



REPUBLIC OF KENYA



Mussa & another v Adongo & another (Environment and Land Appeal E004 of 2020) [2023] KEELC 17407 (KLR) (11 May 2023) (Judgment)

Neutral citation: [2023] KEELC 17407 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT AND LAND APPEAL E004 OF 2020**

BN OLAO, J

MAY 11, 2023

BETWEEN

MILTON OMBUNDU MUSSA 1ST APPELLANT

WILBERFORCE WERE MALINGU 2ND APPELLANT

AND

IDA ADIKINYI ADONGO 1ST RESPONDENT

ROBERT SANYA ADONGO 2ND RESPONDENT

(Being an Appeal from the Judgment of HON. P. A. OLENGO – SENIOR PRINCIPAL MAGISTRATE in BUSIA CHIEF MAGISTRATE’S COURT ELC CASE NO. E49 OF 2020 delivered on 5th November 2020)

JUDGMENT

1. Milton Ombundu Mussa and Robert Were Malungu (the 1st and 2nd Appellants respectively) moved to the Chief Magistrate’s Court Busia and filed ELC Case No E49 of 2020 in which they impleaded Ida Adikinyi Adongo and Robert Sanya Adongo (the 1st and 2nd Respondents respectively) and sought judgment against them as follows:
 - a. That a permanent order of injunction be issued restraining the Respondents, their agents, workers, employees, assignees personal representatives and relatives from burying the body of Catherine Sanya and putting up structures on the land parcel No Samia/Budongo/137.
 - b. Costs of the suit.
2. The basis of the Appellant’s claim as per their plaint dated 19th October 2020 was that they are the registered proprietors of the land parcel No Samia/Budongo/136 on which the Respondents were



- planning to inter the remains of one Catherine Sanya as well as put up structures thereon without any colour of right hence necessitating the suit.
3. The Respondents filed a defence and counter-claim in which they denied that the Appellants are the registered proprietor of the land parcel No Samia/Budongo/136. They added that at all material times, the land parcels No Samia/Budongo/136 and 132 were registered in the name of one Musa Malingu Okello whose sons included the Appellants herein. That the said Musa Malingu Okello allowed one Isaya Malingu Adongo to occupy and develop a portion of the land parcel No Samia/Budongo/137 with the full knowledge of the Appellants. That even when he died, the said Isaya Malingu Adongo was buried on the said portion of land parcel No Samia/Budongo/137 which is ancestral land and that the Appellants are registered as proprietor thereof as personal representatives of the Estate of Musa Malingu Okello and in trust for other beneficiaries of that Estate particulars whereof were pleaded in paragraph 8 of the plaint. The Respondent therefore sought in their counter-claim an order that the Appellants hold the title to the land parcel No Samia/Budongo/137 in trust for them.
 4. The dispute was heard by Hon. P. A. Olengo (senior Principal Magistrate) and the 2nd Appellant and one William Wabungo Malingu testified on behalf of the Appellants while the 1st Respondent and one Clement Oduke Maado testified on behalf of the Respondents.
 5. After hearing the witnesses, the trial Magistrate found that the Appellants were registered as proprietors of the land parcel No Samia/Budongo/137 in trust for the Respondents. He therefore dismissed the Appellant's suit with costs in a judgment delivered on 5th November 2020.
 6. That judgment provoked this appeal in which the Appellants sought to have the same set aside. The following two (2) grounds of appeal have been raised by the Appellants:
 1. That the trial Court erred in law and in fact in making a finding of trusteeship between the Appellants and the Respondents which relationship was non-existent and on which basis he apportioned land to the Respondents.
 2. That the trial Court erred in law and in fact in making orders that the Respondents had any interest in the suit property when there was no such evidence which would have come by way of a will written by the deceased, the father to the Appellants.
 7. The appeal has been canvassed by way of written submissions. These have been filed both by Mr Ashioyainstructed by the firm of Ashioya & Company Advocates for the Appellants and by Mr Bogonko instructed by the firm of Bogonko, Otanga& Company Advocatesfor the Respondents.
 8. I have considered the record of appeal and the submissions by counsel.
 9. This is a first appeal and my duty is to re-consider and evaluate the evidence and draw my own conclusions. I must however bear in mind that I neither saw nor heard the witnesses as they testified and should take that into account. Further, I have the jurisdiction to review the evidence on record and determine whether the conclusions made by the trial Court should stand. A first appeal is in the nature of a re-trial and if there was no evidence to support the findings and conclusions made by the trial Court, this Court must not hesitate in making appropriate orders – *Selle & Another v Associated Motor Boat Company Ltd & Others* 1968 EA 123. See also *Peters v Sunday Post Limited* 1958 EA 124.
 10. The two (2) grounds of appeal can be condensed into one (1) ground of appeal and which is essentially whether the trial Magistrate erred both in law and in fact by making a finding that the Appellants held the title to the land parcel No Samia/Budongo/137 in trust for the Respondents.



11. I must first, however, begin by stating that in paragraph 4 and 5 of their plaint, the Appellants pleaded thus:

4: “The Plaintiffs are registered proprietors of L.R No. No Samia/Budongo/136 with it’s apportionment rights and freedoms.

5: “The defendants jointly and severally are planning to inter the remains of Catherine Sanya and put structures on the parcel without any colour of right.”

12. And in the main prayer of the orders sought, the Appellants pleaded thus:

9: “That permanent order of injunction be granted restraining the Respondents, their agents, workers, employees, assignees, personal representatives and relatives from burying dead body of Catherine Sanya and putting up structures on LR No Samia/Budongo/137.”

13. In his statement dated 19th October 2020, the 2nd Appellant says in paragraph 1 and 3 as follows:

1: “That L.R No Samia/Budongo/137 is registered in the joint names of Wilberforce Were Malinguand Milton Ombundo Mussa.”

3: “The defendants without any justification have put up illegal structures in preparation to lay to rest the remains of Catherine Sanya with impunity when there is L.R No Samia/Budongo/136 which parcel belongs to them.”

14. In their counter-claim, the Respondents seek the main order that the Appellants hold the title to the land parcel No Samia/Budongo/137 in trust for them. The thread that runs through the testimony of the parties during the plenary hearing is the ownership of the land parcel No Samia/Budongo/137. The Court finds that the land parcel No Samia/Budongo/137 is the subject of the dispute herein but cautions counsel that pleadings must identify with clarity what the dispute subject matter is.

15. Having said so, the main plank of the Appellants’ case was that by virtue of Sections 24 and 26 of the [Land Registration Act](#) as well as the Constitutional provision in Article 40 protecting the right to property, the Respondents have no right to lay any claim to the land parcel No Samia/Budongo/137 (the suit land) on the basis of a trust. Counsel for the Appellants therefore submitted at page 4 of his submissions as follows:

“Your Lordship, the trustee relationship must be well established between the claimant and the registered owner; it must be clear when it was so established and there has to be consistency; in the case of [Isack M’Inanga Kebia v Isaaya Theuri M’lintari & Another](#) 2018 eKLR, the Supreme Court of Kenya set out the parameters and held as follow ...”

After setting out the parameters identified in the case of [Isack M’Inanga Kebia](#) (*supra*) counsel for the Appellants goes on to submit that:

“Your Lordship, the case before you does not meet the conditionalities set forth by the Supreme Court of Kenya: we urge you to find that the trial Court was in error in it’s judgment; we urge you to set aside the judgment and find in favour of the Appellants/Plaintiffs in the terms of the prayers in the plaint ...”

16. In his submissions on behalf of the Respondents however, their counsel started by submitting that since the Appellants filed no defence to the Respondents’ counter-claim, it follows that the same



was admitted. Secondly, that this dispute had previously been heard and determined in favour of the Respondents by the District Officer Funyula against whose decision no appeal had been filed and finally, that the suit land was at all times registered in the names of Musa Malingu Okello (deceased) one of whose sons Isaya Malingu Adongo (also deceased) was the husband to the 1st Respondent and father to the 2nd Respondent and therefore it was ancestral land held in trust.

17. It is common ground that the suit land was first registered in the names of Musa Malingu Okello in 1984. In 2016, it was registered in the names of the Appellants who therefore take the view that the said registration entitled them to the orders of injunction as sought in their plaint.
18. It is true, as submitted by the Respondent's counsel, that the Appellants did not file a reply to defence and defence to their counter-claim. Counsel for the Respondents therefore submitted, citing the decision in *Kenya Power & Lighting Company Ltd v Kenya Electrical Traders and Allied Workers Union* 2017 eKLR [a decision of the Employment and Labour Relations Court], that the Respondents' averments should have been admitted. The case of *Kenya Power & Lighting Company Ltd (supra)* cited the decision in *Kiprotich v Gathua & Others* C.A. Civil Appeal No. 19 of 1976 where the Court of Appeal held that the Court has jurisdiction to enter judgment due to failure to file a reply or defence to a counter-claim. However, in the later decision by the Court of Appeal in *Joash Nyabicha & KTDA v Kipkebe Ltd & AG* C.A. Civil Appeal No 302 of 2010 [2013 eKLR] it was held that despite a failure to file a reply to defence, there is still a joinder of issues on that defence.
19. It is of course the law, as submitted by counsel for the Appellants, that the effect of registration of land in the name of a party confers absolute ownership of the land in that party as provided under Sections 24 and 26 of the *Land Registration Act*. However, Section 25 of the same *Act* which provides for the rights of a proprietor of land acquired after registration has the following provisos in sub-section 2:

“Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”
20. Further, Section 28 (b) of the same *Act* makes it clear that among the overriding interests to which registered land is subject to are trusts. It reads:

28. “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 –

 - (a) .
 - (b) trusts including customary trusts.”
21. After considering the evidence by all the parties, the trial Magistrate citing, and correctly so in my view, the Supreme Court decision in the case of *Isaak M'Inanga Kiebia v Isaaya Theuri M'Lintari & Another* 2018 eKLR, sated the following in the last three paragraphs of the impugned judgment:

“I agree with the defendant that the portion in occupation by the 1st and 2nd defendants was given to Isaya Malingu Odongo by Musa Malingu Okello who was the registered owner and the Plaintiffs as personal representatives to the estate of the said Musa Malingu Okello are bound to give effect to the wishes of the said Musa Malingu Okello.

I therefore find and hold that the possession and occupation of L.R No Samia/Budongo/137 by the defendants does not amount to trespass and that the registration of



the plaintiffs on the register of L.R No Samia/Budongo/137 does not relieve them of their obligation as trustees and that it will be a breach of the trust to grant the orders sought.

From the foregoing, I find that the plaintiffs have failed to prove their claim on a balance of probabilities. I decline to grant orders sought and thereby dismiss this suit with costs. The defendants are free to inter the body or remains of Catherine Sanya on the portion occupied by the 1st defendant on L.R. No Samia/Budongo/137.”

22. The trial Magistrate was therefore satisfied, from the evidence adduced, that the Respondents were not trespassers on the suit land who could therefore be enjoined from burying the remains of Catherine Sanya thereon. Rather, he was satisfied that infact the Appellants were trustees holding the title to the suit land in trust for the Respondents specifically, with regard to the portion in which the Respondents intended to bury the remains of Catherine Sanya. From my own re-evaluation of the evidence, the trial Magistrate cannot be faulted for arriving at the decision which he did. There was sufficient cogent evidence to justify the finding by the trial Court that the Appellants were trustees. Firstly, there was un-rebutted evidence that the parties are family. The Appellants are brothers in law to the 1st Respondent. The 1st Respondent’s husband was buried on the suit land and in his oral testimony, the 2nd Appellant admitted that the 1st respondent lives on the suit land. He said:

“Idah came there in 1986. Idah came to No 137 in 1986. She first built a grass thatched home. My brother Isaiah and his wife Idah built there.”

On her part, the 1st Respondent said the following in her evidence in chief:

“I am Idah Akinyi Adongo. The Plaintiffs are my brothers-in-law. Robert is my 2nd child. My husband was Isaiah Adongo Malingu. He died. I was married in December 1967. He took me to their home. We later left that home in 1981. My father in law took us to No 137. He showed us where to put up a home. We started living here. It is not true that I went to No 37 to hold or to guard it. Mine is about one acre. Our father in law also gave us land in NO 136. I have never built in No 136. My husband was buried in No 137. No one objected. We started with grass thatched house, then semi-permanent and later a permanent house and a permanent pit latrine. Robert has been living in No 137.”

That family relationship was sufficient evidence upon which the trial Magistrate was entitled to make a finding that the Appellants were trustees.

23. Secondly, and as is also clear from the evidence reproduced above, the Respondents have always been in occupation of a portion of the suit land from the time the 1st Respondent was married to the Appellants’ deceased brother. At no time during his life time did the Appellants late father eject the Respondents from the portion of the suit land which they continue to occupy to-date and on which the 1st Respondent’s husband is buried. Clearly, there was evidence upon which a customary trust could be founded. As was held in the case of *Isaack M’Inanga Kiebia* (*supra*) the rights of a person in possession or actual occupation of land are customary rights. Such rights fall within the ambit of Section 28(b) of the *Land Registration Act* which I have already cited above. Just as the trial Magistrate found, I am also persuaded that elements of a customary trust in favour of the Respondents pertaining to the suit land indeed existed. The onus was on the Appellants to prove that the Respondents had no



right of ownership of the portion of the suit land which they occupy. This is because Section 116 of the *Evidence Act* provides that:

“When the question is whether any person is owner of something which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.”

24. Not only did the Appellants fail to meet that onus but as is now clear from the evidence, the Respondents were able to prove that they are entitled to a portion of the suit land by way of a trust and that the Appellants, though registered as proprietors of the suit land, hold the title as mere trustees.
25. This appeal is clearly un-meritorious and is for dismissal.
26. There is however one issue which this Court must determine having confirmed that the Appellants hold the suit land in trust. Among the powers bestowed upon this Court under Section 78(1) (a) of the *Civil Procedure Act* is to “determine a case finally.” Section 78(2) of the same Act provides that:

“Subject as aforesaid, the appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on Courts of original jurisdiction in respect of suits instituted therein.”
27. Other than finding that the Appellants were trustees holding the suit land in trust and ordering that the Respondents were “free to inter the body or remains of Catherine Sanya on the portion occupied by the 1st defendant on L.R No Samia/Budongo/137,” the trial Magistrate ought to have gone further and determined that trust so that the parties are henceforth clear with regard to what portions of the suit land can be registered in their names. I intend to do that now so that the ownership of the suit land is brought to an end at least as far as this Court is concerned.
28. The suit land which is currently registered in the names of the Appellants measures 3.8 Hectares [9.38 acres]. The certificate of official search sows that they have shared it equally between themselves with each entitled to 4.75 acres. The most equitable order to make in determining this trust is to direct that the suit land be registered in the names of the parties as follows:
 1. 1st Appellant - 3.12 acres
 2. 2nd Appellant - 3.12 acres
 3. 1st Respondent and 2nd Respondent – 3.12 acres jointly.
29. Finally, on the issue of costs, the trial Magistrate condemned the Appellants to meet the costs. The law of course is that costs follow the event. However, in a dispute such as this where the parties are family, it is preferable that each meets their own costs so as not to further alienate them. I shall therefore interfere with the order as to costs and direct that the parties meet their own costs.
30. The up-shot of all the above is that this Court makes the following disposal orders:
 1. The appeal is dismissed.
 2. The trust herein is determined as follows:
 - a. The land parcel No Samia/Budongo/137 shall be shared as follows:
 - i. 1st Appellant – 3.12 acres.
 - ii. 2nd Appellant – 3.12 acres.



- iii. 1st and 2nd Respondents jointly 3.12 acres.
- b. The Appellants shall within 30 days from the date of this ruling surrender to the Land Registrar Busia the original title deed to the land parcel Samia/Budongo/137 for cancellation and execute all the relevant documents to facilitate the issuance of fresh title deeds to the parties as decreed in (a) above.
- c. In default of (b) above, the Land Registrar Busia and County Surveyor shall be at liberty to issue title deeds to the parties as decreed in (b) above notwithstanding the absence of the original title deed and the Deputy Registrar shall execute all the relevant documents on behalf of the Appellants.
- d. The parties shall each meet their own costs both here and in the court below.

JUDGMENT DATED, SIGNED AND DELIVERED AT BUSIA ELC BY WAY OF ELECTRONIC MAIL ON THIS 11TH DAY OF MAY 2023.

BOAZ N. OLAO

JUDGE

11TH MAY 2023

