



**Pepela & another v Khaemba (Environment and Land Appeal
7 of 2023) [2025] KEELC 963 (KLR) (20 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 963 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL 7 OF 2023
EC CHERONO, J
FEBRUARY 20, 2025**

BETWEEN

KHAEMBA MACHESO PEPELA 1ST APPELLANT

AGNETA NAKHUBA WELE 2ND APPELLANT

AND

ANINA NAKHWAMI KHAEMBA RESPONDENT

*(Being an appeal from the Judgment of Hon. T.M OLANDO PM in
BUNGOMA CM-ELC NO.11 of 2019 delivered on 9th August, 2023)*

JUDGMENT

Background

1. The Appellants Khaemba Macheso Pepela and Agneta Nakhwami Khaembawere Defendants while the Respondent Anina Nakhwami Khaembawas the plaintiff in the former suit being CM-ELC NO. 11 of 2019. In a Plaint Amended on 25th February 2019, the Plaintiffs sought the following orders;
 - a) A declaration that the Plaintiff is the legal wife of the 1st Defendant.
 - b) A permanent injunction do issue restraining the Defendants from selling, disposing of, alienating, leasing and/or in any way dealing with the parcel of land known as E.Bukusu/N.Sang'alo/5659, E.Bukusu/N.Sang'alo/315 and/or E.Bukusu/N.Sang'alo/8713 either by himself or through its agents, servants, employees and/or anybody acting under the Defendants instructions.
 - c) An order restraining the Defendant from accessing the suit land E.Bukusu/N.Sang'alo/5659, E.Bukusu/N.Sang'alo/315, E.Bukusu/N.Sang'alo/8713, making physical contact with the plaintiff and/or issuing threats.



- d. An order granting the plaintiff exclusive use and occupation of the land known as E.Bukusu/N.Sangalo/5659, E.Bukusu/N.Sang'alo/315 and E.Bukusu/N.Sang'alo/8713.
 - e. An order declaring all land transactions in respect of E.Bukusu/N.Sang'alo/5659, E.Bukusu/N.Sang'alo/315 and E.Bukusu/N.Sangalo/8713 were procured in contravention of sections 28(a) and 93 of the *Land Registration Act* NO.3 of 2012 and the same are thus null and void, the same be nullified, cancelled and the respective purchasers be evicted from the suit property forthwith.
 - f. An order that the plaintiff is entitled to a share of E.Bukusu/N.Sangalo/5659, E.Bukusu/N.Sangalo/315, and E.Bukusu/N.Sang'alo/8713 by virtue of being the 1st Defendant's wife.
 - g. General/Pecuniary/Exemplary damages.
 - h. Any other relief this honourable court may deem fit and just to grant.
2. Which he can lay hands on while the 2nd Defendant is the legal proprietor of the land comprised in E.Bukusu/N.Sang'alo/8713. The Defendants further contend that the suit land E.Bukusu/N.Sang'alo/8713 in which the plaintiff is apparently in occupation belongs to the 2nd Defendant and therefore does not form part of the plaintiff's matrimonial property.
 3. They averred that the plaintiff's continued occupation of land comprised in parcel NO. E.Bukusu/N.Sang'alo/8713 is an act of trespass, illegal and unlawful and sought the following orders;
 - a. An order for vacant possession against the plaintiff and the plaintiff's children or relatives and agents.
 - b. An order of eviction.
 - c. Mesne profits accruing since the invasion.
 - d. General Damages.
 - e. Interest at 27% per annum.
 - f. Costs of the suit.

Plaintiff's Case.

4. Anina Nakhwami Khaemba(PW1) identified herself as the plaintiff and a farmer. She referred to her witness statement dated 21st February 2022 and adopted the same as her testimony-in-chief. She stated that Khaemba Macheso Pepela (1st Defendant) is her husband and that they got married in 1971. She stated that they were blessed with two children namely Joshua Macheso Khaemba and Judith Nekesa Khaemba. She stated that the suit property E.Bukusu/N.Sang'alo/8713 which is a subdivision of LR NO.E.Bukusu/N.Sang'alo/5662 has been her matrimonial home for more than 40 years. She stated that for some time now, her husband has been trying in vain to evict her from the suit property after he deserted their home and went and remarried elsewhere.
5. She stated that on 02/01/2019 at about 14hours, her husband Khaemba Macheso Pepela came to her home, the suit premises herein and assaulted her and since it was not his first time, She decided to report to the police who got him arrested and charged in Bungoma CMCC NO. 112 of 2019. After the case was concluded, he was found guilty and fined. She stated that in his continued attempt to evict her from the suit property, her husband opted to sale it to a third party one Agneta Wakhuba Wele who upon obtaining title set out in motion to evict her. She stated that the said Agneta Wakhuba



Wele dumped construction materials outside her home without her permission/authority claiming to be the owner of the suit property. She stated that her husband's sale of her matrimonial home whilst she still lives in it and has occupied it for over 40 years is illegal, unfair and inhuman. She also referred to her list of documents dated 25/02/2019 containing two items which she produced as P-Exhibit 1 & 2 respectively.

6. On cross-examination, the plaintiff stated that she is the 3rd wife to Peter Khaemba Macheso and the other are Juliana Naliaka, Rosemary Nabwire Khaemba and the 4th wife is Emily Nam Khaemba. She stated that she has her husband gave her a home where she lives with her children and that her husband was given land by his father.
7. . Reuben Khaemba Wanami(PW2) identified himself as a farmer, a clan elder and a resident of shaka in Sang'alo within Bungoma County. He referred to his witness statement dated 19/04/2022 which he adopted as his testimony-in-chief.
8. On cross examination, he stated that he was called sometime in 2020 to resolve a dispute where the 1st defendant had sold the disputed land and they agreed that the 1st defendant was to give 1/2 acre to settle the plaintiff

1ST Defendant's Case.

9. . Peter Khaemba Macheso(DW1) identified himself as a farmer and a resident of Nzoia. He referred to his witness statement dated 26/08/2021 which he adopted as his testimony-in-chief. He also referred to his list of documents dated 26/08/2021 which he produced as DExhibit 1 & 2 respectively. He stated that he gave the plaintiff 1/2 acre land and that the land he sold belonged to his 4th wife namely Emily. On cross-examination, He confirmed that the plaintiff was his third wife and that she has not been married somewhere else. He stated that she has no problem with her and that he has not chased her.

2ND Defendant's Case

10. . Agneta Wele(DW1) identified herself as a farmer. She referred to her witness statement dated 20/08/2021 which she adopted as her testimony-in-chief.
11. On cross-examination by the plaintiff, she stated that when she went to buy the suit land, she found her (plaintiff) there. She stated that she had been called by her husband (1st Defendant) to buy the suit land. However, she confirmed that she (plaintiff) was not present when she paid for the land. She said that when she bought the suit land, the plaintiff and her family were living on the land.
12. . Peter Natito Wanjala(DW2) identified himself as farmer. He referred to his witness statement dated 15/04/2019 which he adopted as his testimony-in-chief. He stated that he was a witness when the 2nd Defendant purchased the suit property. He stated that on 08/02/2019, he was given bricks to take to the site by the 2nd Defendant and after dropping the said bricks, the Plaintiff and a group of other people came from the adjacent land and began breaking the bricks while shouting that the land belongs to them.

Appellants Submissions

13. The Appellant through the Firm of Wamalwa Simiyu & Company Advocates submitted that at page 111-112, the Appellant was seeking for various prayers which included special damages of Kshs. 192,000/ being the vale of the damaged bricks. He submitted that the trial court in its judgment never mentioned the fate of those prayers despite the case being consolidated suit giving rise to this appeal.



He further submitted that at page 54-57, the Appellants had filed a counterclaim in respect of land case NO. 11 of 2019 and recorded their statements at page 59-65 of the record of appeal. He submitted that the learned trial Magistrate only considered the aforesaid defence and counterclaim and ignored the prayers in the plaint dated 15/04/2019 and the testimonies of the rest of the witnesses thus occasioned a miscarriage of justice. He relied in the cases of; *Selle & Another v Associated Motor Boat Co. Ltd* (1968) E.A 123; *Peters v Sunday Post Limited* (1958) E.A 424; *Bwire v Wayo & Sailoki* (2022) KEHC 7 (KLR).

Respondents Submissions

14. The Respondent did not file submissions by the time of writing this judgment.

Legal Analysis And Determination.

15. I have considered the Memorandum of appeal dated 29th August 2023, the record of appeal, the pleadings and proceedings before the trial court, the impugned Judgment by the trial Magistrate, the submissions and the applicable law. This being a first appeal, this court is mandated Limited to reconsider the evidence afresh and come up with its own conclusion, bearing in mind that I neither saw nor heard the witnesses. (see the case of; *Selle & Another v Associated Moto Boat Company Ltd & Others* (1968) E.A 123 and *Peters v Sunday Post Limited* (1958) E.A 424)
16. From the evidence on record, the 2nd Appellant is the registered proprietor of the suit land parcel NO.E.Bukusu/N.Sang'alo/8713 sold to her by the 1st Appellant who is husband to the Respondent herein. According to the Respondent, her matrimonial home is situated on the suit property where she has lived with her family for over 40years. She stated that being their matrimonial home, her husband who is also the 1st Appellant herein did not seek and obtain spousal consent before purporting to dispose the same to the 2nd Appellant herein and that her husband (1st Respondent) has been attempting to evict her from the suit property and after he failed, he now sold the same to the 2nd Respondent who immediately upon obtaining title set in motion the process of evicting her. She stated that she has been in occupation of the suit property with her family since they got married in 1971. She stated that on 02/01/2019, her husband came to the suit property and assaulted her. She reported to the police who arrested and charged him in Bungoma CMCC NO. 112 of 2019. She stated that After the hearing of the case, the 1st Respondent was convicted and sentenced to pay a fine. These averments given under oath were not controverted.
17. In *Mugo Muiro Investments Limited V EWB & 2 others*(2017) eKLR, the Court of Appeal observed that a spouse had a beneficial interest in a property although her name did not appear on its title. Again in *M.O V AOW* (2017) eKLR, the High Court found that the wife had beneficial interest in matrimonial property which her husband had sold without the wife's consent.

Section 6(1), (3) and (4) of the [Matrimonial Property Act](#), 2013 provides that;

Meaning of matrimonial property

1. For the purposes of this Act, matrimonial property means-
 - a. The matrimonial home or homes;
 - b. Household goods and effects in the matrimonial home or homes;
or
 - c. Any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.



3. Despite subsection (1), the parties to an intended marriage may enter into an agreement before their marriage to determine their property rights.
 4. A party to an agreement made under subsection (3) may apply to the court to set aside the agreement and the court may set aside the agreement if it determined that the agreement was influenced by fraud, coercion or is manifestly unjust.”
18. From the record of appeal, it is not in contention that the 1st Appellant and the Respondent got married in 1971 and established the suit property as their matrimonial home where they have lived since then to date. It is my view that since the suit property constitutes the matrimonial home of the 1st Appellant and the Respondent, the 1st Respondent could not sale the same without spousal consent of the Respondent. I therefore find that the trial Magistrate did not err when he held that the 1st Defendant/Appellant could not sell the plaintiff/Respondent’s matrimonial home without her consent.
19. The second issue is whether the trial Magistrate erred in law and fact by failing to make a finding on the Appellants counterclaim. It is not in dispute that the Appellants/Defendants filed Defence and counterclaim to the Plaintiff/Respondent’s suit being BungomaCM-ELC NO. 11 of 2019. Although the trial Magistrate failed to pronounce himself on the Appellants/Defendants counterclaim, the same could not have changed the outcome of his decision. At paragraph 10, 11 and 12 of their counterclaim, the Appellants/Defendants averred as follows;
- “10. By way of counterclaim, the Defendants contend that the 1st Defendant has no land of his own which he can lay hands on while the 2nd Defendant is the legal proprietor of the land comprised in E.Bukusu/N.Sang’alo/8713.
 11. The Defendants shall contend that the suit land E.Bukusu/N.Sang’alo/8713 in which the plaintiff is apparently in occupation belongs to the 2nd Defendant and therefore does not form part of the plaintiff’s matrimonial property.
 12. he 2nd Defendant shall aver that the plaintiff continued occupation of land comprised in parcel NO.E.Bukusu/N.Sang’alo/8713 is an act of trespass, illegal and unlawful.”
20. The 2nd Appellant in her testimony admitted that before she bought the suit property, she visited and found that the Respondent was occupying with her children. In my view, it was big gamble for the 2nd Appellant to buy a property which was under occupation of a third party without establishing the relationship with the seller. Having established that the Respondent has a beneficial interest on the suit property, the purported sale by the 1st Appellant to the 2nd Appellant is therefore null and void and liable for cancellation.
21. In view of the foregoing, I find no reason to upset the trial Magistrate’s findings save to add that the Defendants/Appellants’ counterclaim dated 26th August, 2021 is without merit and the same is hereby dismissed with each party to bear their own costs.
22. The upshot of my re-evaluation is that this appeal is devoid of merit and the same is hereby dismissed with each party to bear their own costs.
23. Orders accordingly.

READ, DELIVERED AND SIGNED AT BUNGOMA THIS 20TH DAY OF FEBRUARY, 2025

HON. E.C CHERONO



ELC JUDGE

In the presence of;

1. 1st Appellant-present.
2. 2nd Appellant-absent
3. Respondent/Advocate-absent.
4. Bett C/A.

