



**Jangoro & 2 others v Otiemo & 2 others (Environment and Land Appeal E011 of 2022) [2023] KEELC 17837 (KLR) (8 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 17837 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENT AND LAND APPEAL E011 OF 2022**

**AY KOROSS, J**

**JUNE 8, 2023**

**BETWEEN**

**MARTIN WANGIRE JANGORO ..... 1<sup>ST</sup> APPELLANT**

**JACOB OLANGO ONYANGO ..... 2<sup>ND</sup> APPELLANT**

**MARY AUMA OWINO ..... 3<sup>RD</sup> APPELLANT**

**AND**

**LEONARD JUMA OTIENO ..... 1<sup>ST</sup> RESPONDENT**

**GEORGE ONYANGO OTIENO ..... 2<sup>ND</sup> RESPONDENT**

**RAPHAEL KIMOSI OTIENO ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal against the judgment of the Hon. PM J.P. Nandi delivered on 11/3//2022 in Bondo PM ELC Case Number E010 of 2020)*

**JUDGMENT**

**Background**

1. The respondents, who are brothers instituted suit in the trial court against the appellants. The 1<sup>st</sup> appellant and respondents are distant relatives; the respondents' great great grandfather and the 1<sup>st</sup> appellant's great grandfather was one Achieng.
2. The 2<sup>nd</sup> and 3<sup>rd</sup> appellants are respectively husband and wife and purchased land parcel title no. Bondo/Nyangoma/1077 ('suit property) from the 1<sup>st</sup> appellant who had succeeded the estate of his father Richard Jangara Opado ('Richard'). By a confirmation of grant which was issued to him on 20/11/2020, the suit property was wholly conferred to him. The suit property was at 1<sup>st</sup> registration registered in Richard's name.



3. In the amended plaint dated 25/02/2021, it was the respondents' case they had lived on the suit property for 40 years. Richard held the suit property for the lineage of Achieng by customary trust and they (respondents) had overriding interests over it. Probate proceedings and subsequent sale of the suit property to the 2<sup>nd</sup> and 3<sup>rd</sup> appellants were shrouded with fraud and illegality.
4. The respondents sought several orders. Declarations they were entitled to the suit property which was encumbered by customary trust, its sale to the 2<sup>nd</sup> and 3<sup>rd</sup> appellants was illegal and void, a cancellation of the 2<sup>nd</sup> and 3<sup>rd</sup> appellants as registered owners, permanent injunction, a transfer of the suit property to their names, costs and interests.
5. The 1<sup>st</sup> appellant filed his defence dated 07/12/2020 wherein he denied the averments made in the plaint and put the respondents to strict proof. He averred the respondents had their own parcels of land which they inherited from their grandfather Enos Opado Opiyo ('Enos'). These parcels were idle and adjacent to the suit property. Enos and his family had occupied the suit property with permission from Richard; it had since been terminated.
6. The 2<sup>nd</sup> and 3<sup>rd</sup> appellants filed a joint defence dated 16/04/2021 in which they denied the averments made in the amended plaint, put the respondents to strict proof and stated that they were the bona fide purchasers of the suit property and the claim against them was misconceived and invalid.
7. After the parties had testified and closed their respective cases, the trial court framed several issues for determination; (a) whether the respondents had been in occupation and possession of the suit property to the exclusion of the 1<sup>st</sup> appellant (b) whether the 1<sup>st</sup> appellant held the suit property in trust for the respondents (c) whether the suit property's title document in the names of the 2<sup>nd</sup> and 3<sup>rd</sup> appellants should be cancelled and (d) whether probate proceedings on Richard's estate was improperly conducted. On the first 3 issues, the trial court held in the affirmative while on the last issue, the trial court held the issue had been settled.

### **Appeal to this court**

8. Dissatisfied, the appellants preferred an appeal to this court. They abandoned some of their grounds of appeal. The outstanding grounds that are the subject for determination can aptly be summarised as:-
  - a. The trial court erred in law and fact in finding and declaring the suit property was encumbered by customary trust.
  - b. The trial court erred when it ordered the suit property to be transferred to the respondents' names without making a finding that the 1<sup>st</sup> appellant acquired registration fraudulently, illegally, unprocedurally by misrepresentation or through a corrupt scheme.

### **Appellants' submissions**

9. The appeal was disposed of by written submissions. Mr. Agina, the appellants' counsel, filed written submissions dated 23/04/2023. Counsel submitted on the two consolidated grounds of appeal which he identified as the issues for determination.
10. On the 1<sup>st</sup> ground, counsel submitted the respondents never proved customary law trust since the relationship between them and the 1<sup>st</sup> appellant was tenuous. Additionally, the respondents' testimony contradicted their claim in the probate court in which they had claimed they were beneficiaries of Richard's estate.



11. Counsel submitted the process of land adjudication was elaborate. Even if Richard had relocated from the ancestral land, there was satisfaction in his registration as the suit property's owner. The respondents had their own parcels of land that were registered in their names during 1<sup>st</sup> registration. To affirm his arguments, counsel placed reliance on Sections 25, 26, 27, 28 and 29 of the [Land Adjudication Act](#) and the Supreme Court of Kenya decision of *Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another* [2018] eKLR.
12. On the 2<sup>nd</sup> issue, counsel submitted the registration of the 1<sup>st</sup> appellant was procedural and his subsequent sale to the 2<sup>nd</sup> and 3<sup>rd</sup> appellant was proper. Further, the trial court did not have jurisdiction to entertain the suit.

### **Respondent's submissions**

13. Mr Odongo, the respondents' counsel, filed his written submissions dated 17/04/2023. He submitted his submissions prior to the appellants submissions being filed. Not being alive the appellants had abandoned some of their grounds of appeal, he submitted on 4 issues. (a) whether the trial magistrate erred in law by declaring the sale and purchase of the suit property to the 2<sup>nd</sup> and 3<sup>rd</sup> appellants was illegal and void; (b) whether Richard's registration was encumbered by customary trust; (c) whether the trial court erred in granting an order of permanent injunction and, (d) whether the trial court erred in awarding costs.
14. On the 1<sup>st</sup> issue, counsel submitted the 2<sup>nd</sup> and 3<sup>rd</sup> appellants were not bona fide purchasers and were subject to the encumbrance. In addition, the 2<sup>nd</sup> and 3<sup>rd</sup> appellants did not demonstrate land control board ('LCB') consent was acquired or stamp duty had been paid. The entire transaction between the appellants took a short span of 2 days.
15. On the 2<sup>nd</sup> issue, counsel submitted the respondents' case was in consonance with *Isaack M'Inanga Kiebia v. Isaaya Theuri M'Lintari* (Supra) since the respondents had been in occupation of the suit property to the exclusion of Richard. The respondents and 1<sup>st</sup> appellant shared a common grandfather and their kin were buried on it. Counsel submitted by virtue of Section 62 (1) of the [Land Registration Act](#), the cause of action survived the successors of the suit property's title.
16. On the 3<sup>rd</sup> and 4<sup>th</sup> issues, counsel submitted the principles of permanent injunction were well settled and the respondents had met all the ingredients and costs followed the event.

### **Analysis and determination**

17. Being a 1<sup>st</sup> appellate court, this court is alive that before reaching its own conclusions, its duty is to analyse and re-assess the evidence on record and not introduce extraneous matters not dealt with by parties in their evidence. It will bear in mind that it neither saw nor heard the witnesses and shall give allowance in that respect. See *Abok James Odera T/A A.J Odera & Associates vs. John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR and *Kenya Ports Authority vs. Kuston (Kenya) Limited* (2009) 2EA 212.
18. Before I proceed further, I must address the introduction of a new ground of appeal by the appellants in their submissions; the issue of the trial court's jurisdiction. The appellants were bound by the grounds postulated in their memorandum of appeal and this court will disregard it.
19. Having carefully considered the record of appeal, submissions of counsels, provisions of law cited including authorities, I will adopt the two grounds which were earlier highlighted in this judgment as the issues for determination.



- a. The trial court erred in law and fact in finding and declaring the suit property was encumbered by customary trust.
20. Section 24 (a) of the *Land Registration Act* states the registration of a person as the proprietor of land shall vest in that person absolute ownership together with all such rights and privileges thereto. Within Section 25 of this Act a registered proprietor holds title subject to leases, charges, encumbrances, conditions, restrictions, liabilities, rights and interests including overriding interests which have been recognised by Section 28 (b) of the same Act to include customary trusts.
21. As rightfully submitted by both counsels, the apex court settled the principle of customary trust. In this decision, the court analyzed previous decisions, repealed provisions of the Registered *Land Act* and those of the subsisting *Land Registration Act*. *Isaack M’Inanga Kiebia v. Isaya Theuri M’Lintari (Supra)* held in paragraph 52 as follows: -
- ‘...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...The categories of a customary trust are therefore not closed. ...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.’ Emphasis added.
22. The Court of Appeal in the case of *Juletabi African Adventure Limited & another v Christopher Michael Lockley* [2017] eKLR held: -
- ‘“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 intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.”
- See *Gichuki vs. Gichuki* [1982] KLR 285 and *Mbothu & 8 Others vs. Waitimu & 11 Others* [1986] KLR 171.’
23. These provisions of law and settled decisions affirms that customary trust is an encumbrance on land, it is not noted in the register of the subject land, possession and occupation is irrelevant, each case has to be determined based on the quality of evidence adduced, by Section 107 of the *Evidence Act*, the



persons claiming trust have the onus of proving it, the court can never imply trust but give effect the intention of the parties to create such a trust for the benefit of a group of other family members.

24. In its decision, the trial court held that customary trust had been established by the respondents by virtue of possession and occupation. In my considered view, the trial court implied customary trust instead of analyzing two paramount pillars that were settled in *Isaack M’Inanga Kiebia v. Isaaya Theuri M’Lintari* (Supra); whether the suit property was to be held in trust for a group of family members which should not be tenuous and intention of the parties at the time of first registration.
25. On relationship, the respondents and 1<sup>st</sup> appellant’s relationship was remote. The respondents allegedly derived ownership of the suit property by virtue of their relationship with Achieng. From their evidence, the respondents could not trace their occupancy beyond their grandfather Enos.
26. In fact, there was no evidence Enos’s brother one Naftal Agola Opiyo ever resided on the suit property. If indeed customary trust existed, one would have expected the larger extended family of Achieng to reside on the suit property or for such an extended family to claim trusteeship; which was not so.
27. The respondents never led evidence how the suit property had moved from Achieng through the ages to different family members. I disagree with the trial court that the suit property was before registration land that the respondents could derive trusteeship by virtue of being family, clan or group land.
28. On intention, there no evidence the suit property was ever to be held in trust for the respondents by Richard. Richard was a distant relative of the respondents and was registered as the owner of the suit property. The respondent never led evidence that there were any intervening factors that denied them registration during adjudication.
29. Instead, from adduced and unchallenged documentary evidence, the 1<sup>st</sup> respondent was registered as the proprietor of Bondo/Nyangoma/4480, the 2<sup>nd</sup> respondent that of Bondo/Nyangoma/4481 and Barack Otieno Opado (‘Barack’) who was a brother of their father was registered as the proprietor of Bondo/Nyangoma/1030. All these properties including the suit property were all issued title documents on the same date of 8/3/2017.
30. All these properties were located in one area and this is evident from the registration section and the map sheet; the suit property was registered in map sheet no.39 while those of the 1<sup>st</sup> and 2<sup>nd</sup> respondents parcels together with Barack’s were in map sheet no. 40.
31. Although the 1<sup>st</sup> respondent feigned ignorance of these properties, I find their evidence untruthful. Land adjudication process is a public process with numerous publications by the government. Their customary rights to land were ascertained in accordance with the rigorous process set out by the [Land Adjudication Act](#).
32. The absence of occupancy in the suit property by Richard’s family did not divest Richard’s customary rights or those of his heirs over the suit property. See *Isaack M’Inanga Kiebia v. Isaaya Theuri M’Lintari* (Supra).
33. Having examined the lineage of Achieng’s family and intention at registration, I find the trial court erred when it held the respondents’ possession and occupancy of the suit property affirmed their trusteeship over the suit property.
  - b. The trial court erred when it ordered the suit property be transferred to the respondents’ names without making a finding that the 1<sup>st</sup> appellant acquired registration fraudulently, illegally, unprocedurally by misrepresentation or through a corrupt scheme.



34. By Section 26 (1) of the [Land Registration Act](#), a title can be challenged on grounds of fraud or misrepresentation to which the person is proved to be a party, or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. Section 80 of this Act allows the court to order an amendment or cancellation of title.
35. The trial court based its decision on cancellation of title on its findings on customary trust. The trial court was silent on its findings on whether the manner in which the 2<sup>nd</sup> and 3<sup>rd</sup> appellants acquired the suit property was cloaked with fraud and illegality. Notwithstanding this, and being guided by Order 42 Rule 27 of the Civil Procedure Rules, this court has jurisdiction to settle this issue and pronounce its judgment on appeal if there was sufficient evidence on record.
36. In the well cited Court of Appeal decision of Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR, the court held fraud ought to be specifically pleaded and proved on a standard higher than a balance of probability but not beyond reasonable doubt. The respondents never led evidence on fraud and it is my finding they did not prove it.
37. The respondent particularized illegality in the manner which the 1<sup>st</sup> appellant succeeded the suit property from Richard's estate and alleged the 1<sup>st</sup> appellant had illegally sold and transferred the suit property to the 2<sup>nd</sup> and 3<sup>rd</sup> appellants without applying for and obtaining a land control board consent and paying the requisite stamp duty fees.
38. Having been conferred with the suit property by a confirmation of grant, the 1<sup>st</sup> appellant was expected to comply with the provisions of Section 61 of the [Land Registration Act](#) by having the suit property to devolve to him by transmission. Evidence was not led if this was ever conducted.
39. Although the contract for sale was proper since the 1<sup>st</sup> appellant had capacity, I agree with the respondents' counsel that it was not tenable for the suit property to be registered in the 2<sup>nd</sup> and 3<sup>rd</sup> appellants names within 2 days from the date of executing it. The transaction stank of illegality and failed to meet the prerequisites of a transfer process. The appellants never discharged the burden that they complied with the provisions of Section 8 of the [Land Control Act](#) and Section 5 of the [Stamp Duty Act](#).
40. This court cannot turn a blind eye on illegality. See the recent Supreme Court of Kenya decision of Petition no. 8 (E010) of 2021 Dina Management Limited v. County Government of Mombasa & 5 others. I find that though the respondents did not prove fraud to the required standards. I find the trial court erred in ordering a transfer of the suit property to the respondents' name. I find the 2<sup>nd</sup> and 3<sup>rd</sup> appellants acquired the suit property illegally. It would only be prudent for the suit property to be reverted back to Richard's names so that the suit property can be properly transmitted to the 1<sup>st</sup> appellant before he deals further with it.
41. It is my ultimate finding the appeal was partly successful. Since it is trite law costs follow the event, I will allow the appellants one half of the costs of this appeal and one half of the costs before the trial court. For the reasons stated above, the end result is that the appeal shall be allowed in part and substituted in terms of the following disposal orders: -
  - a. A declaration be and is hereby made that the transactions and/or entries entered and/or endorsed in the register of land parcel no. Bondo/Nyangoma/1077 that conferred proprietorship to Jacob Olango Onyango and Mary Auma Awino were irregular and ineffectual to confer any right, interest and title upon them.
  - b. The Land Registrar, Siaya, is hereby ordered to rectify the register of land parcel no. Bondo/Nyangoma/1077 and to have the entries made thereon on 25/11/2020 and 26/11/2020



cancelled and the proprietorship section of the said parcel of land to revert back to the names of Richard Jangara Opado pending proper transmission to Martine Wandire Jangara.

- c. The appellants shall have one half of the costs of the appeal and of the lower court suit.

**DELIVERED AND DATED AT SIAYA THIS 8TH DAY OF JUNE 2023.**

**HON. A. Y. KOROSS**

**JUDGE**

**08/6/2023**

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

Mr. Agina for the appellant

M/s Awuor Adipo for the respondent

Court assistant: Ishmael Orwa

