



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT SIAYA

ENVIRONMENT AND LAND COURT CASE NO. 32 OF 2021(OS)

MIDIMO OKELO OGUTU.....PLAINTIFF

VERSUS

JOHN OSEWE ONYANGO (Sued as the personal

Representative of the Estate of Onyango Homo [deceased].....DEFENDANT

JUDGEMENT

Introduction

1. By way of an originating summons dated 23/12/2019, the plaintiff filed suit against the defendant claiming that the defendant held a portion of land parcel number **South Sakwa/ Migwena/ 2225** (*hereinafter referred to as 'the suit property'*) in customary trust for the him. He sought declaratory orders, an order of subdivision and transfer of a portion of the suit property to him, prohibitory orders, general damages and costs of the suit.
2. The defendant filed a replying affidavit dated 18/03/2020 in which he asserted that though he and the plaintiff were from the same clan, he never held the suit property in trust for the plaintiff. He averred that the plaintiff was the registered owner of a parcel of land known as **South Sakwa/ Migwena/ 131** in which he held this land as a tenant in common together with his [plaintiff's] brother Ogutu Okello.

Plaintiff's case and evidence

3. The plaintiff's case is contained in his originating summons, supporting affidavit dated 23/12/2019, witness statements, documents produced in support of his case and oral evidence tendered in court during the hearing of his case.
4. It is the plaintiff's testimony that land parcel number **South Sakwa/ Migwena/781 [hereinafter "original parcel"]** which was the original title from which the suit property was a subdivision of was registered in the name of four people in equal shares; Lazaro Kuyo, Arthur Ouma, Andrea Apidi and Onyango Homo. These four people were members of Nyataya clan and they held the original parcel in customary trust for 11 other clan members including the plaintiff. It was his assertion that his portion fell in the portion belonging to Onyango Homo whereby he and his deceased brother Ogutu Okelo each owned approximately 6.8 hectares.
5. It was the plaintiff's case that it was convenient to register the original parcel in the name of the four clan members because it was not feasible to register all the 15 clan members in the register. He asserted that he had occupied his portion of the suit property from the 1981 and that upon the defendant succeeding Onyango Homo's estate, the four registered owners partitioned the original parcel into four distinct parcels of land and as a consequence of this subdivision, the portion of land he occupied fell on land parcel number **South Sakwa/ Migwena/2106**. Upon a further subdivision of **South Sakwa/ Migwena/2106** his parcel of land subsequently fell on **South Sakwa/ Migwena/2225**. It was the plaintiff's case that the defendant had breached the trust bestowed upon him by threatening to evict him from the suit property. On cross examination he testified that the children of Lazaro Kuyo had subdivided his portion of land to his descendants. The plaintiff averred that he and his brother owned another parcel of land known as **South Sakwa/ Migwena/131** which was distinct from the original parcel.
6. The plaintiff's testimony was led by **Willis Juma Apidi** as "PW 2" who is a beneficiary of the estate of Andrea Apidi who was one of the registered proprietors of the original parcel. It was his testimony that in the 1980's the clan allocated a portion of the original parcel to the plaintiff and this parcel of land currently fell on the suit property however, the defendant had neglected to recognise the plaintiff's interests on the suit property. It was his evidence that in 1981, the 15 clan members were given portions of land that were measured by means of footsteps and sisal plantations were planted to demarcate the parcels. According to him, Andrea Apidi's parcel of land which currently fell on **South Sakwa/ Migwena/2226** had been divided amongst 6 out of the 15 clan members because his father held it in trust for these other 5 clan members. It was his testimony that the suit property was owned by the plaintiff, his deceased brother Ogutu Okelo and the defendant. On cross examination, he testified that he was not aware that the registered owners of the original parcel were tenants in common with each one of them owning a quarter share of the original parcel and that he was not privy that the plaintiff owned another parcel of land that was

distinct from the suit property.

7. The plaintiff's evidence was also led by **Wycliffe Ojal Kuyo** as "PW 3". It was his testimony that the plaintiff owned a portion of the suit property and that the original parcel was registered in the name of 4 people who held it in trust for 11 other clan members. On cross examination, he testified that he was the son of Lazaro Kuyo who was one of the original owners of the original parcel and that neither his father, he nor his siblings live on a portion of the original parcel. He testified that he lived on another parcel of land that was inherited from his father however, he occasionally ploughed his father's portion on the original parcel. He testified that the suit land has sisal boundaries that separates the various parcels of land.

Defendant's case

8. The defendant's case is contained in his replying affidavit dated 18/03/2020, witness statement, documents produced in support of his case and oral evidence tendered in court during the hearing of his case.

9. It is the defendant's evidence that though he and the plaintiff are from the same clan known as "Nyataya clan", the original parcel was registered during the land adjudication process in the name of his father together with his 3 brothers as tenants in common.

10. It was his evidence that his father did not hold the suit property in trust for the plaintiff and just like the other tenants in common of the original parcel, the suit property was held in trust for the immediate family of the four patriarchs and that probate proceedings had been undertaken and the estate distributed.

11. He averred that the plaintiff owns another property which he owns with his brother as tenants in common in equal shares. He produced a copy of a search of parcel number **South Sakwa/Migwena/131** as evidence of this.

Plaintiff's submissions

12. The plaintiff filed written submissions dated 4/12/2021. It was his submission that by virtue of **Section 28** of the repealed **Registered Land Act** and **Section 25 (2)** and **Section 28(b)** of the **Land Registration Act**, the defendant held the suit property in trust for him. The plaintiff placed reliance on the Supreme Court of Kenya decision of **Isack Kiebia vs Isaya Theuri M'intari & Another [2018] eKLR** where the court set out the principles that guide courts in deciding on whether a customary trust exists on a parcel of land. The plaintiff identified two issues for determination; (i) Whether the defendant's father held a portion of the suit property in trust for the plaintiff and, (ii) Whether the plaintiff is entitled to the prayers sought in the plaint.

Defendant's submissions

13. The defendant filed written submissions dated 9/12/2021 in which he submitted that a claim in customary trust must be proved and that though the parties were from the same clan, they were not from the same lineage as Lazaro Kuyo, Arthur Ouma, Andrea Apidi and Onyango Homo. He asserted that the plaintiff had not adduced evidence that there were intervening circumstances that led to the plaintiff not being registered as an owner of the suit land.

Analysis and determination

14. 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 holds a portion of 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. I will sequentially make pronouncements on these three issues.

15. 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.

16. 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**.

17. 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 defendant held a portion of the suit property in trust for the him.

18. 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 Kiebia 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”

19. It was the plaintiff's evidence that he and his family have been living on a portion of the suit property since 1981 while it was the defendant's case that he acquired the suit property pursuant to a confirmation of grant to the estate of **Onyango Homo** who was one of the registered co-owners of the original parcel.

22. Far from the defendant's assertion that a title document acquired after a confirmation of grant is unchallenged, the defendant's title is impeachable by virtue of the provisions of **Section 62(1)** of the **Land Registration Act** which provides that beneficiaries of an estate of a deceased person hold such succeeded land subject to the rights that were enforceable against the deceased proprietor. Consequently, the defendant's defence on this basis does not suffice.

23. The defendant produced as “**D Exh 5**” a copy of an official search for land parcel number **South Sakwa/Migwena/131** which evidences that **South Sakwa/Migwena/131** was registered in the name of the plaintiff and his deceased brother Ogutu Okelo. Though the plaintiff testified that this parcel of land was registered on a different date from that of the original parcel, “**P Exh 4**” and “**D Exh 5**” evidences that these two parcels of land were registered on the same dates and in the same adjudication section.

24. From the evidence of “**P Exh 16**” which is a Registry Map Index for Migwena Registration Section, the original parcel fell under a land adjudication section and the Land Adjudication Act applied in this section.

25. The land adjudication process was a laborious process which involved several officials; a recording officer, a demarcation officer and an adjudication officer and several dispute resolution mechanisms were available to land owners. The plaintiff has not adduced evidence of any intervening circumstances that led him not to be registered as co-owner of the suit property at the time of first registration. Infact, the defendant's father died on 15/6/1962 which was several years before the first registration took place in the section yet the officials were satisfied that he was a co-owner of the original parcel together with his brothers and proceeded register him as such.

26. The plaintiff neither led evidence on where he had been living prior to the original parcel being registered or what transpired during the intervening period of seven years between the time the original land was registered to the time he settled on the original parcel in 1981. “**PW 2**” indeed testified that these clan members who were not registered in the suit were allocated the original parcel in 1981 which was long after registration had taken place and the defendant's father had died.

27. Though the parties are from the same clan, the plaintiff never led evidence in court on the degree of consanguinity between the plaintiff and the defendant and how the first registration of the land took place. All these grey issues are only left to courts' speculation. 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 defendant held the suit property in customary trust for the plaintiff.

28. The court having come to the finding on the 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.

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

30. It is so ordered.

Judgment delivered virtually.

DATED, SIGNED AND DELIVERED THIS 10TH DAY OF FEBRUARY 2022.

In the presence of:

Mr. Okello for the Plaintiff.

No appearance for the Defendant.

Court Assistant: Ishmael

HON. A.Y KOROSS

JUDGE

10/2/2022