



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Nzioka & 2 others v Secretary B.O.G Watuka Primary School & 5 others (Environment & Land Case 3 of 2019) [2024] KEELC 4318 (KLR) (23 May 2024) (Judgment)

Neutral citation: [2024] KEELC 4318 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 3 OF 2019**

TW MURIGI, J

MAY 23, 2024

BETWEEN

BENSON MUTUA NZIOKA 1ST PLAINTIFF

MBAIKA NZYOKA MAKALI 2ND PLAINTIFF

MBENYA NZYOKA MAKALI 3RD PLAINTIFF

AND

THE SECRETARY B.O.G WATUKA PRIMARY SCHOOL 1ST DEFENDANT

THE CHAIRMAN B.O.G WATUKA PRIMARY SCHOOL 2ND DEFENDANT

WATUKA PRIMARY SCHOOL 3RD DEFENDANT

THE HON. ATTORNEY GENERAL 4TH DEFENDANT

**THE DISTRICT EDUCATION OFFICER, MAKUENI COUNTY 5TH
DEFENDANT**

THE LAND REGISTRAR, MAKUENI COUNTY 6TH DEFENDANT

JUDGMENT

1. By an amended Plaint dated 24th November, 2021 the Plaintiffs pray for judgment against the Defendants for:-
 - i. A declaration that the Plaintiffs are the lawful, bona fide, rightful and absolute proprietors of land parcel Number and all that property known as Makueni/Kako/420 by virtue of the grant of letters of administration confirmed on 16th February, 2009 in Nairobi HC P&A No. 1834 of 2002 Estate of Makali Maengo (Deceased).



- ii. A permanent order of injunction restraining the Defendants by themselves, agents and servants or through any person claiming under their right, authority and instructions from entering, interfering, constructing, demolishing, leasing out, carrying on any business thereon or committing any act whatsoever of all that property known as Makueni/Kako/420.
 - iii. An order evicting and demolishing any structures that the 1st, 2nd and 3rd Defendants have erected on all that property known as Makueni/Kako/420 at the 1st, 2nd and 3rd Defendants sole expense.
 - iv. A declaration that the restriction registered/placed in respect of all that property known as Makueni/Kako/420 by the 5th Defendant for the benefit of the 1st, 2nd and 3rd Defendants is illegal and unlawful and a subsequent order directing the 6th Defendant to unconditionally remove and/or lift the restriction and register the property in favour of the Plaintiffs by way of transmission.
 - v. Mesne profits.
 - vi. Costs of the suit and interest.
 - vii. Any other order and/or relief which this Honourable Court may deem fit and appropriate in the circumstances to grant.
2. The Defendants filed a statement of defence on 17th April 2019 and denied the Plaintiffs claim.
 3. The 1st – 3rd Defendants filed a Statement of defence on 7th June, 2019 denying the Plaintiffs’ claim. They urged the court to dismiss the Plaintiffs suit with costs.
 4. The Plaintiffs filed a reply to defence on 29th May, 2019 reiterating the contents of the Plaint.

The Plaintiffs’ Case

5. The Plaintiffs called two witnesses in support of their case. PW1, Benson Mutua Nzyoka adopted his witness statement dated 24th November, 2021 as his evidence in chief. He also produced the documents in the supplementary list of documents dated 24th November, 2021 as PEX Nos. 1 – 3 respectively.
6. PW1 testified that land parcel No. Makueni/Kako/420 (the suit property herein) is registered in the name of Makali Maengo who held the same in trust for his late father Nzyoka Makali. It was his testimony that the suit property was excised from land parcel No. Makueni/Kako/398. He further testified that land parcel No. Makueni/Kako/398 was subdivided into two portions being Makueni/Kako/398 measuring nine acres and Makueni/Kako/420 measuring 21 acres. He went on to state that upon subdivision of land parcel No. Makueni/Kako/398, his late father donated land parcel No. Makueni/Kako/398 to the 1st-3rd Defendants to set up a school.
7. It was his testimony that in its judgment, the High Court directed that the suit property be subdivided amongst his late father’s three wives. He went on to state that when they visited the lands office with a view to transferring the suit property amongst the beneficiaries, they were shown a letter from the 3rd Defendant stating that they are not the owners of the suit property. That when they visited the suit property, they found the 3rd Defendant had occupied the land and had put up permanent structures thereon. According to PW1, the restriction registered by the 5th Defendant against the suit property is unlawful as the 1st – 3rd Defendants have no legal claim over the suit property. He urged the court to issue an order that the suit property reverts back to the Plaintiffs.



8. On cross-examination by Ms. Kerubo, he reiterated that his late father donated nine acres to the 3rd Defendant though he could not remember when the land was donated. It was his testimony that Makali Maengo was holding the suit property in trust for his late father even if the green card did not indicate as much. He testified that land parcel No. Makueni/Mubau/339 is registered in the name of his deceased father.
9. On re-examination he testified that the High Court in Nairobi declared that Makali Maengo was holding the suit property in trust for his late father.
10. PW2, Mbaika Nzyoka Makali, adopted her witness statement dated 24th November, 2021 as her evidence in chief. She also produced the documents in the list of documents dated 30th October, 2018 as PEX Nos. 4 – 12 in support of their case. She informed the court that she is the widow of Nzyoka Makali and a co-wife to the 3rd Plaintiff. It was her testimony that the suit property is registered in the name of Makali Maengo who held the same in trust for her deceased husband. It was her further testimony that the suit property was excised from land parcel No. Makueni/Kako/398 measuring 30 acres. She stated that her late husband donated land parcel No. Makueni/Kako/398 measuring nine acres to the 1st - 3rd Defendants for the purpose of putting up a school.
11. That they were later on informed that they could not transfer the suit property because the 5th Respondent had registered a caution claiming ownership over the same. She lamented that she is unable to utilize the Estate of her deceased husband because the 3rd Defendant is in occupation of the suit property. She went on to state that the 3rd Defendant had taken over the rest of the land despite her late husband having donated nine acres out of the original parcel of land.
12. She urged the Court to grant the orders as sought in the Plaint.
13. In cross-examination, she testified that in the succession proceedings in Nairobi, the High Court declared that her late husband is the owner of the suit property.

The Defence Case

14. The Defendants called five witnesses in support of their case. DW1, Peter Ngila Mbuvi, adopted his witness statement dated 13/02/2020 as his evidence in chief. He also produced the documents in the list of documents of even date as DEX Nos.1–26 in support of their case.
15. DW1 informed the court that he is a former headmaster of Watuka Primary School. It was his testimony that Nzyoka Makali was allocated the suit property in the early 1950s through the Government Settlement Scheme. That the suit property was initially comprised in land parcel No. Makueni/Kako/398 measuring 30 acres. That later on, Nzyoka Makali was allocated land parcel No. Makueni/Mubau/339 after he complained that land parcel No. Makueni/Kako/398 was unproductive where he moved and settled with his family. That after he moved out of Makueni/Kako/398, the office of the area chief made an announcement to the effect that land parcel No. Makueni/Kako/398 had been declared as public land for the purpose of setting up a school. That consequently, a nursery school was started in the year 1962.
16. He went on to state that in the year 1967, the Chairman of the school, one Munguti Kyonthe, a brother in law to Nzyoka Makali unlawfully subdivided land parcel No. Makueni/Kako/398 into two unequal portions and caused land parcel No. Makueni/Kako/420 measuring 21 acres to be registered in the name of Makali Maengo and land parcel No. Makueni/Kako/398 in the name of Watuka Primary School. He stated that the school, the administration and the community became aware of the irregular subdivisions in the year 1988 when the sons of Munguti Kyonthe entered the land and started clearing



- the bushes which prompted them to register a caution against the suit property so as to protect the school's land.
17. He went on to state that in a meeting held on 10/5/1988, the Chairman of the school, the school officials and the Assistant Chief confirmed that the suit property was initially allocated to Nzyoka Makali but was later exchanged with another parcel of land in Mubau. He further testified that after the family of Nzyoka Makali lifted the restriction lodged against the suit property, the school lodged a second restriction in the year 2009.
 18. He testified that the Plaintiffs have never settled on the suit property since Nzyoka Makali settled in Mubau in the year 1962 when the exchange took place. He informed the court that the school has been in occupation of the suit property for more than 40 years without any complaint from the Plaintiff until the year 2009 when they sought to have the restriction lifted
 19. On cross-examination by Mr. Makau, he stated that he was conversant with the history of the suit property because he served as the headmaster of the 3rd Defendant from the year 1986 – 1992. He stated that the suit property was initially comprised in land parcel No. Makueni/Kako/398 measuring 30-acres belonging to Nzyoka Makali. He further stated that the suit property measuring 21-acres arose from the subdivision of land parcel No. Makueni/Kako/398 and is registered in the name of Makali Maengo, the father to Nzyoka Makali.
 20. He testified that the suit property is occupied by the Secondary School while the 3rd Defendant occupies land Parcel No. Makueni/Kako/398. It was his testimony that the School does not have a title deed and that it has never instituted any case to have the suit property registered in its name. According to DW1, the court did not award the suit property to the Plaintiffs.
 21. In re-examination, he reiterated that the suit property was initially known as land Parcel No. Makueni/Kako/398 measuring 30-acres was allocated to Nzioka Makali and not to Makali Maengo. He reiterated that Nzioka Makali was allocated Parcel No. 339 in Mubau in exchange for land Parcel No. Makueni/Kako/398 by the administration of the day.
 22. He testified that the school was not a party to the succession proceedings.
 23. DW2, Samuel Mativo Kioko, adopted his witness statement dated 10/02/2020 as his evidence in chief. He testified that he was the Chairman of Watuka Primary School between the years 1974-1988. He informed the court that in the early 1950s, Nzyoka Makali was allocated Plot No 398 measuring 30 acres by the Government Settlement Scheme through the area Chief William Kioko Musoma. His evidence was similar to that of DW1.
 24. On cross-examination by Mr. Makau, he testified that he was the Chairman of the School Board from the year 1974 – 1988. He went on to state that the suit property was subdivided before he became the Chairman of the school Board. He further testified that land Parcel No. Makueni/Kako/398 measuring 30 acres was allocated to Nzyoka Makali and that the suit property is registered in the name of Makali Maengo.
 25. It was his testimony that he was present when the exchange of the suit property was done at Watuka Market in the year 1962 though he did not come across any documents relating to the exchange of the suit property. He stated that the school does not have a title deed in respect of the suit property.
 26. In re-examination, he stated that the green card does not indicate that Makali Maengo was holding the suit property in trust for Nzioka Makali.



27. DW3, Charles Muthoka Mutanga, adopted his witness statement dated 10th February, 2020 as his evidence in chief. He testified that he is a retired teacher of Watuka Primary School. He testified that the dispute in respect of the suit property was referred to the D. O. Kako who requested the Land Registrar to register a restriction against the suit property so as to protect the interest of the school.
28. In cross-examination, he testified that the suit property arose from a sub-division though he could not state the original parcel number. He stated that his first interaction with the family of the late Nzyoka Makali was in the year 2009 when he discovered that they had taken out letters of administration in respect of the suit property. He stated that the 3rd Defendant has not applied to have the grant issued in favour of the Plaintiffs revoked. He testified Maingi Makali filed an application to have the grant revoked on the grounds that the suit property belongs to the school but the court referred the dispute to the land court.
29. DW4, Catherine Makau, a Land Registrar based at Makueni Land Registry adopted the witness statement of Samuel Maina dated 7th February, 2023 as her evidence in chief. It was her testimony that the green card in respect of the suit property was opened on 1st September, 1962 and that Makali Maengo was the first registered owner though he was not issued with a title deed.
30. She went on to state that there were two other entries in the green card, the first being a restriction, registered on 2nd April, 2003 and removed on 17th May, 2009 and the other one being a restriction, registered on 17th September, 2009 which was still in force. She further testified that there was an ownership dispute between the Plaintiffs and the 3rd Defendant over the suit property.
31. It was her testimony that the green card for Makueni/Mubau/339 was opened on 2nd October, 1967 and on the same date, Nzyoka Makali was registered as the first owner. She stated that a title deed was issued on 17th October, 2007.
32. In cross-examination, she testified that Nzyoka Makali acquired the title deed in respect of land Parcel No. Makueni/Mubau/339 through the adjudication process. She further stated that there was no indication from the green card that the suit property passed from Makali Maengo to any other owner
33. DW5, Dr. James Nguzo, the District Land Adjudication and Settlement, Makueni County adopted his witness statement dated 16th May, 2023 as his evidence in chief. He also produced the documents in the supplementary list of documents dated 1st March, 2023 in support of the Defendants' case.
34. DW5 testified that according to records held in their office, Nzyoka Makali was allocated Plot No. 6/CC on 5/8/1952. That according to Entry No. 9 of the Allocation Register, Plot No.6/CC was deemed to be unsuitable for agricultural purposes and the same was reserved for public use and in exchange, Nzyoka Makali was allocated Plot No. S/44.
35. In cross-examination, he stated that he did not know where the Title deed for Shamba No. S/44 was. He further stated that the original register held by their office clearly demonstrates that Plot No. 6/CC was withdrawn.
36. In re-examination, he reiterated that Plot No. 6/CC was allocated to Nzyoka Makali and that the suit property is registered in the name of Makali Maengo and not Nzyoka Makali.
37. After the close of their respective cases, the parties agreed to file and exchange written submissions.



The Plaintiffs Submissions

38. The Plaintiffs submissions were filed on 15th November, 2023. On their behalf, Counsel submitted that according to the certificate of official search dated 23rd March, 2009, the suit property is registered in the name of Makali Maengo. Counsel further submitted that the rights of a registered proprietor are protected under Section 24 of the [Land Registration Act](#), 2012. Counsel argued that the Defendants did not adduce any evidence to show that Nzyoka Makali (Deceased) was re-allocated another parcel of land measuring thirty acres.
39. Counsel submitted that the Plaintiffs have established a prima facie case on the ownership of the suit property with specific reliance of the copy of the title deed thereof. Counsel further submitted that the restriction registered in favour of the 5th Defendant is unlawful because the Defendants do not have any interest in the suit property.
40. To buttress his submissions, Counsel relied on the following authorities: -
 - i. Dr. Joseph Arap Ngok v Justice Moiyo ole Keiwua & 5 others Civil Appeal No. Nai 60 of 1997
 - ii. Peter Ndungu Thiongo & another v Juvenalis Gitau Muchuga & 6 others [2006] eKLR
 - iii. Magdaline Wambui Mbugua Muhia & 2 others v Charles King Kigwe & 3 Others [2019] eKLR

The Defendants Submissions

41. The Defendants submissions were filed on 29th November 2023. On their behalf, Learned State Counsel identified the following issues for the court's determination: -
 - i. Whether the suit property is public land set aside for public use?
 - ii. Whether the Plaintiffs have proved ownership of the suit parcel?
 - iii. Whether the registration of Makali Maengo can be protected by Section 24 and 26 of the [Land Registration Act](#)?
 - iv. Whether the Plaintiffs are entitled to the prayers sought?
42. On the first issue, Learned State Counsel submitted that the suit property was part of land Parcel No. Makueni/Kako/398 measuring 30 acres. It was further submitted that land parcel No Makueni/Kako/398 was initially allocated to Nzyoka Makali but was later withdrawn for public use in the year 1956.
43. It was submitted that land Parcel No. Makueni/Kako/398 became public land and was unavailable for alienation, allocation and registration for private use after it was withdrawn from Nzyoka Makali. It was further submitted that the said land was illegally subdivided and a portion thereof was irregularly, illegally and fraudulently registered as Makueni/Kako/420 in favour of Makali Maengo (Deceased).
44. On the second issue, Learned State Counsel submitted that the Plaintiffs did not prove how the suit property was registered in the name of Makali Maengo instead of Nzyoka Makali the initial allottee. It was further submitted that the green card does not have any entry to show that Makali Maengo held the suit property in trust for Nzyoka Makali. To buttress this point, reliance was placed on Section 126 of the Registered [Land Act](#)(Repealed) and Section 66 of the [Land Registration Act](#).



45. It was further submitted that the Plaintiffs did not adduce any evidence to demonstrate the alleged donation of nine acres comprised in Parcel No. Makueni/Kako/398 to the 3rd Defendant. Learned State Counsel submitted that the Defendants have demonstrated from the allocation register that land parcel No. Makueni/Kako/398 was allocated to Nzyoka Makali but was later withdrawn and became public land in the year 1956.
46. Learned State Counsel contended that the grant of letters of administration to the Plaintiffs vide Nairobi High Court P&A No.1834 of 2002 did not confer upon the Plaintiffs ownership over the suit property. Learned State Counsel submitted that the court did not declare the Plaintiffs as the owners of the suit property but instead acknowledged that there was a dispute and advised the parties to refer the matter to the land court.
47. On the third issue, Learned State Counsel submitted that the Plaintiffs did not produce the Title deed in respect of the suit property that is capable of protection under Section 26 of the [Land Registration Act](#), 2012.
48. It was further submitted that the Plaintiffs fraudulently excised the and registered the suit property as they aware that the land was withdrawn from Nzyoka Makali (Deceased) in the year 1956 and converted to public land. Counsel invoked the provisions of Section 80 of the [Land Registration Act](#) in urging the Court to cancel the registration of Makali Maengo as the proprietor of the suit property.
49. To her buttress her submissions, Learned State Counsel relied on the following authorities: -
 - i. Norbixin Kenya Limited v Attorney General [2014] eKLR
 - ii. Republic v Land Registrar Kilifi & another Ex-parte Daniel Ricci [2013] eKLR
 - iii. Margaret Wanjiru Ndirangu & 4 others v Attorney General [2020] eKLR
50. Having considered the pleadings, the evidence on record and the respective submissions, the following issues fall for determination:-
 - i. Whether the Plaintiffs have capacity to institute this suit
 - ii. Whether there exists a trust in respect of the suit property.
 - iii. Whether the Plaintiff is entitled to the orders sought.
51. From the pleadings and the evidence on record, the following facts are not in dispute: -
 - i. The suit property is registered in the name of Makali Maengo deceased.
 - ii. The suit property measures approximately 21 acres;
 - iii. The Plaintiffs are the legal representatives of the Estate of the late Makali Maengo.

Whether The Plaintiffs Have Capacity To Institute This Suit

52. The Plaintiffs filed this suit as the bona fide and absolute proprietors of L.R No. Makueni/Kako/420, the suit property herein. The 2nd and 3rd Plaintiffs are the widows of Nzyoka Makali deceased while the 1st Plaintiff is the legal representative of the estate Mutene Nzyoka a widow of Nzioka Makali.
53. In their pleadings and evidence, the Plaintiffs contended that they are the bona fide proprietors of the suit property by virtue of the grant of letters of administration confirmed on 16th February 2009 in Nairobi HC P & A No. 1834 of 2002- Estate of Makali Maengo (Deceased). In this regard, the Plaintiffs produced the certificate of confirmation of grant issued on 16th February 2009 to Maingi



Makali, Mutena Nzyoka Makali, Mbaika Nzyoka Makali and Mbenya Nzyoka Kakali. The certificate of confirmation of grant shows that Mutena Nzyoka Makali, Mbaika Nzyoka Makali and Mbenya Nzyoka Makali were to share equally the Estate of Makali Maengo comprised in the suit property.

54. The Defendants on the other hand produced the green card in respect of the suit which shows that it is registered in the name of Makali Maengo.
55. Upon confirmation of the grant, the Plaintiffs did not cause the suit property to be registered in their names through transmission and as such, they are the beneficiaries of the Estate of Makali Maengo. It is trite law that the estate of deceased persons can only be represented in any legal proceeding by a person who is authorized to do so on behalf of the estate. Only a person who has been issued with grant of letters of administration has capacity to represent the estate of a deceased person. In the matter at hand, the Plaintiffs are claiming ownership over property belonging to the Estate of Makali Maengo.
56. The Plaintiffs ought to have sued as the legal administrators of the Estate of Makali Maengo and not in their personal capacities as the owners of the property. The pleadings as drawn and filed is bad in law as the Plaintiffs are suing in their personal capacity as the registered owners of the suit property and not as beneficiaries of the Estate of Makali Maengo.

Whether There Exists A Trust In Respect Of The Suit Property

57. The Plaintiffs contended that Makali Maengo deceased held the suit property in trust for Nzyoka Makali deceased.
58. According to Black's Law Dictionary 9th Edition, a trust is defined as follows:-

“The right enforceable solely in equity, the beneficial enjoyment to which another holds a legal title, a property interest held by one person (trustee) at the request of another (settler) for the benefit of a third party (beneficiary).”
59. A customary trust is a valid claim to land as noted under Section 28(b) of the [Land Registration Act, 2012](#) and being an overriding interest, it affects the rights of a proprietor of land under Section 25 (1) (b) thereof.
60. A customary trust falls within the ambit of the proviso to Section 28(b) of the [Land Registration Act](#) which provides as follows:-

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—

(b) trusts including customary trusts.
61. It is clear from the above provisions that the registration of a person as a proprietor of land does not automatically exclude any obligation to which such proprietor may be subject as a trustee. These are non-registrable rights which run with the land.
62. Customary trust is a matter of evidence and not inference. It is an issue both of fact and law which requires serious demonstration through credible evidence. This was the holding by the Court of Appeal in the case of *Mbothu & Others v Waitimu & 11 Others*, [1980], K.L.R. 171 cited in the Estate



of the late Jonathan Kinyua Waititu (deceased) eKLR Succession Cause No. 488 of 2010 where it was held that:-

“The law never implies, the Court never presumes a trust but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.

Since the plaintiff’s claim was based on trust, the law places the onus on her to prove the existence of such trust..... It is however clear from the evidence herein that the plaintiff has neither pleaded nor proved any of the particulars as to how the trust subject matter of this claim arose with respect to the suit land. There is really no evidence upon which this Court can make a finding that the defendant holds the suit land in trust for him.”

63. Similarly, in the case of Salesio M’itonga v M’ithara & 3 others (2015) eKLR the Court of Appeal held that:-

“It is trite law that trust is a question of fact and has to be proved by evidence.”

64. The issue for determination is whether the Plaintiffs have demonstrated that the suit property is trust land. In the case of Isaack M’inanga Kiebia v Isaaya Theuri M’lintari & another [2018] eKLR, the Supreme Court articulated the elements which a person must prove to demonstrate the existence of a trust as follows:-

“Flowing from this analysis, we now declare that a customary trust, as long as the same can be proved to subsist, upon a first registration, is one of the trusts to which a registered proprietor, is subject under the proviso to Section 28 of the Registered *Land Act*. Under this legal regime, (now repealed), the content of such a trust can take several forms. For example, it may emerge through evidence, that part of the land, now registered, was always reserved for family or clan uses, such as burials, and other traditional rites. It could also be that other parts of the land, depending on the specific group or family setting, were reserved for various future uses, such as construction of houses and other amenities by youths graduating into manhood. The categories of a customary trust are therefore not closed. It is for the court to make a determination, on the basis of evidence, as to which category of such a trust subsists as to bind the registered proprietor.

Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in Kiarie v. Kinuthia, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:

1. The land in question was before registration, family, clan or group land.
2. The claimant belongs to such family, clan, or group.
3. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.



4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.
 5. The claim is directed against the registered proprietor who is a member of the family, clan or group.”
65. The legal burden of proof in demonstrating that the suit property is trust land lies with the Plaintiffs who wishes the Court to make a finding as to the existence of such trust.
 66. In paragraph 9 of the Plaint, the Plaintiffs pleaded as follows:- 9.The Plaintiffs aver that the suit property has and is still registered in the name of Makali Maengo (deceased) who held the same in trust for Nzyoka Makali (deceased) the husband to all the Plaintiffs and there has never been any suit or claim filed before a competent court over the ownership of the suit property.”
 67. The Plaintiffs testified that Makali Maengo deceased held the suit property in trust for Nzyoka Makali deceased. The Defendants on the other hand denied the allegations and contended that the green card does not indicate that the suit property was held in trust for Nzyoka Makali. To buttress this point the Defendants relied on the provisions of Section 126 of the Registered Land Act (repealed) which provides as follows:- (1) A person acquiring land, lease or a charge in fiduciary capacity may be described by that capacity in the instrument of acquisition and if so described shall be registered with the addition of the words “as trustee” but the Registrar shall not enter particulars of any trust in the register”.
 68. Further reliance was placed on Section 66 of the Land Registration Act which provides as follows:- 1) A person acquiring land, lease or a charge in a fiduciary capacity may be described in that capacity in the instrument of acquisition and be registered with the addition of the words “ trustee” but the Registrar shall not enter particulars of any trust in the register”.
 69. In their evidence the Plaintiffs testified that the High Court in its judgment declared that Makali Maengo was holding the suit property in trust for Nzyoka Makali. The Plaintiffs did not produce the proceedings and judgment in the matter where the declaration was made. The Plaintiffs did not adduce any evidence to show that there was an existing trust between the late Makali Maengo and Nzyoka Makali or that the Makali Maengo was holding the suit property in trust for Nzyoka Makali. From the foregoing, I find that the Plaintiffs have not demonstrated that Makali Maengo was holding the suit property in trust for Nzyoka Makali.

Whether The Plaintiffs Are Entitled To The Orders Sought.

70. The Plaintiffs testified that they are the bona fide and absolute owners of the suit property by virtue of the confirmed grant in HC P&A NO. 1834 of 2002- Estate of Makali Maengo. It was their testimony that the suit property is registered in the name of Makali Maengo who held the same in trust for Nzyoka Makali. It was their testimony that the suit property was excised from land parcel No. Makueni/Kako/398 measuring 30 acres which was subdivided into parcel No Makueni/Kako/420 measuring 21 acres and Makueni/Kako/398 measuring 9 acres. It was their case that Nzyoka Makali donated land parcel No. Makueni/Kako/398 to the 1st – 3rd Defendants for putting up a school.
71. The Plaintiffs claim over the suit property is anchored on the certificate of confirmation of grant issued on 16th February 2009 in Succession Cause No. 1834 of 2002 and the certificate of official search in respect of the suit property. In this regard, the Plaintiffs produced the certificate of confirmation of grant (PEX4) and the certificate of official search dated 07th June, 2016(PEX6). According to the certificate of confirmation of grant, the suit property is to be shared equally amongst the beneficiaries



- who are the Plaintiffs herein. The Plaintiffs further contended that the High Court declared that they are owners of the suit property.
72. The Defendants on the other hand produced the green card for the suit property (DEX No.1) which shows that the suit property is registered in the name of Makali Maengo.
73. The Defendants on the other hand contended that the suit property was initially allocated to Nzyoka Makali, son of Makali Maengo, on 05th August, 1952 and that the allocation was officially documented in the allocation register. In addition, the Defendants stated that on 10th April, 1956, the suit property was withdrawn from Nzyoka Makali for public use because the land was not suitable for agriculture.
74. It is the Defendants' evidence that an exchange of the suit property with land Parcel No. Makueni/Mubau/339 was made in favour of Nzyoka Makali. On the basis of the above, the Defendants contended that the suit property belongs to the 3rd Defendant. They argued that the suit property was illegally and fraudulently registered in the name of Makali Maengo, eleven years after it was withdrawn for public use. In this regard they produced the allocation register(DEX27) and various minutes regarding the dispute over the suit property. According to the Defendants, the suit property was fraudulently excised and registered in the name of Makali Maengo.
75. It is not in dispute that both parties are claiming ownership over the suit property. I have read the ruling delivered by Hon. Njagi in High court Succession Cause No 1834 (PEX 10) produced by the Plaintiffs. The ruling was pursuant to an application for revocation of the grant issued to the Plaintiffs on the grounds that it was fraudulently obtained. The court in its ruling delivered on 22nd April 2014 held that the issue of ownership cannot be determined in a probate and administration cause and stated as follows part:-
- “It is not within the province of a succession court to determine disputes of ownership of land. That would best be left to a court exercising a purely civil jurisdiction on land matters. The parties hereto ought to file an appropriate land case in order to help determine the true ownership of the plots.”
76. On the basis of the foregoing, this court is called upon to determine if the Plaintiffs are the absolute owners of the suit property. It is not in dispute that the suit property was hived from land parcel No.Makueni/Kako/398 comprised of thirty acres. It is the Plaintiffs case that land parcel No. Makueni/Kako/398 comprised of thirty acres was subdivided into two portions namely Makueni/Kako/398 measuring nine acres and Makueni/Kako/420 measuring 21 acres. The Plaintiffs informed the court that Nzyoka Makali donated 9 acres comprised in Makueni/Kako/398 to the 3rd Defendant for the purpose of putting up a school. It is the Plaintiffs case that Makali Maengo was holding the suit property in trust for their late husband.
77. According to the Plaintiffs and Defendants evidence, the suit property was initially comprised in land parcel No. Makueni/Kako/398 measuring 30 acres. It is not in dispute that the suit property arose from the subdivision of land parcel No. Makueni/Kako/398.
78. In paragraph 10 of the Plaint, the Plaintiffs pleaded as follows:- 10. “The Plaintiffs aver that the suit property herein known as Makueni/Kako/420 was hived off all that property known as Makueni/Kako/398 then comprised of thirty (30) acres or thereabouts and which was subdivided into two(2) portions of land being Makueni/Kako/398 measuring nine (9) acres or thereabouts and Makueni/Kako/420 measuring twenty one (21) acres or thereabout and the Plaintiffs husband one Nzyoka Makali (deceased) being the proprietor voluntarily, wilfully and on his own accord and initiative donated all that parcel of land known as Makueni/Kako/398 comprising of nine(9) acres or



thereabouts to the 1st, 2nd and 3rd defendants during his lifetime for the purposes of putting up a school and to which the plaintiff lays claim to”.

79. From a reading of paragraph 10 of the Plaintiff, it is clear that the Plaintiffs averred that their late husband was the owner of land parcel No. Makueni/Kako/398.
80. The Defendants’ claim to the suit property is founded on the alleged withdrawal of the suit property for public purposes in the year 1956. According to the Defendants land parcel No. Makueni/Kako/398 was initially allocated to Nzyoka Makali but was later withdrawn after he complained that the land was unproductive and he was allocated parcel No. Makueni/Mubau/339 in its place.
81. At this point, this court is called upon to determine the root of the suit property.
82. The Defendant contended that the suit property was fraudulently hived from land parcel No. Makueni/Kako/398 and registered in the name of Makali Maengo. They argued that land parcel Makueni/Kako/398 was initially allocated to Nzyoka Makali and not to Maengo Makali. To buttress this point, reliance was placed on the copy of the allocation register produced by DW5.
83. Black’s law dictionary defines fraud as:- “A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.” .
84. In the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2000] eKLR (Civil Appeal No. 106 of 2000) Tunoi JA (as he then was) held as follows: -

“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.”

The Court In re Estate of Francis Waita Mbaki (Deceased) [2018] eKLR aptly held as follows: -

“Fraud requires a higher degree of cogency of evidence on the balance of probability test to prove. I agree with the following passage from the decision of Kneller J. (as he then was) in *Mutsonga v Nyati* [1984] KLR 425, 439:

“The next issue is whether or not the defendant had the parcel registered in his name fraudulently? Charges of fraud should not be lightly made or considered. *Mason v Clarke* [1955] AC 778, 794; *Bradford Building Society v Borders*, [1941] 2 All ER 205. They must be strictly proved and although the standard of proof may not be so heavy as to require beyond reasonable doubt, something more than a mere balance of probabilities is required. *Ratilal Gordon bhai Patel v Lalji Makanji*, [1957] EA 314 (CA-T). In fact a high degree of probability is required. *Hornal v Neuberger Products Limited*, [1957] QB 247, 258. It is very much a question for the trial judge to answer. *Gross v Lewis Hilman*, [1970] Ch 445 (CA). See generally *Clerk & Lindsell on Torts*, 15th ed, [1982] pages 853, para 17-20. Whether there is an evidence to support an allegation of fraud is a question of fact. *Ludgater v Love* (188), 44 LT 694 (CA). *Halsbury’s Laws of England*, Vol 26 Third Ed, [1959] page 845, para 1572.”

A thorough perusal of the allocation register reveals as follows: -

- i. Nzyoka Makali was allocated Shamba No. 6/CC vide the entry dated 5/8/1952.



- ii. Shamba No. 6/CC was withdrawn from Nzyoka Makali vide the entry dated 10/04/1956. Shamba No. s/44 was then allocated to Nzyoka Makali.
86. The Defendants did not specifically plead and particularize any acts of fraud in their statement of defence. On the basis above, the facts are not conclusive as to how the suit property subsequently resulted having initially been named Shamba No. 6/CC. It is not clear how Shamba No. S/44 which was allegedly allocated to Nzyoka Makali in exchange of the suit property, subsequently changed to being known as Makueni/Mubau/339.
87. The evidence of the Plaintiff and Defendants shows that the suit property arose from the subdivision of land parcel No. Makueni/Kako/398. The Defendants produced a green card in respect of the suit property which clearly shows that it was opened on 1/9/1967 and registered in the name of Maengo Makali. Interestingly, neither the Plaintiffs nor the Defendants produced the green card for land Parcel No. 398 measuring 30 acres to show when the subdivision that gave rise to land parcel No. Makueni/Kako/398 and Makueni/Kako/420 was carried out.
88. There is no evidence on record to show how Makali Maengo was registered as the proprietor of the suit property.
89. The Plaintiffs did not adduce any evidence to show how Nzyoka Makali caused his land to be registered in his father's name. The manner in which Makali Maengo became the registered proprietor of the suit property in the year 1967 is not clear.
90. I find that the green card for land parcel No. Makueni/Kako/398 would have shed light on how Makali Nzyoka was registered as the proprietor of the suit property.
91. The Plaintiffs rightly submitted that the registered owner of a property is entitled to protection. To buttress this point Counsel relied on the provisions of Section 24 and 25 of the *Land Registration Act*. The Defendant on the other hand submitted that the Plaintiffs do not have a certificate of title which is capable of being protected.
92. Section 26 of the *Land Registration Act*, 2012 provides as follows: -
- ‘26. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
- a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.’
93. It is clear from the above provisions that a certificate of title is conclusive evidence that the person named as the proprietor is the absolute and indefeasible owner of the land. It is evident from the green card that the suit property is registered in the name of Makali Maengo. It is evident that no title deed was ever issued to the late Makali Maengo. The Plaintiffs did not produce a certificate of title to show that they are the registered proprietors of the suit property. From the evidence presented, it is crystal clear that the Plaintiffs are beneficiaries of the Estate of Makali Maengo and not the registered owners of the suit property.
94. From the foregoing, I find that the Plaintiffs are not entitled to the orders as sought in the Plaint.



95. In the end I find that the Plaintiffs have not proved their case against the Defendants on a balance of probabilities as required.
96. The upshot of the foregoing is that the Plaintiffs' suit is hereby dismissed with costs.

.....

HON. T. MURIGI

JUDGE

JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 23RD DAY OF MAY, 2024.

IN THE PRESENCE OF:

Court Assistant Alfred.

Ms. Macharia holding brief for Mutua for the Plaintiff

Ms. Kerubo for the Defendants

