



**Achola v Mifuongo (Environment & Land Case 8 of 2021)
[2023] KEELC 20683 (KLR) (29 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20683 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT & LAND CASE 8 OF 2021
MN KULLOW, J
SEPTEMBER 29, 2023**

BETWEEN

SAMSON NYAPALA ACHOLA PLAINTIFF

AND

ENOS ACHOLA MIFUONGO DEFENDANT

JUDGMENT

1. The plaintiff herein commenced this suit by way of a Plaint dated June 28, 2021; seeking the following Orders against the Defendant: -
 - i. A Declaration that the registration of L.R. No. Kadem/ Muhuru Bay/2461 in the name of the defendant is subject to customary and beneficial trust for himself and his two brothers namely the plaintiff and the family of the late Ochieng Achola hence the same be shared equally accordingly.
 - ii. Permanent Injunction restraining the defendant by himself, servants, agents or otherwise howsoever from interfering with the plaintiff's quiet enjoyment of his portion of L.R. No. Kadem/ Muhuru Bay/ 2461.
 - iii. Costs.
 - iv. Interest.
2. The plaintiff avers that he and the defendant herein are blood brothers including one Ochieng Achola (who is since deceased) of one mother; Teresa Asiago Achola. That their deceased father Achola Mifuongo Manyinga had two wives; Siprina Akeyo Achola and Teresa Asiaga Achola who are both deceased. However, the said Siprina Akeyo Achola sired no son and did a customary woman to woman marriage to one Regina Aludo Nyapala in accordance to the 'Nyumba Thobu' customs practiced by the Suba communities.



3. It is his contention that the original land of their deceased father was shared among his two wives; with the share of Teresa Asiago being L.R. No. Kadem/ Muhuru Bay/ 2461 registered in the name of the defendant to hold in trust for himself and his 2 brothers, being the Plaintiff and the late Ochieng Achola. The other portion L.R. No. Kadem/ Muhuru Bay/2462 was registered in the name of Siprina Akeyo Achola and is occupied by her wife Regina Aludo Nyapala, there is no contention over the said registration or ownership and occupation.
4. It is his claim that despite being lawfully entitled to inherit a portion of the suit parcel No. Kadem/ Muhuru Bay/ 2461 together with the defendant and their deceased brother Ochieng Achola; the defendant has unlawfully resisted and barred him from peacefully enjoying his entitlement where his home lies. Further, he is apprehensive that the defendant has threatened to continue with the said illegal actions and may proceed to evict him from the said portion. He therefore urged the court to allow the suit and grant the reliefs sought in the Plaintiff.
5. The defendant filed a Memorandum of Appearance dated August 2, 2021, through the firm of M/ S C.A. Okenye & Company Advocates. However, on a perusal of the court record, I have noted that the defendant did not file any Statement of Defence in response to the allegations raised against him in the Plaintiff.

Trial

6. On 11/7/2023; the matter proceeded for hearing. Despite both the defendant and his counsel on record being served with the respective pleadings and various Hearing Notices, neither the defendant nor his Advocate filed a Statement of Defence nor attended court to prosecute his case. The matter therefore proceeded undefended.
7. The plaintiff testified as PW1, he adopted his witness statement dated June 28, 2021 as his evidence in chief. It was also his testimony that the defendant is his blood brother and asked the court to grant him the reliefs sought in his plaintiff.
8. He also produced the documents on his list of documents dated 28/6/2021 as Plaintiff Exhibits 1 & 2 in support of his case as follows;
 - i. Photographs - Pexhibit 1
 - ii. Proceedings in Migori CMC Criminal Case No. 32 of 2014 – Pexhibit 2
9. The Plaintiff thereafter closed his case. Since the matter proceeded ex-parte; his evidence and testimony remained unchallenged/ uncontroverted.
10. Having been satisfied that the defendant was duly served with Hearing Notices and an Affidavit of Service filed to that effect; I proceeded to close the Defence case, his absence and/or that of his Advocate on record not having been explained.
11. Upon close of the Defence case, I issued directions on the filing of final written submissions, to be filed within 21 days. However, at the time of writing this Judgment, the plaintiff had not filed his submissions. Be that as it may, I will proceed to issue my determination as hereunder.

Analysis and Disposition

12. It is this court's considered view that the issues arising for determination are: -
 - a. Whether Customary Trust arises in the instant case.



- b. Whether the plaintiff is entitled to the reliefs sought in the Plaintiff dated June 28, 2021.

I. Whether Customary Trust arises in the instant case

13. Customary trust is one of the overriding interests recognized in the *Land Registration Act*, 2012. section 28(b) of the *Land Registration Act* states 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—

- (a)
- (b) trusts including customary trusts;

14. The effect of the above provisions is that the overriding interest such as customary trust need not be noted on the Register of the suit land. Therefore, the registration of a person as a proprietor of land does not preclude him from holding an interest over the said land in trust for another person, subject to the fulfillment of the necessary elements thereto. Customary trust is thus an encumbrance on land.
15. The plaintiff contends that the suit land L.R. No. Kadem/ Muhuru Bay/ 2461 was originally owned by their deceased father and is therefore an ancestral land. It is his claim that the original parcel was divided into two; between the two wives. That he and his brothers were entitled to the suit land herein No. 2461, which belonged to their deceased mother while his father’s second wife, Siprina Akeyo, was entitled to the other portion being L.R. No. Kadem/ Muhuru Bay/ 2462.
16. It is further his claim that the portion belonging to them was registered in the name of the Defendant to hold in trust for them (plaintiff and the deceased brother Ochieng Achola). He however maintained that despite the said registration, he has built his home on his share entitlement and has been occupying the same to date.
17. He avers that the Defendant has unlawfully barred his enjoyment of his share entitlement and has been threatening to continue his illegal actions. He maintained that the Defendant is holding the suit land in trust for the 3 brothers and that he is entitled to his share of their father’s land.
18. The Court of Appeal in *Mbui vs Mukangu vs Gerald Mutwiri Mbui C.A No. 281 of 2000* stated that customary trust is a concept of intergenerational equity where the land is held by one generation for the benefit of succeeding generations. The Court also held that possession and occupation are key elements in determining the existence of a customary trust.
19. In defining “customary trust” the Supreme Court of Kenya in the case of *Isack M’inanga Kiebia v Isaaya Theuri M’lntari & another [2018] eKLR* held as follows:

“..... 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.
20. With these principles in mind; I will proceed to determine whether the customary trust arises in the present case. The first element to be established is whether the land in question was before registration, a family, clan or group land. The Plaintiff contends that the land originally belonged to their deceased father and was an ancestral land and the same was divided between his father's two wives, the Plaintiff's mother and one Siprina. It is therefore not in dispute that the suit land herein was a family land before the subsequent subdivision and registration in the name of the defendant.
21. The second element to be established is whether the claimant belongs to such a family, clan or group. It is the Plaintiff's claim that the Defendant is his blood brother; the three brothers having been 'born by Teresa Asiaga, one of the wives of their father. I have critically looked at Pexh. 2 – the proceedings in the Criminal case and as part of the complainant's (the Defendant herein) testimony at page 3, he confirmed that the Plaintiff herein is his younger immediate brother. The answer to this element is therefore in the affirmative, the Defendant who is the registered owner of the suit land is his brother.
22. The final element to be established in a customary trust is whether the claimant could have been entitled to be registered as an owner of the land but for some intervening circumstances. The Plaintiff contends that the land was originally owned by his father and the same was divided among the two wives. His deceased mother was entitled to one half of the land being the suit land herein No. 2461 while the other wife – Siprina was entitled to the other half being L.R. No. Kadem/ Muhuru Bay/ 2462. He thus contends that the registration of the entire suit land in the name of the Defendant was to hold in trust for him and his other brother Ochieng Achola. He maintained that he is therefore entitled to his portion of the suit land. The Defendant did not challenge the said averments nor adduce any contrary evidence. I therefore find that the plaintiff's testimony and evidence remain uncontroverted.
23. In view of the foregoing, I accordingly find that the suit land herein was registered in the name of the Defendant herein on his own behalf and to hold in trust on behalf of the plaintiff and their deceased brother Ochieng Achola by virtue of customary trust.

II. Whether the Plaintiff is entitled to the reliefs sought in the Amended Plaintiff dated 28.06.2021

24. As held earlier on the judgment; occupation and possession are some of the key elements in proving customary trust. The Plaintiff's claim against the Defendant is for a declaration that he is entitled to a portion of the suit land, where he has built his home and that the suit land should be shared equally amongst the three brothers; the defendant, their deceased brother and himself. He produced bundle of photographs as Pexh. 1 to prove that he has been in actual physical occupation of a portion of the suit land.
25. Despite being served with the respective pleadings, the Defendant only filed a Memorandum of Appearance but did not file any Statement of Defence in response to the allegations levelled against him in the Plaintiff. Further, he did not attend court during the hearing of the Plaintiff's case or to prosecute his case.



26. Even though the Defendant did not file any response or adduce any evidence to challenge the plaintiff's case; I do also acknowledge the evidentiary burden placed on the Plaintiff and the need for him to prove his case to the required standard. This position was restated by the court in the case of *Gichinga Kibutha...vs...Caroline Nduku* (2018) eKLR where the court held that: -

“It is not automatic that instances where the evidence is not controverted the claimants shall have his way in court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.”

27. I have noted that in prayer (a) in the Plaint, the Plaintiff seeks that a declaration be made that the registration of the suit land in the name of the Defendant is subject to customary and the court to thereafter direct that the land be shared equally. It is not in dispute that the land herein was a family land and having held that the doctrine of customary trust applies herein; all the three brothers are entitled to a share of the suit land. Further, the Plaintiff produced Pexh. 1 to prove that he has been in occupation and possession of a portion of the suit land. I have also noted that one of the said brother, Ochieng Achola is since deceased and therefore there is need for his estate to be administered.

28. The jurisdiction of the Environment and Land court is however limited to hearing and determining matters concerning the environment, use and occupation thereof and title to land and the same certainly does not entail matters touching on the distribution and division of an estate of the deceased.

29. In view of the foregoing, it is my finding that the Plaintiff has satisfactorily proved his case to the required threshold to warrant the grant of the reliefs sought. The same does not however include a declaration on the division in favour of the estate of a deceased person, Ochieng Achola and which is the preserve of the High Court in the Family division.

Costs

30. The general rule is that costs follow events. However, this being a family dispute involving brothers, I order that each party shall bear their own costs.

Conclusion

31. The Upshot of the above is that the plaintiff's claim against the defendant succeeds and the Plaint dated June 28, 2021 is hereby allowed on the following terms: -

- a. A Declaration that the registration of L.R. No. Kadem/ Muhuru Bay/2461 in the name of the Defendant is subject to customary and beneficial trust for himself and his two brothers namely the Plaintiff and the family of the late Ochieng Achola hence the suit land should be shared equally.
- b. The share accruing to the deceased brother Ochieng Achola shall be administered pursuant to the *Law of Succession Act*.
- c. An Order of Permanent Injunction be and is hereby issued restraining the Defendant by himself, servants, agents or otherwise howsoever from interfering with the Plaintiff's quiet enjoyment of his portion of L.R. No. Kadem/ Muhuru Bay/ 2461.
- d. Each Party shall their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 29TH DAY OF SEPTEMBER, 2023.



MOHAMMED N. KULLOW

JUDGE

In presence of; -

.....for the Plaintiff

.....for the Defendant

Court Assistant - Tom Maurice/ Victor

