



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUSIA

ELC CASE NO. 51 OF 2015

LINET AOKO OGOLA.....PLAINTIFF

= VERSUS =

JOSEPH OMONDI ONYANG.....DEFENDANT

J U D G M E N T

1. The plaintiff brought a suit against the defendant via a plaint dated 22nd December 2014 and filed in court on 26th May 2015. An amended plaint dated 16th October 2019 was later filed with leave of court where the plaintiff sought judgment against the defendant for;

- a) A declaration that the defendant holds title to land parcel No. SOUTH TESO/ANGOROMO/6168 in trust for the defendant, SAMUEL ONYANGO and GEORGE OTIENO ONYANGO as represented by the plaintiff.**
- b) An order directing the partition of land parcel No. SOUTH TESO/ANGOROMO/6168 into three equal shares in favour of the plaintiff, the defendant and SAMUEL ONYANGO.**
- c) An order empowering the Deputy Registrar to sign and execute all documents on behalf of the defendant to facilitate implementation of the orders in prayer (a) and (b) above.**
- d) Costs of the suit.**
- e) Any other or further relief.**

2. The plaintiff impleaded that the defendant is the current registered proprietor of land parcel no. SOUTH TESO /ANGOROMO/6168 which emanated from the family land being parcel no. SOUTH TESO/ANGOROMO/564 that was originally registered in the defendant's grandfather Jairo Owang - deceased. The parcel number 564 was passed on to JAMES ODHIAMBO OWANGI through succession to oversee its sharing. The plaintiff further stated that the extended family agreed that the portion of land that would have gone to the family of GEORGE OTIENO ONYANGO, SAMUEL ONYANGO and JOSEPH OMONDI OTIENO would be held by the defendant in trust for the 3 sons as informed by the intention to reduce survey costs.

3. She laid out the particulars of trust as follows;

- a) The ancestral land that was meant to benefit the family of SAMUEL ONYANGO (the senior) including other extended family members was compromised in title number SOUTH TESO/ANGOROMO/564 that was held by JOANES ODHIAMBO OWANG.*
- b) JOANES ODHIAMBO OWANG subdivided land parcel number SOUTH TESO/ANGOROMO/564 and gave a portion therefrom titled SOUTH TESO/ANGOROMO/6168 to JOSEPH OMONDI ONYANGO as the eldest son from the 1st house of REGINA AKONGO to hold it for the benefit of children from that house.*
- c) The plaintiff is the widow of GEORGE OTIENO ONYANGO who came from REGINA AKONGO's house.*
- d) The defendant, GEORGE OTIENO ONYANGO and SAMUEL ONYANGO (junior) are sons of the senior SAMUEL ONYANGO and born from REGINA AKONGO's house.*
- e) JOANES ODHIAMBO OWANG gave out land parcel No. SOUTH TESO/ANGOROMO/6167 to JULIUS OPONDO ONYANGO to hold it for the benefit of himself and the other children of SAMUEL ONYANGO from the 2nd house of JACINTA AWOUR.*

4. The defendant entered appearance and filed a defence dated 28th July 2015 which was later amended it after the plaintiff amended her plaint. He pleaded that he is the sole absolute registered owner of all land parcel no. SOUTH TESO/ANGOROMO/6168 which he acquired from his father by way of transfer upon complying with all legal and procedural requirements. He stated that the plaintiff owns, is entitled to, resides and uses L.R. NO. SOUTH TESO/ANGOROMO/6167 thus denied holding title to L.R. NO. SOUTH TESO/ANGOROMO/6168 in trust for the plaintiff, George Otieno Onyango or Samuel Onyango or any person as alleged in paragraph 7A of the amended plaint. The defendant also denied the particulars of trust as stated in paragraph 7A (a-e) and put the plaintiff to strict proof thereof.

5. The hearing of the suit began on 21/7/2021 with the plaintiff, LINET AOKO OGOLA, testifying as PW1. She averred that she stays at Ochude and widow to George Otieno Onyango-deceased who is a younger brother to the defendant. In her written witness statement dated 16th October 2019, the plaintiff stated that her father-in-law named SAMUEL ONYANGO (deceased) had two wives namely REGINA AKONGO and JACINTA AWOUR. The house of Regina Akongo had the following sons; JOSEPH OMONDI ONYANGO, GEORGE OTIENO ONYANGO and SAMUEL ONYANGO and the house of JACINTA was blessed with 4 sons and one daughter.

6. She continued in evidence that on getting married, she was built a grass-thatched house in the original homestead of SAMUEL ONYANGO within which the entire family lived and the larger family's ancestral land being land parcel no. SOUTH TESO/ANGOROMO/564 was being held in the name of JAMES ODHIAMBO OGWANGI. The family decided to share out the ancestral parcel of land pursuant to which exercise, the portion of land titled SOUTH TESO/ANGOROMO/6168 was registered in the name of JOSEPH OMONDI ONYANGO to hold it for his benefit and that of his two brothers from the house of REGINA AKONGO. The portion of land within the original homestead was situated and titled SOUTH TESO/ANGOROMO/6167 was given to those from the 2nd house of JACINTA AWOUR. The second house required her to move out of the original homestead so that she could stay on her late husband's portion that was to be carved out of land parcel no. SOUTH TESO/ANGOROMO/6168.

7. It is the plaintiff's further testimony that her husband died and left her with 4 children. That when she wanted to move her house to the suit parcel of land and start cultivating, the defendant objected to it and even blocked her from doing any farming thereon and this objection left her and her children with no land to cultivate on or to earn a living and support the children. While she continued to stay in the original homestead she has been informed that she cannot build a new house there although her old house is in a state of disrepair because she is required to move out to her husband's share of land. Due to the difficulty she was experiencing she sued the defendant before the Tribunal and succeeded and prepared the mutation form which the defendant refused to sign instead initiating proceedings that prevented the Executive Officer of the Lower Court from signing the documents on the defendant's behalf.

8. She told the court that the defendant was given the suit land as the eldest son in the house of REGINA AKONGO to hold in trust for himself and his 2 brothers and he is therefore a trustee but has failed to act as such by refusing to give out her late husband's share from the subject piece of land. She produced the documents annexed to her statement as PEX1-6 in support of her claim. The plaintiff urged that she be given her share in L.R. NO. 6168 which was due to her husband George Otieno Onyango and that L.R.6168 should be shared amongst Joseph, George and Samuel. She further prayed for costs of the suit.

9. Upon cross examination by counsel for the defendant, the witness contended that she is staying on 6167 because the defendant is holding the L.R. 6168 in trust for her has refused to give her a share. Her husband did not get a title in his name because their father gave the land according to the houses and the defendant was the 1st born in their house. That L.R. NO.564 was subdivided in the year 2001 and the green card for L.R.NO. 6168 shows it is registered in the name of the defendant but does not indicate it was being held in trust for any one. In L.R NO. 6167 green card, Justus is registered owner but record does not show he was registered in trust for anyone. James Odhiambo got the land from Jairo Owang after succession proceedings of the estate of Jairo's estate. During the succession proceedings, it was agreed the sharing be done according to houses.

10. The plaintiff's second witness, JULIUS OPONDO ONYANGO adopted his witness statement dated 11th May 2018 together with the annexed documents. He told the court that he is the son of Samuel Onyango Owang who had two wives, Regina and Jacinta. The late Samuel Onyango, James Odhiambo Owang and John Onyango Owang were brothers raised in a homestead that existed on the land that came to be registered as SOUTH TESO/ANGOROMO/564. With passage of time James Odhiambo Owang who was the eldest was given another parcel of land within Ochude location to which he moved to and built his own home and left his brothers Samuel Onyango and John Onyango occupying the homestead on the suit land. That James pursued succession over L.R. NO. 564 and got registered as the owner. The three brothers named Samuel, James and John shared out land parcel No. SOUTH TESO/ANGOROMO/564 and identified the respective shares for each of the 3 beneficiaries using boundaries that were demarcated on the ground using sisal plants with the original homestead now falling within the share of Samuel Onyango.

11. PW2 continued to state that the share of Samuel Onyango was further split into 2 portions for each wife being Regina and Jacinta. That with the split, the original homestead fell within Jacinta's house share as the youngest wife of Samuel and this eventually meant that the sons of Regina would have to move out of the original homestead and establish their houses on the share that had been created for them. His uncle James brought a surveyor who carried out the survey exercise that picked the boundaries that had been marked several years back using sisal plants. The survey exercise identified four portions of land from the parent parcel of land and these shares were designated as follows; Jacinta's house – 6 ½ acres, Regina's house – 5½ acres, John Onyango – 3½ acres and purchaser who bought from Joanes – 4acres.

12. After the survey exercise, the whole extended family under the leadership of James went to the Land Control Board at the District Commissioner's Office and while at that office his mother Jacinta did not have her National Identity Card and she proposed that he be registered as the owner of the share for her house as a trustee for himself and his brothers. His step-mother Regina proposed that the share meant her house be registered in the name of JOSEPH OMONDI ONYANGO who would hold it in trust for himself and his brothers. Pw2 told the court that the house of Jacinta got registered over land parcel no. SOUTH TESO/ANGOROMO/6167 and within it is the original homestead for SAMUEL ONYANGO (senior) and the house of Regina got registered in name of JOSEPH OMONDI ONYANGO over land parcel no. SOUTH TESO/ANGOROMO/6168. After the survey had been ascertained and registered with agreements of the entire extended family, the sons from Jacinta's house and him required that Joseph Omondi Onyango and his brothers from Regina's house to move out of the homestead within L.R. NO. 6167 to L.R. NO. 6168 and establish their home there.

13. PW2 added that in compliance with the family's resolution, the defendant moved out and built his houses on L.R. NO. 6168. He stated that currently Joseph Omondi Onyango is the one using and cultivating the whole L.R. NO. 6168 and pursuant to the mode of registration that was agreed on while at the Land Control Board meeting at the DC's office, the defendant is under duty to share out L.R. NO. 6168 amongst his brothers and himself. The plaintiff as the widow of George Otieno Onyango should get her late husband's share.

14. Upon cross-examination by counsel of the defendant, PW2 stated that paragraph 6 of his affidavit was shared amongst three sons of Owang. L.R. NO.564 was subdivided to L.R. NO. 6167 and 6168 to Samuel and the rest to James and John. According to the mutation of L.R. NO. 564 it was sub-divided into six portions. L.R. NO. 6167 was registered in his name on behalf of their household and on said land parcel, Peter, Daniel and himself are entitled to live on it. He said that he bought land elsewhere where he has now built his home and the plaintiff's entitlement is on L.R. NO. 6168.

15. The defendant's case relied on the sole evidence of the defendant who testified as DW1. He introduced himself as a cyclist and farmer and adopted his witness statement filed on 31/3/2017 as his evidence in chief. He stated that the plaintiff is his sister-in-law who lived in a portion of parcel L.R. NO. 6167. That neither his deceased brother nor the plaintiff ever lived or utilized L.R.NO. 6168 which belongs to him. He told the court that his late father James Odhiambo Owang allocated him L.R. NO. 6168 and transferred the same to him in the year 2004. He has lived on said parcel of land since the year 2002 when he was allocated. He denied that he holds the parcel of land in trust for the plaintiff.

16. During cross-examination by counsel for the plaintiff, the defendant said that L.R. NO. 6168 was given to him by James Odhiambo Owang and it was a subdivision of L.R. NO. 564. That the original owner was Jairo Owang who was his grandfather and James Odhiambo is his father's brother and his father's name was Samuel. He denied that James called a family meeting before sharing L.R. NO. 564. Currently he lives on L.R. No. 6168 from 2004. The witness confirmed that before moving to L.R. NO. 6168, he was living in their home which is where they all lived including the plaintiff. He agreed that his younger brother also lives on L.R. NO. 6168. He said that George Onyango who is deceased is his brother has no share in L.R. NO. 6168. On re-examination, he testified that his father was called Samuel Onyango Owang and his brother is called Samuel Odhiambo Onyango. He said he had given Samuel a portion to stay on as he arranges where to move to since he is not the one to give his brothers land. He told court that it was James who was to share land parcel no. 564 and 563.

17. Parties agreed to file and exchange written submissions with the plaintiff filed hers on 20th September 2021. She submitted that the defendant's contention that the suit land was a portion of the ancestral land that was transferred to him by James Odhiambo Owang as a gift to own absolutely and exclusively does not tally with the evidence of James Odhiambo Owang when he testified before the Chakol Division Land Disputes Tribunal. She submitted that the suit parcel of land was registered under the Registered Lands Act CAP 300 and under the provisions, the registration of the defendant as proprietor did not discharge him from his duties of acting as a trustee for himself and his 2 brothers George Otieno Onyango and Samuel Onyango Odhiambo. A claim to land by virtue of a customary trust can be considered and allowed even if there was no entry that was noted on the register for the suit parcel of land to that effect. She prayed that claim be allowed with costs. She relied on the decision in **ESTHER NYAMWERU WARUTHU V. GEORGE KANGETHE WARUHIU (2019) eKLR**.

18. The Defendant filed his submissions on 16th November 2021 and submitted that there is no evidence that has been led to show that the defendant held the suit parcel no. 6168 in trust for the plaintiff or her late husband. He submitted that if anyone was to hold in trust for any of the family members then it would be the said James Odhiambo Owang and the trust would have been noted in the register to show beneficiary on whose behalf James was holding in trust for. He submitted that the plaintiff has relied heavily on the ruling by the tribunal as adopted by court and completely ignored the fact that the same was quashed by an order of certiorari in BUSIA HC JR NO. 9 OF 2011. He urged the court to find that this suit to be res judicata. He prayed that the court finds that there is no customary trust or any trust whatsoever and the suit is an afterthought and abuse of the court process. He relied on the decision of **Isack M'inanga Kieba versus Isaaya Theuri M'Lintuari & Another (2018) eKLR**.

19. Having carefully considered the parties' pleadings, evidence and submissions and I frame the following issues that come up for determination are;

- a) **Whether the plaintiff has proved the claim premised on customary trust;**
- b) **Whether the suit is res judicata;**
- c) **Who meets the costs of the suit?**

20. Customary trust is one of the overriding interest hinged on the land that is currently recognized in the Land Registration Act, 2012. The suit property was registered under Registered Land Act Cap 300 wherein Section 27 & 28 of Registered Land Act provided that although the rights of a registered proprietor are absolute and indefeasible there were subject to rights and encumbrances noted on the register or overriding interests which are set out under section 30 of the Act. The provisions of 27 & 28 of CAP 300 (repealed) were replicated in the provisions set out in section 24,25 26 & 28 of the Land Registration Act, 2012.

21. Courts have further discussed and broke down what entails customary trust. In the case of **Mbui vs Mukangu vs Gerald Mutwiri Mbui C.A No. 281 of 2000**, the Court of appeal stated that customary trust is a concept of intergenerational equity where the land is held by one generation for the benefit of succeeding generations. The Court also held that possession and occupation are key elements in determining the existence of a customary trust.

22. In the case of **Isack Kieba M'Inanga Vs Isaaya Theuri M'Lintari & Another SCoK No 10 of 2015** the Supreme Court Justices held that;

*"...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:- (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; (c) The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances; and, (d) The claim is directed against the registered proprietor who is a member of the family, clan or group.”

23. A trust can never be implied by the Court unless there was intention to create a trust in the first place. *In Peter Ndungu Njenga vs. Sophia Watiri Ndungu [2000] eKLR* where the Court held,

“The concept of trust is not new. In case of absolute necessity, but only in case of absolute necessity, the Court may presume a trust. But such presumption is not to be arrived at easily. The Courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust is implied.”

24. To determine whether a customary trust exists, one has to examine the root of the suit land. From the evidence of the plaintiff, she has testified that the larger family ancestral being land parcel no. SOUTH TESO/ANGOROMO/564 was held in the name of James Odhiambo Ogwangi which was shown in the green card produced as DEX 1 and he was a brother to her father-in-law. I note that he was the second registered owner after one Jairo Owang-deceased (and grandfather to the parties herein). This was confirmed by the defendant in his evidence that the said James Odhiambo was his uncle. PW2 and DW1 gave evidence that their father was called Samuel Onyango Owang but they came from different homes as their father had two wives.

25. PW2 told the court that their uncle James pursued succession over L.R. 564 and got registered as the owner and identified the respective shares for each of the 3 beneficiaries. The share of Samuel Onyango was further split in two as he had two wives being Jacinta and Regina. James brought a surveyor who carried out the survey exercise and picked the boundaries of the shares for the two wives. PW2 said that during the registration exercise, his stepmother proposed the defendant be registered to hold the share in trust for himself and the sons in Regina’s house. The evidence of Pw2 brings a clear narration on the root of the suit title and why it constitutes family land from which a customary trust is created.

26. The defendant submitted that there was no evidence led to show that James Odhiambo Owang’ held the suit title L.R. 564 in trust for his brother Samuel Onyango senior. Yet upon sub-division, the resulting sub-divisions were registered in the names of Samuel’s sons (the defendant & Julius) amongst two others. It is also apparent that the defendant was from the house of Regina and Julius Opondo Onyango was from the house of Jacinta. Since the defendant is denying that his registration was not in trusteeship, the burden shifted on him to explain why the land registered in his paternal uncle’s name would be registered in their names and to the sons from each of the houses of the two wives of Samuel.

26. According to the defendant, because the registration of James as trustee was not noted in the register such trust does not exist. The defendant however does not deny the averment by the plaintiff during cross-examination that during the succession proceedings, it was agreed the sharing was to be done according to the houses. The failure to note a trust in the register is taken care of by section 28 of Land Registration Act which provides thus –

“28. 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) Trusts including customary trusts;

27. The defendant submitted that the subdivision of L.R. 564 into four portions displaces the idea of customary trust. PW2 said that the remaining two portions went to James (which this court presumes is the administrator) and John who was the other sibling. The plaintiff chose to bring this claim instead of applying for revocation. Her obligation in this court is to prove her case and it is not the mandate of this court to question why she did not take steps to revoke the grant issued to James Odhiambo Owang’.

28. The defendant misinterpreted the holding in Isack Kieba case by stating that the plaintiff did not prove the land was family land before Jairo Owang’ – deceased was registered as the owner thereof. This court takes judicial notice that during adjudication, the adjudication process registration was conferred in accordance with who was in occupation of the land. It follows therefore that the registration of Jairo implied he lived on it as the owner. James and Samuel are sons to Jairo and they were under customary law entitled to inherit land belonging to their father. James registration was pursuant to his appointment as the administrator of Jairo’s estate. Therefore, his distribution through subdivision of the land was merely standing in the shoes of the late Jairo. The plaintiff is a widow to the grandson of Jairo thus enjoying being part of the lineage of the first registered owner.

29. The defendant further submitted that this suit is *res judicata* the proceedings undertaken before the tribunal. In the same breath, the defendant submitted that the proceedings and award of the Tribunal were quashed in Busia HC JR No. 9 of 2011 after the court found that the Tribunal did not have jurisdiction to deal with claims over title. Besides the quashing making the parties return to their positions as if there was no suit; but the reason that there is a court finding that the Tribunal did not have jurisdiction disqualified this suit from meeting the essentials of *res judicata* as provided in section 7 of Civil Procedure Act with states *inter alia* that the former suit must have been determined by a court of competent jurisdiction.

30. Costs follow the event and though the plaintiff and the defendant are related, the defendant has taken the plaintiff through a lot of litigation to get her share in the suit land. I find the plaintiff is entitled to costs.

31. The Court in conclusion, enter judgement for the plaintiff and order as follows;

a) A declaration be and is hereby made declaring that the defendant holds title to land parcel No. SOUTH TESO/ANGOROMO/6168 in trust for himself, SAMUEL ONYANGO (junior), and GEORGE OTIENO ONYANGO (represented by the plaintiff).

b) An order directing the partition of land parcel no. SOUTH TESO/ANGOROMO/6168 into three equal shares in favour of the plaintiff, the defendant and SAMUEL ONYANGO with the defendant directed to sign all documents to facilitate this process.

c) In default, the Deputy Registrar is shall sign and execute all documents on behalf of the defendant to facilitate implementation of the orders in prayer (a) and (b) above.

d) Costs of the suit to the plaintiff.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 21ST DAY OF APRIL 2022.

A. OMOLLO

JUDGE