**

**(c) Nzaui/Mumbuni/688 was registered in the name of the 3<sup>rd</sup> Defendant on 14<sup>th</sup> November, 2012.**

4. That upon discovering the irregularities in the three aforementioned titles, the Plaintiff petitioned the Court on 13<sup>th</sup> March, 2015 in Machakos High Court Succession cause No.219 of 2015, for letters of administration intestate of the estate of the deceased and at the same time issued citations to her co-wives. That two of her co-wives (Ndulu Matheka and Musyawa Matheka) objected to the petition but with consent of the parties, the court issued letters of administration in their three names on 25<sup>th</sup> May, 2016. That the other co-wife, Mumbuni Matheka had no objection to the said letters being issued to her.

5. The Plaintiff further stated that upon being granted letters of administration *ad litem*, she registered a caution on the three properties that were transferred to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. She added that she believes that the Defendants fraudulently colluded to register the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants as proprietors of the suit properties in that the first three Defendants purported to effect a transfer of the suit properties after the deceased's death without any lawful authority, that the 4<sup>th</sup> Defendant purported to register the transfer of the suit properties without verifying the legitimacy of the documents presented to him for registration and that the first three Defendants took out title deeds for the aforementioned suit properties while they were well aware that their deceased father was the bona fide registered owner.

6. The Plaintiff's evidence in cross-examination by Mr. Makau for the first three Defendants was that she would not be able to know how the suit properties were transferred to the first three Defendants. Her evidence in re-examination was that the Defendants' documents do not bear transfer documents signed by the deceased.

7. The Plaintiff called Alfred Mutunga (PW1), Richard Mukunzu Mutaiti (PW2), Benedict Manthi Matheka (PW3) and Esther Mombuni Matheka (PW4) who all adopted their respective witnesses statements as their evidence.

8. Mutunga's (PW1) evidence in cross-examination was that it was unfair for the deceased who had over 30 children to allocate land to only three of them. He said that even though the deceased sub-divided his land before his death, he did not disclose the beneficiaries of the land in question.

9. Mutaiti's (PW2) evidence in cross-examination was that he was not aware that the deceased had subdivided his land in favour of the Defendants.

10. Matheka's (PW3) evidence in cross-examination was that the Defendants herein were the ones who committed the fraud. In re-examination Mutaiti (PW2) revealed that the suit land was transferred to the first three Defendants' names after the death of the deceased.

11. Mumbuni's (PW4) evidence in cross-examination was that the deceased never subdivided the family property.

12. On the other hand, the first three Defendant's evidence in chief was that the deceased shared his land to all his sons. The three adopted their respective witnesses' statements and went ahead to produce the documents in their list of documents as defence exhibits. It was their case that subdivision of Nzaui/Mumbuni/686, 687 and 688 was carried out while the deceased was alive. That in order to have the three parcels transferred to them the deceased signed all the necessary documents and had the documents delivered to the Land Registrar.

13. When the 1<sup>st</sup> Defendant was cross-examined by Mr. Wanga for the Plaintiff as to why the title documents to the three aforementioned parcels of land were not in their list of documents, his answer was that the court did not require them. He agreed that the green card (D.Exhibit No.1) shows that he got his title deed on 14<sup>th</sup> November, 2012 while his father died on 13<sup>th</sup> September, 2011. He further agreed that his list of documents does not contain copies of the transfer forms. His evidence in re-examination was that the transfer forms are with the Land Registrar Makeni.

14. Similarly, the evidence in cross-examination of the 2<sup>nd</sup> Defendant was that their father took time to share his property amongst his sons. The 3<sup>rd</sup> Defendant in his evidence in cross-examination told the court that they did not have witnesses when they signed the transfer forms.

15. The three Defendants called Musyawa Matheka (DW1), Muniyoki Kwau Nzioka (DW2), Solomon Keli Matheka (DW3), Francis Matheka Kata (DW4), Scholastica Dorothy Ndave Matheka (DW5) and Juliana Ndulu Matheka (DW6) as their witnesses. The six defence witnesses adopted their witnesses' statements as their evidence in chief. All maintained in their evidence in cross-examination that the deceased transferred the three parcels of land to the Defendants while he was still alive.

16. I have read the submissions that were filed by the Counsel on record for the parties herein. The Counsel for the Plaintiff framed three issues for determination namely:-

**(a) Whether the deceased – Jonathan Matheka Mutaiti transferred the suit properties to the deceased before his death,**

**(b) Whether the Defendants fraudulently affected the transfers of the suit properties;**

***(c) Whether the orders sought should be granted in the circumstances of this suit.***

17. As for issue number 1, I will assume that the Counsel meant to say whether the deceased transferred the suit properties to the Defendants and not the deceased as the issue is framed.

18. On the other hand, the Defendants' Counsel framed the following issues for determination:-

***1) Who ought to prove a case in court?***

***2) When was the transfer done to the first to third Defendants and whether the transfer was proper?***

***3) Was their minutes/agreements prior to the transfer and subdivisions?***

***4) Are the first to the third Defendants intermeddlers or beneficiaries of the estate?***

19. In my judgment, I will adopt the issues as framed by the Plaintiff's Counsel. Regarding the first issue, the Plaintiff's Counsel submitted that considering the suit properties in question are registered parcels of land, any transfer during the lifetime of the deceased was mandatorily in law to be done through a duly executed transfer. The Counsel pointed out in the absence of any written memorandum/transfer duly signed by the deceased, it is only logical to conclude that the process of the transfer thereof was done and finalized long after the death of deceased and urged the court to hold this position.

20. The Counsel cited the case of **Mary Muthoni vs. Francis Mwangi Muthara [2016] eKLR where Musyoka, J** held thus:-

*".....the bringing of property under registration regime meant that any gifting of property was thereafter to be in writing. So that if the deceased intended to benefit the Respondent during her lifetime, she ought to have reduced the gift into writing or caused the transfer of title during her lifetime."*

Musyoka, J went on to hold that:-

*"The absence of any such transfer or written memorandum for such gift meant that there was no inter vivos gift of it to anyone. Consequently, the said property had not passed to the respondent during the deceased's lifetime, and therefore the same formed part of the estate of the deceased, available for distribution amongst all those who survived her."*

The Counsel also cited the case of **Re Estate of the late Gedion Manthi Nzioka (Deceased) [2015]eKLR** where Nyamweya, J stated as follows:-

*"For gift inter vivos, the requirements of the law are that the said gift may be granted by deed, an instrument in writing or by delivery, by way of declaration of trust by the donor, or by way of resulting trusts or the presumption of ..... Gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of trust in writing. Gifts inter vivos must be complete for the same to be valid."*

21. On whether or not the Defendants fraudulently affected the transfers of the suit properties, the Plaintiff's Counsel submitted that whereas the subdivision of Nzaui/Mumbuni/79 into the three suit parcels is not disputed and is clearly supported by the documents on record, the transfer of the parcels to the Defendants is not supported at all by the documents produced in court. The Counsel went on to submit that having asserted that they were the registered owners, the Defendants had legal burden on their shoulders to prove that they lawfully acquired the same.

22. It was also the Counsel's submissions that where a party deliberately withholds relevant evidence, it is only logical to invite the court to infer that if such titles were produced perhaps they would have been adverse to the Defendants' case. The Counsel cited Section 119 of the Evidence Act Chapter 80 of the Laws of Kenya which provides that:-

*"The court may presume the existence of any fact which it thinks likely to have happened, regard being led to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."*

23. The Counsel cited the case of **Peter Gichuki King'ara vs. Independent Electoral & Boundaries Commission and 2 others [2013] eKLR.**

24. The Counsel concluded by urging the court to grant the prayers sought.

25. On the other hand the Counsel for the Defendants submitted that even though the Plaintiff has alleged fraud on the part of the Defendants, the latter denied the same and availed all the documents in their possession. The Counsel pointed out that the Defendants took out summons to the 4<sup>th</sup> Defendant to come and testify but the latter declined to come to court on three occasions as opposed to the Plaintiff who did not make any attempt. The Counsel submitted that the burden of proof could not shift to the Defendants.

26. The Counsel further submitted that the documents produced by the 1<sup>st</sup> to the 3<sup>rd</sup> Defendants show that they were given their respective parcels of land by their father. The Counsel pointed out that D.Exhibit Nos.7, 8 and 9 are receipts for payment of Land Control Board to

cater transfer of the three parcels of suit land to the 1<sup>st</sup> to the 3<sup>rd</sup> Defendants' names. The Counsel added that the receipts are dated 16<sup>th</sup> February, 2011 while the deceased died 13<sup>th</sup> September, 2016 which was 7 months later. The Counsel was of the view that the Plaintiff is pushing the court to overlook the issue of administrative duties at Makueni lands office. The Counsel pointed out that once a party lodges documents which are then registered months later for one reason or the other when the transferor has passed away, that should not be construed to mean that fraud was committed. In my view, this line of submission amounts to adducing evidence from the bar. None of the defendants gave evidence on the alleged delay in issuing title deeds.

27. The Counsel concluded by asking the court to find that the case lacks merit and dismiss it with costs to the 1<sup>st</sup> to the 3<sup>rd</sup> Defendants.

28. Arising from the above, my finding is that it is not in dispute that the deceased herein died on the 13<sup>th</sup> September, 2011. That it is also not in dispute that before the demise of the deceased, he sub divided his Nzaui/Mumbuni/79 land into three parcels. There are documents on record to support the subdivision. However in the absence of any written memorandum/transfer duly signed by the deceased, I am unable to hold that the deceased signed he same before his death and that what remained was administrative duties as the Defendants allege. The only logical inference to be drawn is that the process of transfer was done and finalized after the death of the deceased. Even though I agree that the burden of proof lay with the Plaintiff, the 1<sup>st</sup> to the 3<sup>rd</sup> Defendants had evidentially burden of proof to show how they acquired title documents to the three respective parcels of land. It wasn't enough for the Defendants to assert that the deceased signed the transfer documents in his lifetime without proffering the copies thereof. It is not lost on this Court that the Defendants did not produce the title documents to their respective parcels of land. The green cards produced by the Plaintiff herein show that after sub-division of Nzaui/Mumbuni/79, into parcels number Nzaui/Mumbuni/686, 687 and 688 by the deceased, he had the latter parcels registered in his name on 15<sup>th</sup> February, 2011. By the time the entries in favour of the 1<sup>st</sup> to the 3<sup>rd</sup> Defendants were made on 14<sup>th</sup> November, 2012 the deceased was long dead. That would put to question how the transfer of the three parcels of land was effected.

29. For the reasons that I have enumerated hereinabove, it is safe to conclude that the transfer of the three parcels to the first three Defendants was irregularly done. The three parcels therefore belong to the estate of the deceased since the process of transfer is null and void.

30. The upshot of the foregoing is that my finding is that the Plaintiff has satisfied this court that she has a cause of action against the Defendants on a balance of probabilities. In the circumstances, I hereby proceed to enter judgment in her favour and against the Defendants in terms of prayers (a), (b), (c), (d), (e) and (f) of her plaint.

**Signed, dated and delivered at Makueni this 03<sup>rd</sup> day of May, 2019.**

**MBOGO C. G.,**

**JUDGE.**

**In the presence of:-**

Mr. Langalanga holding brief for Mr. Wanga for the Plaintiff

Mr. Hassan holding brief for J. A. Makau for the 1<sup>st</sup> to 3<sup>rd</sup> Defendants

Ms. C. Nzioka – court assistant

**MBOGO C. G., JUDGE,**

**03/05/2019.**