



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT VIHIGA**

**ENVIRONMENT & LAND CASE NO. 28 OF 2021 (O.S)**

**(FORMERLY KAKAMEGA ELC NO 90 OF 2018)**

**IN THE MATTER OF**

**AN APPLICATION UNDER ORDER 37 RULE 1 OF THE CIVIL PROCEDURE RULES**

**AND**

**IN THE MATTER OF LAND TITLE NO. KAKAMEGA/KEGOYE/1095**

**BETWEEN**

**ISHMAEL KEGODE HAVI**

**JOSEPH OSANGO HAVI (suing in his own capacity**

**as the legal representative of the estate of**

**CHARLES ODONGO (Deceased).....APPLICANTS**

**VERSUS**

**DAN AMENA ATINGA (Being sued in his own capacity**

**and as the Administrator of the Estate of**

**JOHAN ATINGA SHADRACK- Deceased) .....RESPONDENT**

**JUDGEMENT**

**Introduction**

1. This matter was first filed at Kakamega Environment and Land Court as KAKAMEGA ELCC NO. 90 OF 2018 vide the Originating Summons dated 19<sup>th</sup> December 2018. Later when the environment and Land Court was opened at Vihiga, it was transferred to Vihiga ELC for hearing and disposal.
2. The Originating Summons is stated to be brought pursuant to the provisions of Sections 1A, 1B, and 3A Civil Procedure Act, Order 37 Rules 1, 7 and 14 of the Civil Procedure Rules 2010 and any other enabling provisions.
3. The plaintiffs ISHMAEL KEGODE HAVI and JOSEPH OSANGO HAVI claim portions of land parcel known as KAKAMEGA/KEGOYE/1095 measuring 0.8 Ha (the suit land) on the basis of a customary trust.
4. The Defendant DAN AMENA ATINGA denies the Plaintiffs' claim.

**The plaintiff's case**

5. The Plaintiff's case is that the suit land originally belonged to one SHADRACK HAVI (the original owner) who died in the year 1962.

That the original owner was the father of the 1<sup>st</sup> Plaintiff, Charles Odongo-deceased(who was the father of the 2<sup>nd</sup> Plaintiff) and Johan Atinga Shadrack-deceased(who was the father of the Defendant). That before his death the original owner physically shared out the suit land equally amongst the three sons and placed boundaries that demarcated each son's share. That the boundaries still exist on the ground to date. That each of the sons settled on and started using their respective shares of the suit land. Before land adjudication at Kegoye area, where the suit land is situated, took place, the Plaintiff and Charles Odongo acquired land at Lugari Scheme and leaving their shares of the suit land intact, relocated to Lugari. That during adjudication the suit land was registered in the name of Johan Atinga Shadrack. That the said registration was in trust for the said Johan Atinga Shadrack, the 1<sup>st</sup> plaintiff and Charles Odongo in equal shares. That the Defendant initiated succession proceedings to the Estate of his father Johan Atinga Shadrack vide VIHIGA SPM SUCC. CAUSE NO. 54 OF 2018 pursuant to which the suit land has been transmitted to the defendant awaiting Confirmation of the Grant and distribution of the estate. The plaintiffs therefore present six (6) issues for the court's determination and pray that the Defendant be ordered to subdivide the suit land and transfer to the Plaintiffs their respective shares. The six (6) issues are:

- i. Whether customary trust exists between the parties herein over the land parcel KAKAMEGA/KEGODE/1095 in equal measure**
- ii. Whether Dan Amena in his capacity as the Administrator of the Estate of his late father JOHN ATINGA holds the land in trust for himself and the Applicants herein in equal shares**
- iii. Whether the Respondent's father JOHN ATINGA SHADRACK, deceased held the land in trust for himself, the 1<sup>st</sup> Applicant and the father of the 2<sup>nd</sup> Applicant herein**
- iv. Whether the title of the said land registered in the name of JOHN ATINGA SHADRACK should be cancelled and the said land be sub-divided and registered into the names of the 1<sup>st</sup> Applicant, the 2<sup>nd</sup> Applicant and the Respondent herein.**
- v. Whether the Respondent as the administrator of his late father's Estate should be ordered to sub-divide land parcel No KAKAMEGA/KEGOYE/1095 into three equal portions for transfer to each of the parties herein.**
- vi. Whether the Respondent should be condemned to pay costs.**

They pray that judgement be entered in their favour.

#### **The Defendant's case**

6. The Defendant's case as contained in his Replying Affidavit sworn on 6<sup>th</sup> March 2019 is that no customary trust exists between his father or himself and the Plaintiffs herein over the suit land. That although the 1<sup>st</sup> Plaintiff and his brother Charles Odongo were given shares of the suit land by their father, the original owner, they later surrendered the said shares to Johan Atinga Shadrack who in turn bought for them land at Lugari Scheme within Kakamega County. He contends that the suit land therefore belongs to his late father exclusively. He prays that the suit be dismissed.

#### **submissions**

7. Direction were taken on the Originating Summons on 17.11.2021 and the matter proceeded by way of oral evidence. At the close of the evidence, the parties chose to file written submissions in support of their respective arguments.

8. Written submissions dated 21<sup>st</sup> March 2021 were filed on behalf of the Plaintiffs by the firm of Shitsama & Company Advocates. Counsel submitted that it is not disputed that the suit land was registered in the name of JOHAN ATINGA SHADRACK the deceased as evidenced in the copy of register produced as Plaintiff exhibit 2. That what the court is invited to determine is whether the registration was subject to any overriding interests. Relying on section 28(b) of the Land Registration Act and the case of *Twalib Hatayan & another vs Said Saggar Ahmed Al-Heidy & 7 others [2015] eKLR* Counsel submitted that the registered owner of the suit land took advantage of the plaintiffs. That the said registered owner being the elder brother of the 1<sup>st</sup> Plaintiff and Charles Odongo and also being the area chief during the land adjudication period, he took advantage of his position for his own benefit. That the said registration however resulted in a constructive trust. Counsel relied on the case of *Isack M'inanga Kiebia vs Isaaya Theuri M'linturi & another [2018] eKLR* wherein the Supreme Court of Kenya outlined the elements that would qualify a Claimant as a trustee and submitted that the Plaintiffs have satisfied the said elements. Citing the case of *Kareu Ndebu vs Ndege Ndebu [2020] eKLR* Counsel urged the court to make a declaration that the deceased held the suit land in trust for his two brothers. Counsel urged the court to order the Defendant who is the Administrator of the Estate of the deceased to subdivide the suit land and transfer the shares to the respective trustees namely; all the parties herein.

9. Similarly, written submissions dated 18<sup>th</sup> March 2022 were filed on behalf of the Defendant by the law firm of Oduol Nyanga & Co. Advocates. Counsel submitted on behalf of the Defendant that the deceased was and remains the proprietor of land parcel KAKAMEGA/KEGOYE/1095. That the land rights of the deceased over the suit land are protected by article 40(1) of the Constitution of Kenya 2010, sections 2, 24 and 26 of the Land Registration Act and section 2 of the Land Act. Counsel submitted that certificate of title issued by the Registrar upon registration shall be taken by all courts as *prima facie* evidence that the person named as proprietor of land is the absolute and indefeasible owner. Counsel relied on the case of *Shimoni Resort vs Registrar of Titles & 5 others [2016] eKLR* where the court observed that Section 26 of the Land Registration Act applies the Torrens System of land registration which recognizes sanctity of title in this country such that the title of a registered owner will be held to be absolute and indefeasible unless it is shown that the registration was obtained through misrepresentation or fraud or through a corrupt scheme to which the registered owner was a party.

10. On whether there exists customary trust held by the Defendant in favour of the Plaintiffs, Counsel submitted that the deceased did not hold the suit land in trust for his brothers. Counsel urged the court to make its finding based on the unique merits and circumstances of this

case and quality of evidence adduced. He cited the case of *Mbui Mukangu vs Gerald Mutwiri Mbui C. A No. 281 of 2000* where the court of Appeal held that customary trust is a concept of intergenerational equity where land is held by one generation for the benefit of succeeding generations. That possession and occupation are key elements in determining the existence of a customary trust. He submitted that the plaintiffs failed to meet the threshold of possession and occupation.

Counsel submitted that the Plaintiffs failed to seek the remedy, if any, from the deceased during his life time. That 45 years had lapsed since 1973 when the suit land was registered in the name of the deceased to 2018 when the suit herein was filed. That this was 45 years of indolence, non-protest, abeyance and acquiescence on the part of the Plaintiffs and that this shows malice, bad intentions and hidden agenda on the part of the Plaintiffs in pursuing the suit land.

Counsel relied on the case of *Alice Wairimu Macharia vs Kirigo Philip Macharia [2019] eKLR* and submitted that the legal burden to prove the existence of a trust rests with the one who is asserting a right under customary trust and that person must prove that the suit properties were ancestral land and that one family member was designated to hold the properties on behalf of the family.

On the case of *Isack M'inanga Kiebia vs Isaaya Theuri M'linturi & another [2018] eKLR* cited by the Plaintiffs, Counsel submitted that the Plaintiffs have not satisfied the elements listed therein by the Supreme Court and hence do not qualify as trustees. Counsel urged the court to declare the Defendant as the absolute proprietor of the suit land and to find that no customary trust exists over the same. He prays that the Originating Summons be found to have no merit and costs of the suit be borne by the Defendant.

### **Issues for determination**

11. The court has considered the issues framed and presented on the face of the Originating Summons, the pleadings filed by both parties, the evidence adduced and the submissions. The issues that present themselves for determination are:

- i. Whether or not the deceased held the suit land in trust for himself and his two brothers namely the Plaintiff and Charles Odongo under customary trust.**
- ii. Whether or not the Defendant as the administrator of the estate of the deceased should sub-divide the suit land and transfer to the Plaintiffs their respective shares**
- iii. What order to make on costs.**

### **Analysis and determination**

12. On whether the deceased held the suit land in trust for himself and his two brothers, the Supreme Court of Kenya in the case of *Isack M'inanga Kiebia vs Isaaya Theuri M'linturi & another [2018] eKLR* set the elements that would qualify a claimant as a trustee as follows:

- a) The land in question was before registration, family, clan or group land.**
- b) The Claimant belongs to such family, clan or group.**
- c) 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**
- 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 is directed against the registered proprietor who is a member of the family, clan or group.**

13. The facts of the present case are fairly straight forward and partly uncontested. It is not contested that the parties herein are all members of the family of one SHADRACK HAVI -deceased and that the said Shadrack Havi was the original owner of the suit land before land adjudication and registration. The relationship of the parties and particularly the plaintiffs to the family of the original owner cannot be said to be so remote or tenuous as to make their claim idle or adventurous because the 1<sup>st</sup> plaintiff is the son of the original owner and the 2<sup>nd</sup> Plaintiff who is a grandson of the original owner brings the suit in his capacity as the Administrator of the estate of his father Charles Odongo- deceased, a son of the original owner. It is not contested that the suit land is registered in the name of the deceased and that the Defendant herein is the personal representative of the deceased and that he (the Defendant) is in the process of transmitting the suit land through succession process. These facts fit perfectly in the criteria set out by the Supreme court in the case cited above. They satisfy the elements listed as (a), (b), and (c) therein.

14. One other element is that the claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances. According to the Plaintiffs they were entitled to be registered as owners of the respective shares of the suit land allocated to them by the original owner. Their evidence is that the original owner had placed boundaries demarcating the respective portions, each of them had settled on and started using their respective shares. That their house is still on the land and that the boundaries placed by the original owner are still on the suit land. That the intervening circumstances that prevented registration of their shares in their names are that firstly, they were away from the suit land during the land adjudication and registration period. Secondly that the deceased was the chief of the area where the suit land is situated. That taking advantage of the Plaintiffs' absence and his position, the deceased caused himself to be registered as owner of the suit land.

The Defendant's position on this, however, is that although the original owner shared out the suit land to the three sons and gave them

occupation, they were not entitled to be registered as owners. According to him, the deceased acquired land for the 1<sup>st</sup> Plaintiff and Charles Odongo at Lugari Scheme in Kakamega County before adjudication and so they surrendered their shares of the suit land to the deceased and relocated to Lugari. He contends that therefore the deceased became absolute owner of the entire of the suit land.

15. Evidence on record is that the Plaintiffs' shares of the suit land are intact. The 1<sup>st</sup> Plaintiff testified that his homestead is still on the land. The 2<sup>nd</sup> Plaintiff testified that although the Defendant has recently begun to plant nippier grass on his (2<sup>nd</sup> Plaintiff's) share, his son lives on the land and that nobody has ever opposed his occupation of the land. That he was born on the suit land and when they moved to Lugari, they left their shares intact and that the boundaries are still there. The defendant admitted that there is a house on the land that was built in the year 1963. He (Defendant) stated on cross-examination:

**“one of the brothers had built there. He was shown where to build by my grandfather. Ishmael Kegode had a share and Charles Odongo had a share of the suit land which they were given by their father. Those portions are still on the land. They are all registered as one land parcel No KAKMEGA/KEGOYE/1095 registered in my father's name. There before the portions belonged to Ishmael and Charles. My father also had a share.”**

The Defendant did not explain why his father or him have not removed the Plaintiffs' house from the suit land if the land was surrendered to his father. He tried to explain how his father acquired the suit land by stating that his father bought part of the suit land and inherited part of it from his (deceased's) father. But he had no evidence of such purchase. And the rest of his evidence was that the entire of the suit land was inherited from his (deceased's) father. That it comprised of his father's share and the shares of his (deceased's) two brothers. The Defendant had no evidence that his father's brothers surrendered their shares of the suit land to him and that his father bought or acquired land for his brothers at Lugari in Kakamega County.

16. The court is persuaded to believe the evidence of the Plaintiffs that if it wasn't for the intervening actions of the Deceased, the 1<sup>st</sup> Plaintiff and Charles Odongo (2<sup>nd</sup> Plaintiff's father) could have been registered as owners of their respective shares of the suit land.

The court therefore finds that a customary trust exists in favour of the Plaintiffs over the suit land and that the Deceased held the suit land in trust for himself, the 1<sup>st</sup> Plaintiff and Charles Odongo in equal shares under the customary trust.

17. On whether or not the Defendant as the administrator of the estate of the deceased should sub-divide the suit land and transfer to the Plaintiffs their respective shares, section 28 of the Land Registration Act provides that a customary trust is an overriding interest to which all registered land is subject. It provides 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) **Trust including customary trusts**
- (c) .....
- (d) .....
- (e) .....
- (f) .....
- (g) .....
- (h) .....
- (i) .....
- (j) .....

18. The court has already found that a customary trust exists over the suit land suit land. It means that although registered in the name of the deceased or the Defendant, the suit land is subject to the customary trust in favour of the Plaintiffs in accordance to the provisions of Section 28 Land Registration Act. There is no dispute that the defendant is the personal representative of the deceased. The Defendant produced a grant of Letters of administration as exhibit. The copy of register produced as exhibit shows that the suit land has been transmitted into the name of the Defendant as the personal representative pending confirmation of Grant and consequent distribution of the estate. One of the obligations of the Defendant as Administrator of the estate of the deceased under section 83(f) of the Law of Succession Act Cap 160 Laws of Kenya is to distribute the assets in the estate of the deceased according to the beneficial interests therein. It follows that the Defendant who is the personal representative of the deceased ought to distribute the estate and transfer to the Plaintiffs their respective shares.

19. On costs section 27 of the Civil Procedure Act provides that costs of any action, cause or other matter, or issue follow the event.

**Conclusion**

20. On the basis of the finding herein namely; that there exists a customary trust in favour of the 1<sup>st</sup> Plaintiff and his brother Charles Odongo-deceased over the suit land, that the Deceased held the suit land in trust for himself, the 1<sup>st</sup> Plaintiff and Charles Odongo deceased in equal shares and that the Defendant as the administrator of the deceased's estate has an obligation to distribute the estate to all beneficial interests, the court finds that the Plaintiffs have proved their case on a balance of probabilities and enters judgement in their favour for:

**i. A declaration that a customary trust exists in favour of the 1<sup>st</sup> Plaintiff, Charles Odongo- deceased and the Johan Atinga Shadrack-deceased over the suit land.**

**ii. A declaration that Johan Atinga Shadrack -deceased held the suit land in trust for himself, the 1<sup>st</sup> Plaintiff and Charles Odongo deceased in equal shares under a customary trust.**

**iii. The Defendant as the Administrator of the Estate of Johan Atinga Shadrack to sub-divide the suit land into three equal portions as per the demarcations on the ground and transfer a portion to each of the beneficiaries namely; the 1<sup>st</sup> Plaintiff the 2<sup>nd</sup> Plaintiff as the Administrator of the estate of Charles Odongo and the Defendant forthwith.**

**iv. The Defendant to execute all documents necessary so as to effect the subdivision and transfer of the suit land and in default the Deputy Registrar of the Court to execute the requisite documents in place of the Defendant.**

**v. Costs of the suit are awarded to the Plaintiffs.**

**DATED, DELIVERED AND SIGNED IN OPEN COURT AT VIHIGA THIS 28TH DAY OF APRIL 2022.**

**E. ASATI**

**JUDGE, ELC.**

In the presence of:

N/A or the Plaintiff

Edaki Advocate for the Defendant

Ajevi- Court Assistant

**E. ASATI**

**JUDGE, ELC.**