



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ELC NO. 118 OF 2015

GEORGE ANDERA OBUYA

(Suing on behalf and as a leg. Rep

of NIKODEMO OBUYA WANDERA.....PLAINTIFF

= VERSUS =

OKUMU OKELO ANDERA.....1ST DEFENDANT

ALBERT ONYANGO OMBIJI.....2ND DEFENDANT

J U D G M E N T

1. The plaintiff via a plaint dated 9th September 2015 and filed in court on 16th October 2015 prays for judgment against the defendants jointly and severally for;

a) A declaration that land parcel no. SAMIA/BUBURI/86 was ancestral land subject to a customary trust in favour of the families of OKELLO WANDERA and NIKODEMO OBUYA WANDERA.

b) A declaration that OKUMU OKELO ANDERA and ALBERT ONYANGO OMBIJI were registered as proprietors of land parcel No. SAMIA/BUBURI/807 to hold in trust for the family of NIKODEMO OBUYA WANDERA as represented by the plaintiff herein to the extent of 1.4 Hectares.

c) An order empowering the Deputy Registrar to sign all the necessary application for consent for subdivision, application for consent to transfer and the transfer form to facilitate the subdivision of land parcel No. SAMIA/BUBURI/807 and the transfer there from a portion measuring 1.4 Hectares to the plaintiff.

d) Costs of the suit.

e) Any other or further relief.

2. The plaintiff impleaded that the father of the 1st defendant and NIKODEMO OBUYA WANDERA inhabited and established families on and cultivated their ancestral land SAMIA/BUBURI/86 by virtue of inheritance under Samia Customary Law and that OKUMU OKELO ANDERA was registered as proprietor of land parcel no. SAMIA/BUBURI/86 to hold the same to the extent of half of the share of the suit land in trust for the family of NIKODEMO OBUYA WANDERA. He outlined the particulars of trust as follows;

i) The suit land was prior to the land adjudication process the property of WANDERA SIKHEMBO who died and passed on the land to his sons NIKODEMO OBUYA WANDERA and OKELO WANDERA.

ii) Before the land adjudication process NIKODEMO OBUYA WANDERA left with his family for work engagement in Uganda leaving behind OKELLO WANDERA and his son OKUMU OKELO ANDERA.

iii) At the time of adjudication OKELLO WANDERA had also died but his widow facilitated the registration of the suit land in the name of her son OKUMU OKELO ANDERA to hold the same on his own behalf and also in trust for the family of NIKODEMO OBUYA WANDERA who was away.

iv) The family of NIKODEMO OBUYA WANDERA came back and occupied a portion of the land to enable NIKODEMO's family to have a place to live and cultivate as the family sorted out the sharing of the said land.

v) The first defendant subdivided parcel no. SAMIA/BUBURI/86 into two portions and sold one portion comprising part of his share to HENRY MUHIZI KONZOLO which came to be registered as parcel no. SAMIA/BUBURI/808 while the 1st defendant's remaining part of his share together with the share meant for the plaintiff's family became registered as parcel no. SAMIA/BUBURI/807.

vi) The parent parcel SAMIA/BUBURI/86 measured 2.8 Hectares and the plaintiff's family was entitled to 1.4 Hectares to be *exercised therefrom.

3. The plaintiff averred that he is the son of NIKODEMO OBUYA WANDERA (deceased) and had prior to and after subdivision lived on the suit land openly uninterrupted, physically and without force from 1985 to date thereof.

4. The 2nd defendant entered appearance and filed a statement of defence on 7th January 2016. It was later amended and the amended statement of defence and counterclaim filed on 10th December 2020. He denied the particulars of trust pleaded by the plaintiff and put him to strict proof. The 2nd Defendant stated that at the time he was sold L.R. SAMIA/BUBURI/807 the title was clear and he did apply for consent to transfer the same to himself by the 1st defendant and denied that the plaintiff lived on L.R. SAMIA/BUBURI/807. In the counterclaim, the 2nd defendant averred that he was the registered proprietor of all parcel of land no. SAMIA/BUBURI/807. He prayed for

i) an eviction order to issue against the defendants, their kin, workers and any other person claiming through on L.R. SAMIA/BUBURI/807.

ii) to be effected by O.C.C Funyula/Sio Port Police Station.

5. The 2nd and 3rd defendant in the counterclaim filed their defence on 4th March 2021 pleading that they have been in open physical occupation and possession of the suit land long before the secret coming of the 2nd defendant to purchase the same. They stated that the suit land constitutes a larger family ancestral land that was registered in the name of OKUMU OKELO ANDERA to hold it in trust for them and which trust though not noted on the register amounted to their overriding interests that did not require registration in order to crystallize hence the said OKUMU OKELO ANDERA had no property in the suit land to exclusively pass the same to the said ALBERT ONYANGO OMBIJI without their express consent. They prayed that the counterclaim be dismissed with costs.

6. The hearing commenced on 21/1/2020 with the evidence of GEORGE ANDERA as the plaintiff's first witness. He testified that he is the son of Nicodema Obuya (deceased) who died on 8/1/2002 and who was a brother to Okello Wandera. PW's grandfather was Wandera Sikhembo and he had two wives, Nakhone who was the mother of Okello Wandera and Nasirumbi who was the mother to Nikodemu Obuya Wandera. He continued that the suit land is ancestral land that was passed from their grandfather and his father went with them to Uganda to do business before land adjudication had been started. When they came back they found the land had been adjudicated and registered as L.R. SAMIA/BUBURI/86 measuring 7 acres. At the time of adjudication, the widow to Okello Wandera was in the home and her name was Apondi Ogemba and who registered the land in the name of her son Okumu Okello Wandera.

7. **PW1** added that they left Uganda in 1985 and they came and built on the suit land. That on their return, the chief and elders came and demarcated a portion of land for his family to cultivate as they waited to conclusively settle the matter. It is PW1's further evidence that Okumu sold a portion of his share secretly to Henry Muhizi Konzolo and they sought to have the land subdivided equally so that they could get a title to their portion. After subdivision, the sold portion was given title No. 808. Later, the 1st defendant proceeded and secretly sold the entire parcel when he was only entitled to 3½ acres which he is now claiming. **PW1** averred that they have stayed on the land within their portion from 1985 to date. He had sued the 1st defendant at the Tribunal which had ruled that they should be equal owners of the land and the award was never appealed against. When he went to survey to implement the award, he found the 2nd defendant had registered himself yet he had no relationship with them. He said that the 2nd defendant was brought on the land by the 1st defendant. He prayed that his claim be allowed with costs and produced the documents filed as PEX 1- 6.

8. Upon cross examination by Mr Jumba learned counsel for the 2nd defendant, the witness said that Nicodemo and Okello Wandera were brothers and they passed on in the year 2002 and 1964 respectively. He continued that L.R. NO. 807 was registered in the name of the 2nd defendant while L.R. NO. 808 is registered in the name of Henry Konzolo but he had not sued Henry because the 1st defendant sold his share to him. On re-examination, Pw1 stated that he had registered a caution on title number 807 under entry no. 4 and he was not summoned by the Land Registrar before removal of the caution. It is the 1st defendant who carried out the subdivisions of L.R. 86 and at the time of sharing, the clan elders had placed demarcations on how to use the land.

9. **PW1** was recalled to answer to the counterclaim. He said that he was born on the suit land and if he were to leave he would have nowhere to go. That when the 2nd defendant was registered in the year 2010 he was already on the land and he was not made aware that the 1st defendant was selling to the 2nd defendant. He asked the court to dismiss the counterclaim. On further cross-examination by counsel for the 2nd defendant, he reiterated that he did not know the 1st defendant had sold the land to the 2nd defendant. He knew the land was registered in the 1st defendant's name and his grandfather's parcel was L.R. NO. 86.

10. The plaintiff's second witness was CLEMENT ODUKE MALO testifying as **PW2** adopted his affidavit evidence dated 23/12/2019. He stated that he is a retired senior chief and confirmed the plaintiff as the son of the late Obuya Wandera. The sons of the late Obuya Wandera stay on their ancestral land being SAMIA/BUBURI/86 and at the time of the land adjudication and registration process, the plaintiff's father was working in Uganda around 1969 to 1972. The deceased Obuya Wandera had a brother named Okelo Wandera who returned from Uganda and passed on leaving behind a widow named Apondi Okello. Okelo was blessed with a son called Okumu Okelo and 2 daughters. At the time of the land adjudication and registration process, Apondi got her son Okumu Okelo to be registered as the owner of their family's ancestral land and she promised that when her brother-in-law Obuya Wandera would return from Uganda they would share out the land.

11. PW2 averred that when Obuya Wandera returned, Okumu and Obuya demarcated the land into the share for Okumu and the other to

Obuya Wandera. That Okumu was to go to the Land Control Board, do subdivision and enable each of them get titles for their portions. Apondi died then Obuya started following up on Okumu to go to the Land Control Board and do subdivision but he kept dodging until Obuya passed on. His son George pursued the matter and Okumu kept avoiding which made George to come to the local administration with a complaint. George complained that Okumu had refused to go to the Land Control Board and grant to him the title deed for his portion of land. He summoned Okumu but he failed to come and he advised the plaintiff to go to the Land Disputes Tribunal and file his case to claim the land. He also learnt during the Land Tribunal Case that that Okumu had sold part of the land to another person.

12. During cross examination by the 2nd defendant's counsel, the witness said that Nickodema Obuya is the brother of the father to the 1st defendant and he was buried on the suit land. The 1st defendant was normal and the plaintiff lives on the suit land and cultivates it.

13. ALBERT ONYANGO OMBIJI was the first defence witness testifying as DW1. He adopted his replying affidavit as his witness statement. He said that it was not true that the plaintiff has been in actual possession of L.R. SAMIA/BUBURI/807 for a period of 30 years and the plaintiff's younger brother was the one who moved onto the land in the year 2010. When he applied for consent to transfer L.R. SAMIA/BUBURI/807, the title was clear and consent was granted to him on 8th September 2009 and it was duly executed by one Okello Okumu Andera. On 9th December 2009 when he presented the transfer documents he was advised by lands office that the plaintiff had placed caution against the title. On 24th August 2010, he instructed M/S Balongo & Co. Advocates with a view to removing the said caution and did a letter to the Land Registrar. The plaintiff was summoned thrice but he did not attend and the caution was eventually removed.

14. The 2nd defendant continued that the original land L.R. SAMIA/BUBURI/86 before it was subdivided in 1997 was registered in the name of Okumu Okello Andera as the plaintiff who are distant cousins had their land elsewhere and they did not raise any claim during land adjudication process. The original owner moved to Uganda after selling him the land and the plaintiff is capitalizing on the absence to lay their claim on land. He stated that he is the absolute owner of L.R. SAMIA/BUBURI/807 and he should be left alone to enjoy peaceful occupation of the suit land. He produced the documents in his list as DEX 1-10 in support of his defence and claim.

15. On cross examination by counsel for the plaintiff, Dw1 said that he purchased the suit land although he did not produce any sale agreement executed between the 1st defendant and himself. He denied that the plaintiff was living on the suit land but he had sued Ochieng Obuya and Omondi seeking eviction orders plus the plaintiff. On re-examination, he clarified that the defendants in the counterclaim are using the suit land.

16. The 2nd defendant in the counterclaim ABRAHAM OCHIENG OBUYA gave his evidence and the plaintiff (Pw1) is his elder brother and he associated himself with the evidence of Paul Omondi Obuya. He had no other home beside the suit land where he lives to date. He asked the court to dismiss the counterclaim. On cross examination, he stated he was not aware of any case that was before the tribunal and did not know when this present case was filed. He said they are cousins with Okumu Wandera.

17. The 3rd defendant in the counterclaim PAUL OMONDI gave his evidence and stated that he is a farmer. He adopted his statement filed in court on 15/4/2021 as his evidence in chief. He said that he is living on his grandfather's land which is where he was born and George and Abraham are his brothers. On cross examination, DW3 said that the dispute arose only when the 2nd defendant purchased the land and the first case was before the Tribunal.

18. Counsels for the parties agreed to exchanged written submissions. The 2nd defendant in the suit and plaintiff in the counterclaim filed his brief submissions on 25th October 2021 and urged the court to issue an order for eviction against the defendants in the counterclaim.

19. The plaintiff filed his submissions on 24th November 2021 and urged the court to allow the plaintiff's claim for the following reasons;

i) Land parcel no. SAMIA/BUBURI/86 prior to its adjudication constituted the ancestral block of land that was meant for the larger family of WANDERA SIKHEMBO who had upon his demise passed it on to his two sons named NICODEMO OBUYA WANDERA and OKELLO WANDERA. The plaintiff and his two younger brothers and the 1st defendant are the respective children of NICODEMO OBUYA WANDERA and OKELLO WANDERA.

ii) The plaintiff as the legal representative of the family of NICODEMO OBUYA WANDERA is entitled to a portion of 1.4Ha from the remaining land parcel no. SAMIA/BUBURI/807.

iii) The 1st defendant never moved to quash or set aside the Tribunal's award which had been adopted as a judgment of the lower court. Due to the said award, the 1st defendant holds the adjudged portion of one half from land parcel nos. SAMIA/BUBURI/86, 807 and 808 in trust for the plaintiff.

iv) The trusteeship duty was attached to the 1st defendant who transferred the said duty to the 2nd defendant and the plaintiff's case is as such not affected by the change of ownership of the suit title.

v) The 2nd defendant did not allude to having made any inquiries on the land before its purchase. He knew of its physical location and its occupation status but chose to forge ahead with the purchase.

vi) The defendant's counterclaim was a belated and speculative effort that was not proved and urged that the same be declined.

20. From the foregoing, the following issues are framed for determination of the dispute;

a) Whether the plaintiff has proven the existence of customary trust;

b) Whether the 2nd defendant is entitled to the eviction orders against the plaintiff;

c) Who bears the costs of this suit?

21. Courts have established that customary trust is one of the overriding interest hinged on land that is recognized under the Land Registration Act, 2012. Section 28 thereof provides that all registered land shall be subject to overriding interests as may for the time being subsist and affect the same without their being noted on the register and customary trust is one of such overriding interest.

22. The plaintiff states that they are from the same family with the 1st defendant with their grandfather called WANDERA SIKHEMBO. The plaintiff is the son of Obuya Wandera while the 1st defendant is the son of Okelo Wandera. The plaintiff averred he was born on parcel No. L.R. 86 before they moved with their father to Uganda. When they returned, L.R. 86 was already registered in the name of the 1st defendant. on 24.8.1973 as shown in the green card produced as PEX 4. PW1's evidence was corroborated by that of PW2 and 2nd and 3rd defendants in the counter-claim who all testified on the relationship between the plaintiff and the 1st defendant and confirmed that the plaintiff together with his siblings live on the suit land. The 1st defendant never entered appearance in the suit despite being served and therefore the plaintiff's case as against him is uncontroverted.

23. The Supreme Court expressed itself as follows in regard to customary trust in the case of Isack M'Inanga Kieba versus Isaaya Theuri M'Lintari & another (2018) eKLR,

“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.”

24. Going by the decision of the Supreme Court and the evidence adduced by the plaintiff, it is my considered opinion that the circumstances of the plaintiff's case meet the criteria described in the Isack case. The registration of the 1st defendant as the proprietor of L.R. 86 was the first entry in the register and it was done during the time when land adjudication and registration was ongoing. The plaintiff has explained why the same was registered in 1st defendant's name stating that during the adjudication process his father was in Uganda and the 1st defendant's father was deceased making the mother to the 1st defendant to cause the name of her son to be registered on L.R. 86. Although the 2nd defendant denied the existence of the trust, he came in the picture in the year 2010 therefore his evidence ought to have been corroborated to contradict the explanation offered by the plaintiff.

25. The subdivision of L.R. 86 into L.R. 807 and 808 did not dissolve the trust neither did the sale of the suit land to the 2nd Defendant. The 2nd defendant was registered as the owner of the suit land on 30th August 2010 (shown in green card Dex 1) which date was after the Plaintiff had sued the 1st Defendant before the Tribunal as exhibited in the Tribunal proceedings produced as Pex2. The 1st defendant testified before the proceedings and denied the claim by the Plaintiff. The question is whether the 2nd Defendant would have been aware of this interest to make him guilty of being part of the fraud and or misrepresentation in so far as it concerns his acquisition of the land.

26. In paragraph 7 of a replying affidavit produced as Dex.7, the 2nd Defendant stated that on 9th December 2009 when he presented the transfer documents for registration, he was advised by the lands office that the Plaintiff had placed a caution on the title. The caution then registered as entry number 2 on the suit title had the plaintiff claiming beneficial interest. The 2nd Defendant further produced as Dex.4 a letter dated 24th August 2010 drawn by his advocates on record asking the Land Registrar to remove the said caution. Thus the 2nd Defendant's own document demonstrate that he was aware of the plaintiff's claim over the land before it was transferred to his name.

27. In support of his prayers for eviction orders to be issued against the defendants' in the counterclaim, the 2nd defendant has stated that he is the registered proprietor of L.R. No. 807 which is a subdivision of the original parcel known as SAMIA/BUBURI/86 through purchase from the 1st defendant. DW1 produced the register of L.R. 807 as DEX 1, transfer form as DEX 5, letter of consent as DEX 6 and application for consent of Land Control Board as DEX 7 and they show that the 1st defendant as the seller. He denied that the plaintiff has been in occupation of L.R. 807 for over 30 years and said that the plaintiff's brother only entered the land in 2010 after he had purchased it.

28. The 2nd defendant has not told the court whether he visited the land prior to buying it. He just said that he was advised that there was a caution on the register when he presented his documents for registration. That the plaintiff was summoned but he never came to the Land Registrar which then cleared the way for the removal of the caution. While the 2nd defendant has shown how he got registered as the

proprietor of L.R. 807, the title came with an encumbrance of customary trust which was not noted on the register but which he would have discovered had he conducted due diligence.

29. PW2 stated that the defendants to the counterclaim lived on the portion contained in L.R. 807 after they returned from Uganda. Since this court finds that family of Obuya Wandera were entitled to a share of the original number L.R/86 by virtue of their ancestry and which portion they had been using when the 2nd Defendant purchased it, the orders of eviction sought does not lie. The 2nd defendant's counterclaim of eviction therefore fails and is hereby dismissed.

30. The upshot of the foregoing is that the plaintiff's suit is merited and allowed as follows;

a) It is hereby declared that land parcel no. SAMIA/BUBURI/86 was ancestral land subject to a customary trust in favour of the families of OKELLO WANDERA and NIKODEMO OBUYA WANDERA.

b) It is hereby declared that OKUMU OKELO ANDERA and ALBERT ONYANGO OMBIJI were registered as proprietors of land parcel no. SAMIA/BUBURI/807 to hold in trust for the family of NIKODEMO OBUYA WANDERA as represented by the plaintiff to the extent of 1.1Ha.

c) An order be and is hereby given that the 2nd defendant shall forthwith execute all necessary application for consent for subdivision, application for consent to transfer and the transfer form to facilitate the subdivision of land parcel no. SAMIA/BUBURI/807 and transfer therefrom a portion measuring 1.1Ha to the plaintiff failing to which Deputy Registrar of the court do execute the documents in place of the 2nd defendant.

d) The plaintiff to meet the costs of subdivision, transfer and registration of the portion awarded to his name on behalf of the family Nicodemo Obuya Wandera.

e) The Plaintiff awarded costs to be paid by the 1st Respondent.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 28TH DAY OF APRIL 2022.

A. OMOLLO

JUDGE