



Nanjala & another v Endalo (Environment and Land Case Civil Suit E015 of 2020) [2022] KEELC 3174 (KLR) (8 June 2022) (Judgment)

Neutral citation: [2022] KEELC 3174 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT AND LAND CASE CIVIL SUIT E015 OF 2020**

AA OMOLLO, J

JUNE 8, 2022

BETWEEN

CECILIA NANJALA 1ST PLAINTIFF

JULIA ACHIENG' MAGOROMBO 2ND PLAINTIFF

AND

JAFET ONG'ENG'O ENDALO DEFENDANT

JUDGMENT

1. Vide a Plaint dated and filed on the December 29, 2020 the Plaintiffs implead the defendant in this suit for orders that:
 - a. That the Defendant holds land parcel no. Nambuku/lugala/samia/27 or resultant number of remaining portion thereof in trust for himself and the Plaintiffs;
 - b. The Defendant does transfer the Plaintiff's shares of the land parcel no. Nambuku/lugala/samia/27 or resultant number or remaining portion thereof to the Plaintiffs. In default the Deputy Registrar of this Court does sign the necessary documents to effect the transfer;
 - c. Injunction restraining the Defendant, his agents or those claiming through him from charging, transferring or in any other way dealing with the said parcel of land or any portion thereof; and
 - d. Costs.
2. The Plaintiffs aver that together with the Defendant, they were the only children of Charles Okechi Malingu who in 1996 transferred the family land LR No Nambuku/lugala/samia/27 measuring 1.4Ha to the Defendant as his only son to hold the same in trust for the family. That the Defendant is currently in breach of the trust by their father and the particulars of breach are:



- a. Failing to hold parcel number LR No Nambuku/lugala/samia/27 in trust for the family i.e. himself and the Plaintiffs;
 - b. Secretly selling off portions of LR No Nambuku/lugala/samia/27 to outsiders without reference to the Plaintiffs;
 - c. Failing to distribute the trust property among the beneficiaries i.e. himself and the Plaintiffs;
 - d. Claiming the whole of the trust property to the exclusion of the Plaintiff and other beneficiaries of the trust.
3. The Defendant filed his defence on the 11th of February, 2021 denying the averments in the Plaint and contended that the present suit was res judicata as there was a previous suit between the 1st Plaintiff and the Defendant designated as Busia HC JR No. 18 of 2011. That there is another suit between the 1st Plaintiff's daughter being Busia ELC Case No. 26 of 2014 which suit was heard and determined on the 17th of November, 2020. The Defendant averred further that the Plaintiffs lack of locus standi to institute the suit as the same has been overtaken by the Limitations of Actions Act. He urged this Court to dismiss the Plaintiffs' suit with costs.
 4. During the hearing on the 29th of September, 2021, the 1st Plaintiff, Cecilia Nanjala testified as PW1 on her behalf and on behalf of the 2nd Plaintiff. She adopted her witness statement dated December 29, 2020 as her evidence in chief. She stated that the 2nd Plaintiff was her older sister and she was going to testify on behalf of both of them. She testified that she met the Defendant during their father's funeral when he introduced himself as a son to their father. Her father was the owner of LR No Nambuku/lugala/samia/27 which they (plaintiffs) discovered had been transferred to the Defendant's name. That a clan meeting was called and the land was shared amongst the three siblings and the portions demarcated on the ground. PW1 continued that she discovered the Defendant had sold part of this land before giving them titles to their portions. That she filed against him before the tribunal where the Defendant admitted the land be shared into the three portions. PW1 concluded by producing the green card as Pex. 1, the Land Dispute Tribunal's proceedings as Pex. 2 and their father's death certificate as Pex. 3.
 5. During cross-examination, PW1 stated that their father transferred the land to the Defendant without their knowledge and that she was the complainant before the Tribunal where she stated that they did not know the Defendant as they had not been told about him. PW1 confirmed that the award by the Tribunal was later quashed. She confirmed that she just wanted the land distributed among the three parties. She confirmed that Maurine Nekesa was her first child and she lived on the land after being awarded ½ an acre by the Court. The witness added that she has 8 children while Julia has 6 children and neither her nor Julia live on the suit land. That they filed this suit to get their share of the land. She concluded by stating that their parents did not leave any wills. On re-examination, PW1 stated that neither the Defendant nor his mother lived on the suit land. That only Maurine Oketch lives on the portion she was awarded together with her children.
 6. The Defendant in his testimony adopted his witness statement dated March 15, 2021 as his evidence in chief together with the documents in the list dated February 11, 2021. He stated that the suit land was owned by his father and he gave it to him without instructions to him to share the same with his siblings. That the said land measures 3 ½ acres and the title deed was issued in his sole name. He stated that at the time of his father's death no one claimed an interest in the land. That the 1st Plaintiff sued him at the Land Tribunal claiming that they did not know him.



7. DW1 stated further that after the judgement of the tribunal he filed a case against the 1st Plaintiff in Busia HCJR case no.14 of 2009 where judgement was issued in his favour. That thereafter Maureen Nekesa also filed a suit against him vide ELC Case no. 26 of 2014 and the Court determined that he gives her ½ an acre of the land. That he is currently wait for the surveyors to come and subdivide the land to enable him curve out her share of the land.
8. Upon cross-examination, DW1 stated that he lived on the land and had a house on it and that his father got into the disagreement with his mother so she left. Later, he came back to live with his father and that was why he was awarded the land as he stated in page 2 of the proceedings before the Land Disputes Tribunal. He was referred to page 3 of his evidence before the tribunal's proceedings and confirmed that he had agreed to subdivide the land to share it with the Plaintiffs. He concluded by stating that Charles inherited his mother and that was how he was sired and he did not understand why the Plaintiffs disowned him at the tribunal. This marked the close of the defence case.
9. Parties were then required to file and exchange their respective written submissions within 21 days each and only the Plaintiffs filed theirs on the 26th of October, 2021. They submitted that in 1996, their father transferred the land to the Defendant and that after the demise of their father, the family decided that the land be shared among the deceased's three children. That the Defendant admitted before the Tribunal that he demarcated the land into three portions. They submitted further that the Defendant did not deny that he held the land in trust for the Plaintiffs.
10. On the issue of the previous suits, the Plaintiffs submitted that ELC No. 26 of 2014 was an originating summons by Maureen Nekesa who claimed that she had lived on the suit land for over 12 years. That the Plaintiffs were not parties to the said suit and as such res judicata does not apply. On the limitation of actions, the Plaintiffs submitted that the Defendant had not led any evidence as to when the limitation came into play. That the present suit was a declaratory suit and therefore no limitation period can be attached to it presently until after the declaration is done. They urged this Court to grant judgement as prayed in the Plaint as the Defendant has not given any defence against the Plaintiff's prayer.
11. I have considered the parties' pleadings, evidence, submissions and the applicable law and the issues which in my opinion arise for determination are as follows:
 - a. Whether the present suit is res judicata;
 - b. Whether the Defendant is holding the suit land in trust for the Plaintiffs; and
 - c. Who bears the costs of this suit?
12. The Defendant pleaded and stated in his evidence that the present case was res judicata. The substantive law on res judicata is found in Section 7 of the [Civil Procedure Act](#), Cap 21 which provides that:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”
13. The test in determining whether a matter is res judicata was summarized in Bernard Mugo Ndegwa James Nderitu Githae and 2 others [2010] eKLR, as follows:
 - a. The matter in issue is identical in both suits;



- b. The parties in the suit are the same;
 - c. Sameness of the title/claim;
 - d. Concurrence of jurisdiction; and
 - e. Finality of the previous decision.
14. The Defendant stated that the issues in the present case had been canvassed in Busia HC JR No. 18 of 2011 and Busia ELC Case No. 26 of 2014. Although the 1st Plaintiff was a party in Busia HC JR No. 18 of 2011 the same was a judicial review claim for certiorari orders to quash the proceedings of the Funyula Land Disputes Tribunal. Once the proceedings of the LDT were quashed, parties reverted to a position as if there was no suit between them. Secondly, the defendant did not outline whether the issue of trust was part of the cause of action between the parties. While the claim by the plaintiff herein may be related to her claim before the Tribunal, it is without a doubt that the Tribunal was not a competent court to deliberate on the matter nowonder their decision was quashed. Thus the LDT case and the ensuing JR case no 14 of 2009 does not meet the threshold of res judicata to this suit.
15. With respect to the suit Busia ELC No 26 of 2014, neither the 1st nor 2nd Plaintiffs were parties to the suit and the subject matter was adverse possession. The question that arises is whether the Plaintiffs could have brought their claim through Maurine Nekesa who was the plaintiff in the former suit. From the evidence adduced, the 1st Plaintiff has admitted that she is the mother to Maurine. PW1 was the first to bring a claim against the Defendant in the year 2009 when she took the case before the Tribunal. She has justified Maureen’s claim that it was different because it was premised on adverse possession. However, she does not deny being aware that such a suit was filed neither does she explain why her claim and Maureen’s claim could not be placed in one suit. In my opinion and I so hold that although the award in the former suit was on a different heading this is not a bar that the two claims should have been brought in the same suit. Explanation 6 of section 7 provides thus;
- “Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”
16. In respect to the second issue, Order 2 rule 10 of the *Civil Procedure Rules* requires that a claim for breach of trust must be pleaded and particularised. The Plaintiffs have pleaded as much in their paragraph 7 of the Plaint. Both the witnesses confirmed that the land was initially registered in the name of Charles Oketch Mangilu- deceased and who transferred the land to the Defendant in 1996. The Defendant stated that he was the son to the late Charles Mangilu and that the deceased gave him the land without instructions on sharing the land with the Plaintiffs. The 1st Plaintiff stated that an agreement was reached during a clan meeting for subdivision of the land into three portions and it was only after the Defendant declined to do so that she reported the matter to the Tribunal. PW1 admitted that both her and the co-Plaintiff do not stay on the suit land but they deserve a share in it.
17. Customary trusts also exist in situations where the parties belonging to the same clans or family have one member holding property on behalf of the other clan/family members. There is no dispute that the land initially belonged to the parties’ father who later transferred to the Defendant who appears was the only son. The Supreme Court in *Isack M’inanga Kiebia v Isaaya Theuri M’lintari & another* [2018] eKLR held as follows with regards to customary trusts:
- 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;
 - 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.”
18. The following facts are not really in dispute in this case; that the parties are siblings - different mothers same father; land belonged to the parties’ father who in later transferred it to the Defendant; and the suit land is registered in the Defendant’s names. Both Plaintiffs are not living on or using the land but are claiming an interest by virtue of being daughters of the initially owner. A portion of this land measuring half an acre has already been awarded to a third party through a court order.
19. The Supreme Court in the *Issack case supra* referred to Section 30 (g) of the *Registered Land Act (repealed)* recognizes as overriding interests:
- “The rights of a person in possession, or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed.”
- And went on to hold that The rights of a person in possession or actual occupation of land, as previously envisaged under Section 30 (g) of the Registered Land Act, have now been subsumed in the “customary trusts” under Section 25 (b) of the *Land Registration Act*. Thus under the latter Section, a person can prove the existence of a specific category of a customary trust, one of which can arise, although not exclusively, from the fact of rightful possession or actual occupation of the land.
20. Since the Plaintiffs are not in occupation of the suit portion, the burden was upon them to lay a basis on why the land should be divided equally between the three of them taking note of the fact that the process of transferring the land to the defendant was not challenged. The 1st plaintiff referred the court to some clan meeting which took place after the funeral of their father and demarcated the land into three. No evidence was called to corroborate this averment. The 1st plaintiff also relied on the evidence of the Defendant presented before the Tribunal where he had agreed to have the land shared out, however, those proceedings were quashed and so no much weight can be placed on them.
21. In MERU HCCC No 146 of 2000 - *Peter Gitonga v 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”. The court was not told that at the time the suit title was registered on the Defendant’s name either of the plaintiffs’ interest was on the land. Given the land did not constitute an estate of Charles Okech Malingu-deceased, the plaintiffs really had a duty to demonstrate the intention of their father gifting a part of this land for a trust to be created. Order 2 of the *Civil Procedure Rules* state that a trust is a question of fact that must be proved by evidence. In my opinion being siblings by itself is not sufficient proof of a trust.



22. Consequently, in light of the evidence adduced, I am not persuaded that the Plaintiffs have ably made out a case of being entitled to a portion of the suit land under customary trusts. Their suit is dismissed with an order that each party shall bear their respective costs.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 8TH DAY OF JUNE, 2022.

A. OMOLLO

JUDGE

