



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Oyoyo v Oyoyo & 3 others (Environment and Land Appeal
39 of 2021) [2022] KEELC 2600 (KLR) (20 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 2600 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL 39 OF 2021
GMA ONGONDO, J
JULY 20, 2022**

BETWEEN

OSIMBO OYOYO APPELLANT

AND

HELLEN OPIYO OYOYO 1ST RESPONDENT

ISMAEL OYOYO 2ND RESPONDENT

ABIUD OOKO KAWAWO 3RD RESPONDENT

MICHAEL WASHINGTON OYOYO 4TH RESPONDENT

(Being an appeal from the judgment of Hon. R.B.N Maloba, Principal Magistrate, delivered on 1st November, 2019 in Homa Bay Chief Magistrate’s Court Environment and Land Case No. 4 of 2018 as consolidated with Homa Bay Chief Magistrate’s Court Environment and Land Case No. 198 of 2012.)

JUDGMENT

1. This appeal arose from the trial court’s judgment delivered on the November 1, 2019 by the Honourable RBN Maloba, Principal Magistrate, in Homa Bay Chief Magistrate’s Court Environment and Land Case No s 4 of 2018 where she reasoned, inter alia;

“A declaration be and is hereby issued that the suit land parcel originally known as LR Kanyada/Kotieno/Katuma “A”/1271 (now subdivided into 2238, 2239 and 2223) was family land to which the defendant was registered to hold in trust for the family.”

2. The appellant namely Osimbo Oyoyo through the firm of Nyauke and Company Advocates mounted the appeal by way of a memorandum of appeal dated November 20, 2019. The Appeal is anchored on



grounds 1 to 11 as set out on the face thereof. I find it superfluous to reproduce the grounds which are compressed as stated in paragraph 8 (infra).

3. Wherefore, the appellant has sought the orders that the judgment of the trial court be quashed and set aside with costs to the appellant.
4. The appeal was transferred to this court from Migori Environment and Land Court on October 27, 2021. A supplementary record of appeal dated April 6, 2022 was filed herein on April 7, 2022.
5. The appeal was heard by way of written submissions pursuant to this court's directions of March 1, 2022.
6. Accordingly, the appellant's counsel filed submissions dated April 12, 2022 and filed on April 13, 2022. Counsel identified five (5) issues for determination. In discussing the issues, learned counsel submitted, inter alia, that the learned trial magistrate erred in law and in fact by holding that the original suit parcel of land number Kanyada/Kotieno/Katuma "A"/1271 was family land while at the same time conceding that it was not an ancestral land. Counsel relied on various authorities including the case of *Alice Wairimu Macharia v Kirigo Philip Macharia* (2019) eKLR, to buttress his submissions.
7. Learned counsel for the respondents filed submissions dated July 11, 2022 on July 13, 2022. Counsel submitted that the appeal is incompetent for failure to abide by the provisions of Order 42 of the *Civil Procedure Rules, 2010*. Counsel further submitted that the appeal lacks merit. Counsel relied on various authorities including the case of *Isack M'Inanga Kiebia v Isaaya Theuri M'lintari & Another* (2018) eKLR, to fortify the submissions.
8. In the foregone, the issues for determination are as captured in the grounds of appeal and are condensed thus: whether there is emergence of a customary trust in the matter and whether the trial court relied on written evidence and the law in reaching its findings.
9. It is important to note that the instant appeal being the first one from the trial court in the matter, this court is obliged to review the record of the trial court, evaluate it and arrive at its own conclusions herein; see *Mwanasokoni-vs Kenya Bus Services Ltd* 1982-88 1KAR 278 applied in the case of *Titus Ong'ang'a Nyachieo v Martin Okioma Nyauma and 3 others* 2017 eKLR.
10. Initially, the suit was commenced by way of a plaint dated November 6, 2014 and amended on July 27, 2019 pursuant to leave of the court granted on July 26, 2017 and filed in court on October 30, 2017 for the following orders;
 - a. Declaration that the defendant holds the whole of LR No Kanyada/Kotieno/Katuma 1271 (now sub-divided), on trust for the plaintiffs.
 - b. Declaration that the sub-division of LR No Kanyada/Kotieno/ Katuma 1271 into LR Nos Kanyada/Kotieno/Katuma 2122 (now sub-divided into LR Nos Kanyada/Kotieno/Katuma 2238 & 2239) and 2123, respectively, was unlawful, irregular, illegal, fraudulent and void for all intent and purposes.
 - c. An order of cancellation of the titles in respect of LR No Kanyada/Kotieno/Katuma 2122 (now sub-divided into LR Nos Kanyada/Kotieno/Katuma 2238 & 2239) & 2123, respectively and rectification of the register in respect of LR No Kanyada/Kotieno/Katuma 1271, with a view to re-instating and/or restoring the title in respect of the suit property.
 - d. An order for the sub-division of LR No Kanyada/Kotieno/Katuma 1271 into seven (7) equal portions in the manner of occupation and the portions in occupation by the plaintiffs be transferred and registered to and in favour of the plaintiffs.



- e. In default, the deputy registrar of this honourable court be ordered and/or at liberty to sign the relevant mutation, consents and transfer documents to facilitate compliance with orders in (d) above.
 - f. Permanent injunction restraining the defendant either by himself, agents and/or servants from selling, sub-dividing, alienating, charging, encumbering and/or in any other manner, whatsoever, interfering with the title in respect of LR No Kanyada/Kotieno/Katuma 1271.
 - g. Costs of this suit be borne by the defendant.
 - h. Such further and/or other relief as the honourable court may deem fit and expedient so to grant.
11. PW1 who was the 2nd plaintiff, Ishmael Oyoyo (the 2nd respondent herein) before the trial court, testified on September 3, 2018. He stated that the suit land was registered in the names of the defendant/appellant who was to hold the same in trust for the benefit of himself and the plaintiffs. Instead, the defendant started disposing of the land in 2012. That family members are buried on the land. He produced in evidence a copy of green card for parcel no K/K/K 'A'/1271, copy of green card for parcel no K/K/K 'A'/2238 and copy of minutes dated November 23, 2011 (PEXhibits 1 to 3 respectively).
 12. PW2, Hellen Opiyo, testified on October 29, 2018 and adopted her statement dated November 6, 2014 as part of her evidence. She stated that her late husband left the suit land to her but she is not presently in occupation as the appellant chased her from the same.
 13. PW3, Abiud Ooko Kawawo, too, testified on October 29, 2018. He stated that indeed, the appellant had been registered as the proprietor of the suit land to hold it on behalf of the other family members in 1978. The appellant, however, started dividing the land and selling it to 3rd parties.
 14. In the statement of defence dated December 15, 2014 and filed on December 17, 2014, the defendant Osimbo Oyoyo (Appellant herein) denied the claim. He then sought dismissal of the suit with costs.
 15. The testimonies of PW1, PW2 and PW3 firmly point to the appellant's holding of the suit land in trust for the family; see Mumo case (infra).
 16. Article 45(1) of the Constitution (supra) provides;

“The family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the State.”
 17. The evidence of DW1 was that the suit land was registered in his name in 1978 following adjudication as he was the buyer. He admitted that there was no sale agreement thereof but that he gave the vendor a boat as consideration for the land.
 18. Clearly, DW1 deliberately failed to enter into a written agreement as required under Section 3(3) of the Law of Contract Act, Chapter 23 Laws of Kenya. He was not a bona fide buyer in the circumstances as noted in the case of Lawrence P Mukiri Mungai, Attorney of Francis Muroki Mwaura v AG & 4 others (2017) eKLR.



19. In arriving at the impugned judgment, the learned trial magistrate observed at page 13 of the judgment, *inter alia*;

“...initially, the defendant in his examination in chief claimed that these people moved out voluntarily but he later owned up in cross-examination that their movement out of the suit land was as a result of the disagreements and/or quarrels that were related to the aforesaid issue.... Further proof of possession is not a necessity as per the Supreme Court decision in *Isack M'inanga Kiebia v Isaaya Theuri M'lintari & Another* (supra)...”

20. The learned trial magistrate further noted at page 14 thus:

“...I agree with the defendant and there was an admission by the plaintiffs that this was not ancestral land per se..... nevertheless, the evidence shows that all those who settled on the land the parties herein included went there courtesy of their patriarch Mzee Ismael Oyoyo, the deceased...”

21. It is important to note that the learned trial magistrate stated the parties' respective cases in the consolidated cases, framed issues for determination, analysed them and arrived at her decision based on reasons. So, the impugned judgment complied with Order 21 Rule 4 of the [Civil Procedure Rules, 2010](#).

22. Article 10 (2) (b) of the [Constitution of Kenya, 2010](#) anchors the principles of equity. No doubt, trust is envisioned thereunder.

23. I endorse the decision in the case of [Mwangi v Mwangi and another](#) (1986) KLR 328 that a trust created over registered land is an equitable right thereon. That its existence need not to be referred to in the title document

24. Section 3(2) of the [Judicature Act](#) Chapter 8 Laws of Kenya on application of customary law provides thus:

The Supreme Court, the Court of Appeal, the High Court, the Environment and Land Court, the Employment and Labour Relations Court and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.

25. Customary trust is a question of fact to be proved by evidence; see *Mumo v Makau* (2002) 1 EA 170.

26. It is trite that some of the elements that would qualify a claimant as a trustee include; that the land in question was before registration, family land and that the claimant belonged to that family, clan or group; see [Isack Kiebia-vs-Isaaya M'Lintari](#) (supra).

27. Section 28 of the [Land Registration Act, 2016 \(2012\)](#) recognizes customary trust. It is an overriding interest in any registered land as envisioned under Section 25 of the same Act.

28. The rule of evidence is that “He who alleges must prove”. This is founded under Section 107 of the [Evidence Act](#), Chapter 80 Laws of Kenya. On that account, did the respondents discharge this duty before the trial court as held in *Ahmed Abdulkarim v Member for Lands and Mines* [1958] EA 436 at 441?



29. Bearing in mind the entire evidence on record in this case, and applying the facts of the case as well as legal principles stated above, it is clear that the respondents who were the plaintiffs before the trial court proved the existence of customary trust over the suit land. They proved their claim to the requisite standard as noted in Abdulkarim Case (supra). Therefore, the grounds of appeal are untenable.
30. In conclusion, it is the finding of this court that the learned trial magistrate's judgment is sound at law. I hereby uphold the same.
31. In the result, the instant appeal is hereby dismissed with costs to the respondents.
32. Orders accordingly.

G.M.A ONG'ONDO

JUDGE

Delivered, dated and signed at Homa-Bay this 20th day of July 2022.

Present

1. 2nd respondent
2. Mr. D. Adawo holding brief for Ochwal, learned counsel for the respondents
3. Ms. Odera for the appellant

G.M.A ONG'ONDO

JUDGE

