In re Estate of Kokii Mutunga (Deceased) (Succession Cause 414 of 2009) [2022] KEHC 12761 (KLR) (31 August 2022) (Ruling)

Neutral citation: [2022] KEHC 12761 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

SUCCESSION CAUSE 414 OF 2009

GV ODUNGA, J

AUGUST 31, 2022

IN THE MATTER OF THE ESTATE OF THE LATE KOKII MUTUNGA (DECEASED)

BETWEEN

ANTONEUS MUASYA MUTUNGA ..... 1ST PETITIONER

MULI MULWA ..... 2ND PETITIONER

AND

JOATHAN NDUNDA MUTUNGA ..... OBJECTOR

RULING

1. The petitioners and the objector are children of the late Koki Mutunga, the deceased herein who died on November 10, 2000. According to the record, the deceased left behind land parcel No Mitaboni/Kaiani/1881 which is the property whose distribution is in contention in these proceedings. The grant of letters of administration herein were issued to the 1st petitioner herein but the same was eventually revoked and on July 12, 2021, the same was jointly issued to the 1st and the 2nd petitioners. From the evidence on record, the 1st objector, Muli Mulwa was the eldest followed by Jonathan Ndunda Mutunga, the 2nd objector and then the petitioner, Antoneus Muasya Mutunga.

2. According to the 1st petitioner, their late father, Mutunga Ngovia died in 1962 after he had subdivided his land into three portions amongst his three sons, Muli Mulwa, Jonathan Ndunda and Koki Mutunga who was to hold in trust for the 1st petitioner who was then aged 10 years. However, after the death of their father the other sons, in 1964, sold their portions and moved to Ithanga and Muranga respectively where they bought land leaving the 1st petitioner in the custody of their mother, the deceased herein.

3. It was averred that during the adjudication in the year 1983, the land was registered in the deceased's name, Koki Mutunga, and she was issued with LR No Mitaboti/Kaiani/74 which is currently Mitaboni/Kaiani/1881. When their mother, the deceased herein, died in 2000, the 1st petitioner

averred, he was left alone on the land. He then, accompanied by the area Chief, visited his brothers on May 8, 2009, in order to obtain their consent to enable him institute these proceedings and the said brothers gave him the consent. Pursuant to the same the cause was gazetted and he was issued with the grant on July 5, 2010 and the land as registered in his name and on July 16, 2010, he was issued with a title deed in his name.

4. In his oral evidence, the 1st Petitioner while reiterating the foregoing, explained that when their deceased mother, Koki Mutunga died, she left behind 4 sons, Kimuyu Mutunga, Jonathan Ndunda Mutunga, Muli Mutunga and the 1st petitioner. However, Kimuyu Mutunga died. He reiterated that when he visited the 2nd petitioner and the objector, he was with the area chief who recorded their names and ID card numbers and that the 2nd petitioner and the objector agreed that the 1st petitioner should take the land in question. As a result, the matter was gazetted and no one objected. It was his evidence that he also got land from his mother in exchange for a goat and that the two parcels are together. However, the shares given to the 2nd petitioner and the objector by their father were sold by them after which they left leaving the 1st petitioner, who was then aged 10 years with their mother. According to the 1st petitioner, the 2nd petitioner resides in Muranga while the objector resides in Ithanga.

5. The 2nd petitioner swore an affidavit on his behalf and on behalf of the objector. According to him, their late father died before subdividing the land amongst them. He also denied that they sold their portions of land and stated that they bought land where they were residing using their own money hence they are still entitled to their share of the estate of their late father, Mutonga Ngovia.

6. According to them land parcel No Mitaboni/Kaiani/74 currently Mitaboni/Kaiani/1881 was registered in the name of their mother, Koki Mutunga during the adjudication process in 1983. Following the death of their mother, they consented the issuance of the grant herein being issued to the 1st petitioner herein. However, on January 16, 2015 the petitioner fraudulently and without their knowledge and consent obtained title deed for the said land parcel No Mitaboni/Kaiani/74.

7. In his evidence before this court, the 2nd petitioner stated that he was from Kathiani but was staying in Ithanga in Masinga Dam on his own plot. He reiterated that the 1st petitioner fraudulently registered himself as the proprietor of the said land without their knowledge. He however confirmed that the objector was also residing in Ithanga. It was his prayer that the said land be divided between them.

8. In cross-examination, he denied that the 1st petitioner visited them in the company of the Chief and he denied signing the documents. He also stated that he was staying in Kathiani in a rented plot.

9. On his part, the objector stated that he was also from Kathiani. While associating himself with the evidence given by the 2nd petitioner, he asserted that their problem with the 1st petitioner was that he, without their knowledge. He denied that he was aware when the 1st petitioner instituted these proceedings and denied that they agreed that he should represent them. According to him, the signatures on the documents were inserted by the 1st petitioner in their absence. While admitting that he knew how to write he denied that he signed the document and denied that the signature on the document was his.

10. It was his position that the land should be divided equally amongst them. He denied that they moved to Ithanga and Muranga and insisted that he was staying in Kathiani with the 2nd petitioner since their birth. He denied that they left in 1963 and only returned to bury their mother.

Determination

11. I have considered the issues raised in this matter. The issue for determination how Mitaboni/Kaiani/1881 should be divided, if at all. It must be emphasised that the estate the subject of these

proceedings is that of Koki Muli, the mother of the parties herein and not that of Mutunga Ngovya, their father. It is also not in dispute that at the time of the death of Koki Muli, the subject parcel of land was registered in the name of Koki Muli. The 1st petitioner explained that the said parcel of land was a portion of the larger land that belonged to Mutunga Ngovya and which Mutunga Ngovya subdivided to his sons. However, due to the young age of the 1st petitioner, who was the last born of Mutunga Ngovya, the portion that was given to the 1st petitioner was registered in the name of Koki Muli to hold in trust for the 1st petitioner, while the portions given to the 2nd petitioner and the objector, they sold and left the home.

12. On their part, the 2nd petitioner and the objector have not attempted to explain the circumstances under which the land was registered in the name of their mother. They have not, for example, contended that the registration of the land in the name of Koki Muli was also in trust for them in order for this court to invoke the opinion of the Supreme Court in Petition No 10 of 2015 - *Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another* here the court held that:

> " 37. Land in a traditional African setting, is always the subject of many interests and derivative rights. The content of such interests and rights is often a complex area of inquiry. Such rights could be vested in individuals or group units. The rights and interests frequently co-exist with each other. For example, the rights of members of a family do not necessarily derive from the corporate rights of the family as such, but by operation of the applicable law and customs. Besides, the enjoyment of the rights is dependent on the fulfilment of certain conditions unique to the group unit. Several rights of the members could be inferior to, or co-terminus with, or indeed superior to the sum total of the rights of a group. Hence, customary law does not vest "ownership", in land in the English sense, in the family, but ascribes to the family the aggregate of the rights that could be described as "ownership." (Bennett 1995:3 and Cocker 1966: 30-33)."

13. While consigning the decisions of *Esiroyo v Esiroyo* (1973) EA 388 and *Obiero v Opiyo* (1972) EA 277 to the dustbin of history where they rightly belonged, the Supreme Court held that:

> " [38] It is therefore our view that, the decisions in *Obiero v Opiyo*, and *Esiroyo v Esiroyo*; were based on faulty conceptual and contextual premises. Faulty conceptually because, they did not take into account the complex nature of customary rights to land, and faulty contextually because, in interpreting sections 27, 28 and 30 of the Registered Land Act, the courts paid little or no attention to the relevant provisions of the retired Constitution regarding trust land. It is the registration of land in the trust land areas that had triggered the enduring tension between registered proprietors and claimants under customary law. It is no wonder that customary rights to land would exhibit resilience in subsequent decisions.
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> [39] It is instructive to note that neither section 115 nor 116 of the retired Constitution stipulates that upon registration of Trust land, any rights, interests or other benefits in respect of that land that were previously vested in a tribe, group, family or individual under African customary law shall be extinguished. All that the section provides is that "no right, interest or other benefit under African customary law shall have effect for the purposes of the relevant sub section (115 (2)) so far as it is repugnant to any written law". On

the contrary, the *Constitution* is categorical that each county council shall give effect to such rights, interests or other benefits in respect of the land as may, under African customary law for the time being in force or applicable thereto, be vested in any tribe, group, family or individual.

[40] There can be no doubt that the obligation imposed upon a county council to give effect to rights under African customary law applicable to Trust land did not cease upon the application of the *Land Consolidation Act* and the *Land Adjudication Act* to that land. In fact, the duty to give effect to these rights, became more pronounced, during the land registration process. Given the fluidity and complexity of these rights, it is obvious that, such rights could not find expression in the Register in their totality. Such customary rights as could not be noted on the register would have to be recognized somehow, for they had already been recognized by the *Constitution*.

[41] Thus, the obligations of a registered proprietor upon a first registration, as embodied in section 28(b) (and the proviso thereto) and section 30 (g) of the Registered Land Act, could only logically, be traceable to the "rights, interests, or other benefits under African customary law". How then, given this historical context, and the constitutional and statutory provisions, could it have been so easy to declare that rights under customary law become extinguished for all purposes upon the registration of a person and that none could survive whatsoever?

[45] In our considered view, the language of section 117 (2) of the retired constitution, was wrongly imported into sections 27, 28 and 30 of the Registered *Land Act* (now repealed) by the Judges in the cited decisions. Had the judges' view been informed by a proper appreciation of the nature, scope and content of the rights, interests and benefits to land under African customary law, subsisting before individualization of tenure, both the proviso to section 28 and section 30(g) of the Registered Land Act, would have been contextually interpreted. In this regard, there would have been no difficulty in construing a "customary trust" under the proviso to section 28 of the Act. Surely, before a first registration, what other trust, if not "a customary one", could have subsisted over land held under African customary law as to bind a registered proprietor?

[46] From the authorities we have considered, it is clear that the courts, vide section 163 of the Registered Land Act, have been more willing to import the doctrines of implied, resulting and constructive trust as known in English law, into section 28 of the Act. But the notion of a customary trust, which should have been the first port of call, has only been gradually and hesitatingly embraced. Due to this judicial hesitancy, the vital elements and content of a customary trust have yet to be fully and clearly developed.

[49] Be that as it may, it is undeniable that such rights of a person that subsisted at the time of first registration, as evidenced by his being in possession or actual occupation, are rooted in customary law. They arise under African customary law. They derive their validity from African customary law. They are "rights to which one is entitled in right only of such possession or occupation". They have no equivalent either at common law or in equity. They do not arise

through adverse possession, neither do they arise through prescription. For if they did arise through these processes, they would be overriding interests, not under Section 30(g), but under section 30(f) of the Registered Land Act."

14. In conclusion the court held that:

> " [52] 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.
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> 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:
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> 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.
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> [53] We also declare that, rights of a person in possession or actual occupation under Section 30(g) of the Registered Land Act, are customary rights. This statement of legal principle, therefore reverses the age old pronouncements to the contrary in Obiero v Opiyo and Esiroyo v Esiroyo. Once it is concluded, that such rights subsist, a court need not fall back upon a customary trust to accord them legal sanctity, since they are already recognized by statute as overriding interests.

[54] In the foregoing premises, it follows that we agree with the Court of Appeal's assertion that "to prove a trust in land; one need not be in actual physical possession and occupation of the land." A customary trust falls within the ambit of the proviso to section 28 of the Registered Land Act, while the rights of a person in possession or actual occupation, are overriding interests and fall within the ambit of section 30(g) of the Registered Land Act."

15. As regards the *Land Registration Act*, 2012, the court held that:

> "[57] With the repeal of the RegisteredLand Act (cap 300), Parliament enacted the *Land Registration Act* No 3 of 2012. The provisions of section 28 of the former, including the proviso thereto, were re-enacted as section 25 of the latter; while the provisions of section 30 of cap 300 were re-enacted as section 28 of the *Land Registration Act*. However, Parliament introduced two new categories of overriding interests, the first category is what are now called "spousal rights over matrimonial property"; while the second category is what are, rather curiously called "trusts including customary trusts". Even more curious, is the fact that "the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation," as earlier provided for under section 30 (g) of the Registered Land Act, are no longer on the list of overriding interests under section 28 of the *Land Registration Act*.
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> [58] What are we to make of these changes? Several interpretations are plausible. It is now clear that customary trusts, as well as all other trusts, are overriding interests. These trusts, being overriding interests, are not required to be noted in the register. However, by retaining the proviso to Section 28 of the Registered Land Act (now repealed), in section 25 of the *Land Registration Act*, it can be logically assumed that certain trusts can still be noted in the register. Once so noted, such trusts, not being overriding interests, would bind the registered proprietor in terms noted on the register. The rights of a person in possession or actual occupation of land, as previously envisaged under Section 30 (g) of the Registered Land Act, have now been subsumed in the "customary trusts" under section 25 (b) of the *Land Registration Act*. Thus under the latter section, a person can prove the existence of a specific category of a customary trust, one of which can arise, although not exclusively, from the fact of rightful possession or actual occupation of the land."

16. Whereas, it is clear that customary trust does exist notwithstanding lack of occupation or possession or registration, it is another thing to prove the factual existence of the trust which in my view depends of the evidence.

17. Even if they were to invoke the principles enunciated above, this court would be bereft of jurisdiction to deal with that contention being a matter calling for a determination of an interest in land. I am guided by the position adopted *In re estate of PNN (Deceased)* [2017] eKLR, where it was held that:

> "According to article 162(2) of the *Constitution* the Environment and Land Court (ELC) is vested with jurisdiction to determine disputes touching on ownership and the right to occupy and use land. Article 165(5) of the *Constitution* states that the High Court has no jurisdiction over matters that are the subject of Article 162(2) of the *Constitution*. It is my

considered view that the matter of Ngong/Ngong/[particulars withheld]. falls within the purview of Article 162(2) of the *Constitution*, meaning that this court then, by virtue of article 165(5) of the *Constitution*, does not have any jurisdiction over it. Determination of the question of the ownership of Ngong/Ngong/[particulars withheld]. as between the deceased and the other claimants should be referred to the ELC for resolution of the matter of as to who between the deceased and his father had bought the property from Paul Karanja Muiruri."

18. Apart from the foregoing, whereas the 1st petitioner maintained his position that the 2nd petitioner and the objector sold their portions and moved out to Ithanga and Muranga, the evidence of the 2nd petitioner and the objector was not consistent. On one hand they stated that they had never left Kathiani while on the other hand, the admitted that they were residing in Ithanga where they had bought land. At one point the 2nd petitioner contradicted himself by stating that he was in fact staying in rented premises. They never explained the circumstances under which they left their ancestral and in the absence of such explanation, the only reasonable conclusion is that the 2nd petitioner and the objector failed to prove their case. They also contradicted themselves as regards the circumstances under which their signatures appeared on the documents which were relied upon by the court in making the grant.

19. Having considered the evidence on record I find the evidence of the 1st petitioner consistent and believable. Accordingly, I find, based on the limited evidence placed before me and being well aware that this court has no power to deal with a dispute in respect of interest to land, that objectors have failed to prove their objection.

20. Accordingly, the said objection fails and the registration of the suit parcel of land to remain in the name of the 1st petitioner. There will be no order as to costs.

21. It is so ordered.

READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 31ST DAY OF AUGUST, 2022.

GV ODUNGA

JUDGE

Delivered in the presence of:

The petitioners and the objectors.

CA Susan/Tecla.