



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT SIAAYA

ENVIRONMENT AND LAND COURT CASE NO.2 OF 2021

DOMINIC OTIENO OGONYO.....1ST PLAINTIFF

LEONARD ORWA OGONYO.....2ND PLAINTIFF

PETER ODHIAMBO OGONYO.....3RD PLAINTIFF

VERSUS

HELIDA AKOTH WALORI.....DEFENDANT

JUDGEMENT

Background

1. The plaintiffs and the defendant's deceased husband Lawrence Walori Ogonyo are children of one **Pitalis Ogonyo Asweto [deceased]** and hereinafter "the patriarch". The patriarch had two wives; Gaudencia Apondi [deceased] and hereinafter the "**1st house**" and Agneta Warinda [deceased] and hereinafter the "**1st house**". During land demarcation and adjudication, the defendant's husband who was then a minor and 1st born of the 1st house was registered as the proprietor of land parcel number **NORTH SAKWA/AJIGO/1153** hereinafter the "**suit property**" while land parcel number **NORTH SAKWA/AJIGO/1154** was registered in the name of Charles Ogunde Sakwa who was also a minor and 1st born son of the 2nd house. The children of the 2nd house co-exist peacefully in their parcel. Upon the demise of Lawrence Walori Ogonyo, his widow, the defendant obtained letters of administration and transferred the suit property to her name.

Plaintiff's case.

2. The plaintiff filed a plaint dated 17/11/2015 which was amended by an amended plaint dated on 19/03/2019. The plaintiff's asserted that the defendant held the suit property in trust for them and that land parcel number **NORTH SAKWA/AJIGO/1207** which was registered in the name of one Andrew Opado Asweto [deceased] who was their father's brother, was allegedly frequently transferred to the names of Lawrence Walori Ogonyo. They prayed for; a permanent injunction, the OCS Lwala Kotiende Police Station to enforce the orders, a declaration that the defendant held the suit property and land parcel number **NORTH SAKWA/AJIGO/1207** in trust for them.

Defendant's case

3. On 10/10/2016, the defendant filed an undated defence. However, she filed another defence dated 14/11/2019. The court record does not demonstrate that the defendant was ever granted leave to amend her defence or was the earlier defence expunged from the court record and as it stands, the defence dated 14/11/2019 is improperly on record. In her defence filed on 10/10/2016, the defendant denied the assertions in the plaint and contended that the land was allocated to her husband by his father before his demise.

The plaintiffs' case and evidence

4. The Plaintiffs' case is contained in their amended plaint, witness statements dated 17/11/2015, their bundle of documents and oral evidence tendered in court during the hearing.

5. The 1st, 2nd and 3rd plaintiffs testified respectively as "**PW 1**", "**PW 2**" and "**PW 3**". Their witness statements were more or less similar and it was their testimony that all parties belong to the 1st house who died on 6/06/1990.

6. During land demarcation and adjudication, their father the suit property in the name Lawrence Walori Ogonyo to hold in trust for the

plaintiffs and on behalf of the 1st house, however, the defendant is of the mistaken belief that her husband who is also deceased solely owned the suit property.

7. It was their testimony that **PW1** and **PW2** lived in parcel number **NORTH SAKWA/AJIGO/1152** which was also registered in their brother Morris Ambayo Ogonyo's name because it was their father's homestead and their fathers two wives lived in this parcel of land and for the reason **PW3** is a last born, culturally he cannot move out of his parents' homestead. It was their testimony that their father had before his demise demarcated portions of land in the suit property to the plaintiff's and 1st defendant's husband.

8. It was their testimony that the defendant had prevented them from accessing their portions of the suit property yet they did not have challenges in utilising their parcels of land when their brother Lawrence Walori Ogonyo was alive.

The defendant's case and evidence

9. The defendant's case is contained in her defence filed on 10/10/2016, witness statement dated 14/11/2019 and her oral evidence given in court during the hearing.

10. In summary, it was the defendant's case that she was the sole owner of the suit property having acquired title by means of probate proceedings. She stated that the plaintiffs have their own distinct parcels of land. She testified that the plaintiffs' invaded her parcel of land upon her husband's demise and planted sisal on the land. On land parcel number NORTH SAKWA/AJIGO/1207, it was her testimony that Andrew Opado Asweto gave her deceased a title deed of the suit property in exchange for Ksh.25,000/- She prayed for the suit to be dismissed with costs.

The plaintiffs' submissions

11. The plaintiffs filed written submissions dated 12/01/2022. They framed three issues for determination; (i) whether the plaintiffs have proved that the defendant was holding the suit property and **NORTH SAKWA/ AJIGO/ 1207** in trust for them, (ii) whether the plaintiffs are entitled to the reliefs sought and (iii) who shall bear the costs of the suit.

12. The plaintiffs submitted that customary trusts are overriding interests that subsist on the land and therefore the registration of the defendant as a proprietor of land does not preclude the defendant from holding an interest in trust for another. They asserted that the defendant's late husband, being the eldest, held the suit property in trust for the younger siblings. Since customary trust is an interest on the land, the defendant now held the suit property in trust for the plaintiffs. In that regard, the plaintiffs placed reliance on the cases of **Kanyi v Muthiora [1984] KLR 712**, **Gathiba v Gathiba Nairobi HCCC No. 1647/84** and **Mbui Mukangu v Gerald Mutwiri Mbui CA Number 281 of 2000**.

13. The plaintiffs asserted that their father did not register any other parcels of land in their names and they were in possession and occupation which were key ingredients in proving customary trust. It was their submission that the 2nd plaintiff put up his traditional home on the suit property.

14. It was their submission that it was not strange for their father to register the 1st born sons of the 1st and 2nd houses as proprietors of land because it was within the Luo customs and norms. They contended that the defendant held NORTH SAKWA/ AJIGO/ 1207 in trust for the them.

Defendant's submissions

15. Despite being directed by the court on two occasions to file her written submissions, the defendant did not comply and as it were, the defendant's written submissions are not in the court record.

16. I have considered the pleadings together with the parties' respective submissions and evidence tendered together with the relevant legal frameworks and jurisprudence. The following are the key issues falling for determination: (i) Whether the defendant held a portion of the suit property in trust for the plaintiffs (ii) Whether the plaintiffs are entitled to the orders sought and, (iii) Who shall bear the costs of the suit. I will sequentially make pronouncements on these three issues.

17. 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.

18. From the evidence adduced in the trial court, it is evident that the rights of the plaintiff were not registered in the register of the suit property and it therefore follows that the claim by the plaintiff would lie within the provisions of **Section 28** of the **Land Registration Act** and not **Section 25** of the **Land Registration Act**.

19. It is settled law that to prove a trust in land; one need not be in actual physical possession and occupation of the land. This was the position upheld by the Supreme Court of Kenya in the case of **Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another [2018] eKLR**. The question that then arises is whether the plaintiff discharged the burden that the appellant held a portion of the suit property in trust for the him.

20. 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. A determination on the existence of trust is on a case by case basis and the Supreme Court settled the guiding principles of customary trust in the case of **Isack Kieba M’Inanga Vs Isaaya Theuri M’Lintari & Another SCoK No 10 of 2015** where it held thus;

“Each case had to be determined on its own merits and quality of evidence...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”

21. 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.

22. In **MERU HCCC NO. 146 OF 2000- PETER GITONGA VERSUS FRANCIS MAINGI M’IKIARA**, it was stated that :-

“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”.

23. At the hearing of the suit, it emerged that during land demarcation and adjudication in the section, the family patriarch had several parcels of land some of which were registered in his names while others were registered in his son’s names. Currently, the 2nd plaintiff has constructed a house on the suit land. The defendant testified that when she got married, she lived in the patriarch’s homestead before moving onto the suit property.

24. From evidence adduced, the suit property which is approximately 2.8 hectares was registered in the name of Lawrence Walori Ogonyo, **NORTH SAKWA/AJIGO/1154** which is approximately 2.8 hectares was registered in the name of Charles Ogunde Ogonyo, Land parcel number **NORTH SAKWA/AJIGO/1154 1152** which is approximately 2.2 hectares was registered in the name of Morris Ambayo Ogonyo who was a son of the patriarch and it was the patriarch’s [Pitalis Ogonyo Aseto] homestead and currently occupied by the 1st and 3rd plaintiff.Land Parcel **NORTH SAKWA/AJIGO/ 1155** which is registered in the name of the patriarch is located at a market and is jointly utilized by the children of the two houses. Land Parcel **NORTH SAKWA/AJIGO/ 2016** which was registered in the name of the patriarch is occupied by the 1st plaintiff.

25. From the evidence adduced in court, Land Parcel **NORTH SAKWA/AJIGO/ 2016 1207** was originally registered in the name of Andrew Opado Asweto who died on 10/2/1999 was transferred to Lawrence Walori Ogonyo on 23/8/1999 which was after the registered owner had died. There was no evidence that succession proceedings were undertaken on behalf of Andrew Asweto’s estate. The defendant alluded that the land was given to Lawrence in exchange for Kshs. 25,000/= and transferred the suit property prior to his death. However, she did not produce documents in support of this.

26. The process of land adjudication was to ascertain rights and interests in land. From the evidence tendered in court, during first registration, none of the plaintiffs were registered as owners of any parcels of land. From the evidence tendered in court, the defendant’s husband, was registered as the owner of the suit property when he was still a minor and being a minor, he did not have capacity to transact and therefore it is my considered view that it is the family patriarch who fully participated in the process in the land adjudication to ensure that the suit property was registered in the name of the his 1st born son Lawrence. It is obvious that the plaintiffs being younger than Lawrence were either minors or were not born at the time of land adjudication and even if they were minors, the patriarch did not deem it fit to register them in any of the parcels of land.

27. From the evidence tendered in court, the patriarch’s children who had parcels of land registered in their names during the land adjudication process do not have exclusive occupation and possession of these parcels of land. Their siblings, occupy these parcels as of right and save for the suit property, the patriarch’s family co-exist peacefully in these parcels of land.

28. As evidenced by the **“P Exh P 8, 9 and 10”**, the plaintiffs clan known as “Owino Clan” held a meeting on 3/2/2014 to distribute the suit property amongst the children of the 1st house however, the defendant failed to attend the meeting and in her testimony, she contended she was never invited to attend a clan meeting. These minutes were not challenged by the defendant. The patriarch’s first wife did not attend the meeting but from the minutes, she sent a representative to inform the clan thus;

“ ...She mandated Andericus Omenya, Nicholas Waga, George Odera etc to ensure that the land Walori held in trust for his brothers be distributed fairly as Ogonyo their father had said”

29. It is my considered view that the Gaudencia Apondi who was the patriarch’s 1st wife and a mother to the plaintiffs and the 1st defendant’s husband was privy to the circumstances that led to her son Lawrence being registered as a proprietor of land.

30. The 2nd issue is whether the plaintiffs are entitled to the orders sought. My conclusion on issue of ancestral land is that suit property is ancestral land. The fact that none of the plaintiffs were registered as owners of any parcels of land during first registration, some the patriarch’s children including the plaintiffs children occupy parcels of land that were not registered in their names and coupled by the plaintiffs mother’s allusion that Lawrence held land in trust for his siblings holds credence that their eldest brother Lawrence Walori Ogonyo

held the suit property in trust for the children of the 1st house including the plaintiffs and it is my finding that the plaintiffs have on a balance of probabilities proved that Lawrence Walori Ogonyo held the suit property in trust for the plaintiffs and by virtue of **Section 62(1)** of the **Land Registration Act**, the customary rights are an encumbrance on the title and a successor in title bears this encumbrance.

31. None of the witnesses led evidence on the exact size of the portion of the suit property that they occupied taking into consideration that the plaintiffs and the defendant's children were all children of the 1st house, I find that they are each entitled to equal shares on the suit property.

32. Turning to land parcel North Sakwa/ Ajigo/ 1207, it was originally registered in the name of Andrew Opado Asweto who was registered in the plaintiffs' uncle. It is trite law that particulars of fraud must be specifically pleaded. Looking at the pleadings, they have not been specifically pleaded instead the plaintiffs have framed their pleadings with the notion that their deceased uncle held this property in trust for them. Far from it, the plaintiffs have not established that their uncle held this property in customary trust for them and having failed to specifically plead fraud in the dealings of this land, this court declines to make a finding on North Sakwa/ Ajigo/ 1207.

33. Lastly, on the issue of costs, the general rule is that costs shall follow the event in accordance with the provisions of Section 27 of the **Civil Procedure Act (Cap. 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. This was the holding in **Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd [1967] EA 287. The plaintiffs and the defendant are close family relations and in view of the very special circumstances of this case, each party shall bear their own costs of the suit.**

34. Ultimately, I make the following disposal orders;

- a) A declaration be and is hereby made that the defendant holds in trust land parcel number **NORTH SAKWA/AJIGO/1153** for the plaintiffs.
- b) It is hereby declared that the plaintiffs and defendant are each entitled to $\frac{1}{4}$ portion of land parcel number **NORTH SAKWA/AJIGO/1153**.
- c) It is hereby ordered that the plaintiffs be registered as owners of their respective $\frac{1}{4}$ portions of land parcel number **NORTH SAKWA/AJIGO/1153**.
- d) Each party to bear their own costs of the suit.

Judgment delivered

Dated, signed and delivered

This 10th day of February, 2022

In the presence of Mr. Oriho holding for Nyanga for the Plaintiff

No appearance for the Defendant.

HON. A.Y KOROSS

JUDGE

10/2/2022