



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT SIAYA

ELC CASE NO. 25 OF 2021

JOHN OLUOCH WANYANDE.....PLAINTIFF

VERSUS

PHILLIP ANDREW OREGA.....1ST DEFENDANT

GEORGE OLUOCH OMWANDHO.....2ND DEFENDANT

JUDGEMENT

Introduction

1. By way of plaint dated 24/06/2015, the plaintiff instituted suit against the defendants in which he claimed that the previous registered owners of land parcel number **NORTH UGENYA/ SIFUYO/ 929 (hereinafter “the original property”)**; Agnes Akoth and Joseph Osaa held the suit property in trust for him. He asserted that the 1st defendant had caused the original property to be subdivided into two land parcels; **NORTH UGENYA/ SIFUYO/ 1147** and **NORTH UGENYA/ SIFUYO/ 1148 (hereinafter “the suit property”)**.
2. That upon subdivision and registration, the 1st defendant transferred the suit property to the 2nd defendant. The plaintiff sought for; a declaration that the 2nd defendant held the suit property in trust for him, an order rectifying the register by deleting the name of the 2nd defendant and replacing it with that of the plaintiff, an order of eviction and costs of the suit.
3. The defendants filed a defence dated 17/03/2016 in which they denied the averments in the plaint and asserted that the plaintiff was not in a consanguineous relationship with the previous registered owners and that he had neither occupied nor possessed the suit property. They urged the court to dismiss the suit with costs.
4. The plaintiff filed a reply to defence dated 15/04/2016 in which he reiterated the averments in his plaint.

The plaintiff’s case and evidence

5. The plaintiff’s case is contained in his plaint, witness statement filed in court on 6/07/2015, oral evidence tendered in court during the hearing and documents produced as **“P Exh 1”** to **“P Exh 8”**.
6. The plaintiff testified as **“PW1”**. In his plaint and witness statement, it was his case that the original property is located in the old homestead of *Kanyaloro* clan and that his family comprising of his father Wanyande Oloo together his brothers Otieno Oloo, Choka Oloo and Ogonjo Oloo settled on the original land between the years of 1962- 1963 or immediately thereafter.
7. That around this period of 1962-1963, there was unprecedented rainfall in Nyanza region in a phenomenon popularly known as “independence rainfall” which resulted in flooding and displacement of people including one Agnes Akoth.
8. On her displacement, his father allocated Agnes Akoth who was either a sister in law to his father or aunt to his mother the original property to reside on together with her husband and that upon her husband’s death, she jointly registered the original property in her name together with that of her brother in law (brother to her husband) one Joseph Osaa.
9. It was his case that Agnes Akoth and Joseph Osaa had a life interest on the suit property and that upon their demise, the original property reverted back to the family of Oloo and therefore the 1st defendant did not have capacity to sell the suit property to the 2nd defendant.
10. He asserted that he had a customary interest over the suit property and that he had been in occupation and possession of it.
11. In his examination in chief, it was the plaintiff’s testimony that he had obtained Grant of Letters of Administration of the Estate of Agnes

Akoth who was his grandmother and that the original property had been the subject of proceedings in **Ukwala Central Nyanza African Court, Land Case No. 44 of 1963** between **Otieno Oloo vs Radido Ogunga**. He produced proceedings of this suit as **“P Exh 4”**.

12. He testified that he did not have a familial relationship with the 1st defendant nevertheless he had sued him for unprocedurally subdividing the original property and transferring the suit property to the 2nd defendant. As for **NORTH UGENYA/ SIFUYO/ 1147**, he testified that it was registered in his brother’s name.

13. On cross examination, he asserted that one half share of the original property was registered in the name of Joseph Osaá and that the defendant had obtained a Confirmation of Grant of the Estate of Joseph Osaá.

14. The plaintiff’s evidence was led by Charles Osoro Oluoch who was a retired Chief and he testified as **“PW 2”**. In his exam in chief, it was his testimony that he and the plaintiff were from *Kanyaláro* Clan while the 1st defendant was from *Kager* Clan and that this two clans had been in co-existence. He testified that the 1st defendant is a nephew of Joseph Osaá who was a brother to the 1st defendant’s father one Oudia Ogutu. He testified that Joseph Osaá and Oudia Ogutu were brothers to Akoth Agutu who was husband to Agnes Akoth.

15. He testified that the 1st defendant’s clan are settled in the area where the original property is located because they were displaced by floods in the year 1963. That during the floods, the plaintiff’s father allocated the original property to Akoth Agutu.

16. It was his testimony that during land adjudication in the Section, Agnes Akoth and her brother in law were registered as proprietors of the original property because her husband had died. The plaintiff’s father one Joseph Wanyande Oloo was a member of the Committee of Villagers who participated in the adjudication and registration of Agnes Akoth and Joseph Osaá as the proprietors of the original property and that he [plaintiff’s father] never objected to the registration even prior to his death in the year 1978.

17. During cross examination, it was his case that land demarcation took place in the Section between 1972 to 1975.

The defendants’ case and evidence

18. The defendants’ case is contained in their defence dated 17/03/2016, 1st defendant’s witness statement dated 18/04/2016, oral evidence tendered in court during hearing and documents produced as **“P Exh 1”** to **“P Exh 4”**.

19. In their defence, it is was their case that the plaintiff is neither in a consanguineous relationship with Agnes Akoth nor Joseph Osaá and that both Agnes Akoth and Joseph Osaá died without leaving behind a spouse or child. It was their case that the 1st defendant is the first son of Oudia Ogutu and he obtained Grant of Letters of Administration of the estate of Joseph Osaá.

20. It was their case that the plaintiff neither occupies nor possesses the original property and that the suit was frivolous and vexatious.

21. The 1st defendant testified as **“DW I”** and it was his testimony that upon demarcation and adjudication, the original property was registered in the name of Agnes Akoth and Joseph Osaá as tenants in common with equal shares and that upon their death, they neither left behind a spouse or child who would rank higher in priority for purposes of succession and that on probate, he succeeded the Estate of Joseph Osaá who was his father’s brother. It was his testimony that the he never held the suit property in trust for the plaintiff.

22. During cross-examination, **“DW I”** testified that he was from *Kager* Clan and the original property was allocated in the 1960s to his Uncle Akoth Agutu and that upon land adjudication in the 1970s, Agnes Akoth and his Uncle Joseph Osaá were registered as proprietors of the original land because Agnes Akoth’s husband had died.

23. The 2nd defendant testified as **“DW 2”**, In his exam in chief, it was his testimony that he carried out due diligence before purchasing the suit property from the 1st defendant and that he undertook due process in registering the suit property in his name and he was in possession of it.

24. During cross exam, it was his testimony that his relationship with the 1st defendant was that of a vendor and purchaser and that the plaintiff was a stranger to him. It was his testimony that he was neither privy to fraudulent proceedings on the partition of the original property.

The plaintiff’s submissions

25. The plaintiff filed written submissions dated 20/12/2021. He pegged his submissions on four issues he identified for determination: (i) whether the original property was the plaintiff’s ancestral land, (ii) whether the defendants held the original property in trust for him, (iii) whether the 1st defendant acquired any proprietary interest over the original property and, (iv) whether the 1st defendant had the legal capacity to obtain Grant of Letters of Administration of the Estate of Joseph Osaá.

26. On the 1st issue he contended that from his uncontroverted testimony, the suit property belonged to his father and as evidenced by **“P Exh 4”** the original property was intended for his family and that the relationship between his father and Agnes Akoth was that of naked owner and usufructuary with the former being his father and the latter being Agnes Akoth. That upon the demise of Agnes Akoth, the property reverted back to his father.

27. On the 2nd and 3rd issue the plaintiff submitted that the original property was ancestral land and the registration of Agnes Akoth and

Joseph Osaa as proprietors did not extinguish the existing customary trust. On this, he relied on the Supreme Court of Kenya decision **Isack M’Inanga Kiebia v Isaya Theuri M’Lintari & another [2015] eKLR**. On issue 4, it was the Plaintiff’s contention that the manner in which the 1st defendant succeeded the Estate of Joseph Osaa was questionable.

The defendants’ submissions

28. The defendants on 24/01/2022 filed written submissions. In their submissions, they contended that 1st defendant obtained a Confirmation of Grant of the Estate of Joseph Osaa and that the original property was properly demarcated, adjudicated and subsequently registered in the name of Agnes Akoth and Joseph Osaa as tenants in common. It was their submission that the plaintiff had failed to establish a relationship between himself and Agnes Akoth and Joseph Osaa. It was their submissions that they had demonstrated to court how they acquired the suit property.

29. It was their submission that the 2nd defendant was a purchaser for value and he had exercised due diligence before he purchased the suit property.

Analysis and determination

30. I have considered the pleadings together with the parties’ respective submissions and evidence tendered in court together with the relevant legal frameworks and jurisprudence. The following are the key issues falling for determination: (i) Whether the defendants held the suit property in trust for the plaintiff (ii) Whether the plaintiff is entitled to the orders sought in the originating summons and, (iii) Who shall bear the costs of the suit.

31. Before I proceed in making sequential pronouncements on these three issues. I will address one preliminary issue. The plaintiff in his submissions has urged this court to discredit **PW 2’s** testimony on the ground that he was merely to produce certain documents. Contrary to this in the plaintiff’s application of 28/3/2019, the court granted the plaintiff leave to call “**PW 2**” as a witness and he led him in evidence as a witness. It would be preposterous for the plaintiff to discredit the evidence of this witness at the submissions stage and therefore the evidence of “**PW 2**” stands. The purposes of submissions was well articulated in the Court of Appeal decision of **Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR** where the Court stated thus:

“Submissions are generally parties’ “marketing language”, each side endeavouring to convince the court that its case is the better one”.

32. On the 1st issue, it is evident that *trusts including customary trusts are recognized as overriding rights within the provisions of Section 28 of the Land Registration Act and these trusts being overriding rights are ordinarily not noted in the register and therefore a proprietor’s title is defeasible on grounds of trust.* Within the provisions of **Section 25 of the Land Registration Act**, certain trusts can still be noted in the register. Once so noted, such trusts, not being overriding interests, bind the registered proprietor on the terms noted in the register.

33. It is trite law that a party who alleges customary trust must prove that it was the intent of the parties or family members that the parcel of land would be registered in trust for other family members and once this onus is discharged, then the court would render its decision on the intent. It is never the duty of the court to infer trust.

34. From the evidence on record, “**PW 1**” testified that he derived his customary rights on the original land from Agnes Akoth. However, he failed to address the nature of his relationship with Joseph Osaa who was also a tenant in common in equal shares of the original property. The nature of the relationship between the plaintiff and Agnes Akoth was somewhat contradictory. He either described her as a sister in law to his father, an aunt to his mother or his grandmother.

35. “**PW 2**” and “**DW 1**” corroborated that the 1st defendant was in a relationship of affinity and consanguinity with Agnes Akoth and Joseph Osaa; Agnes Akoth was a wife to the 1st defendant’s Uncle one Akoth Agutu while Joseph Osaa was his Uncle. Akoth Agutu and Joseph Osaa were brothers to the 1st defendants’ father.

36. The Supreme Court of Kenya settled the guiding principles of customary trust in the case of **Isack Kiebia M’Inanga Vs Isaaya Theuri M’Lintari & Another SCoK No 10 of 2015** where it held thus;

“Some of the elements that would qualify a claimant as a trustee were:(a) The land in question was before registration, family, clan or group land, (b) The claimant belonged to such family, clan, or group, (c)The relationship of the claimant to such family, clan or group was not so remote or tenuous as to make his/her claim idle or adventurous. (d)The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances. (e)The claim was directed against the registered proprietor who was a member of the family, clan or group”

37. From the evidence tendered, prior to 1st registration, the plaintiff’s father who was from *Kanyaloro* clan allocated the original property to Akoth Agutu who was from *Kager* clan. In essence, the original property had ceased to be a property of *Kanyaloro* clan upon the allocation of the original land to Akoth Agutu.

38. The process of land adjudication was to ascertain rights and interests in land and these rights crystalized upon registration and in a claim of customary trust, the court has to look at the intervening circumstances during registration in order to establish the existence of customary trust. In the case of **MERU HCCC NO. 146 OF 2000- PETER GITONGA v FRANCIS MAINGI M’IKIARA**, the court stated thus:-

“A “trust” can be created under customary law and the circumstances surrounding registration must be looked at to determine the purpose of the registration. This was what led Muli J. to say this; “Registration of titles are a creation of law and one must look into the considerations surrounding the registration of titles to determine whether a trust was envisaged”.

39. It is the plaintiff’s submission that Agnes Akoth and Joseph Osaah held the original property as usufructuaries and upon their demise, the original property devolved back to the plaintiff’s father who was a “naked owner”. “PW 2” testified that the plaintiff’s father participated in the demarcation and adjudication process and he (plaintiff’s father) together with his brothers and elders registered the original property in the name of Agnes Akoth and Joseph Osaah and he recognised their legal rights over the original land.

40. “PW 2” who was a retired Chief was a credible witness who did not have any interest in the suit property and it was his evidence that his testimony was arrived at as a result of meetings between himself, 3 other chiefs and the then area District Officer. His testimony was not controverted.

41. In the Court of Appeal decision of **Mbui Mukangu v Gerald Mutwiri Mbui [2004] eKLR**, the court had this to say;

“It was unregistered land held under custom but the tenure changed during the land consolidation process and subsequent registration under the Registered Land Act. It is a concept of intergenerational equity where the land is held by one generation for the benefit of succeeding generations”.

42. My understanding of this decision is that once customary land was registered, it was could only be the succeeded by the heirs of the registered proprietor in title. In my view, the argument by the plaintiff that usufructuary rights exist over customary land is superfluous. The preamble of the **Land Adjudication Act** is very clear that its purpose was to ascertain and record of rights and interests in community land. The interests of Agnes Akoth and Joseph Osaah having been ascertained at the point of 1st registration could only devolved to their heirs in title.

43. It is common knowledge that in the olden days, persons moved from place to place as a result of pasture, natural disaster, war and pestilence and when these sojourners and wayfarers relocated, they were integrated by another host community. Should these persons and their succeeding generations be uprooted from properties they acquired? How far should one go generationally backwards to ascertain the original homeland of a person or a community? My answer to this is that recognition of usufructuary rights over customary land is untenable because such recognition would be a recipe of chaos and disharmony in an organized society.

44. It is the view of this court that the proceedings of the “**PEXh 4**” do not assist the plaintiff’s case because they were between his uncle one Otieno Oloo and one Radido Ogunga who are strangers to this case.

45. Consequently, it is the finding of this court that the plaintiff has failed to discharge the burden of proof on a balance of probabilities that the defendants held the suit property in customary trust for him.

46. The court having come to the finding on this one issue, it therefore follows that the plaintiff is not entitled to the orders sought in the plaint and in the absence of special circumstances, the general principle that costs follow the event will apply meaning the plaintiff shall bear the costs of the suit.

47. Ultimately, the court finds that the plaintiff has failed to prove his case against the defendants to the standard required by the law. The orders sought are declined and the plaintiff shall bear the costs of this suit.

It is so ordered.

JUDGMENT DELIVERED VIRTUALLY

DATED, SIGNED AND DELIVERED THIS 24TH DAY OF FEBRUARY 2022

IN THE PRESENCE OF:

MR. OLUOCH FOR THE PLAINTIFF

N/A FOR THE DEFENDANT

COURT ASSISTANT: SARAH OORO

HON. A. Y. KOROSS

JUDGE

24/2/2022