



**Atieng & 2 others v Omusolo & another (Environment & Land Case
37 of 2016) [2022] KEELC 12779 (KLR) (27 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 12779 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 37 OF 2016
AA OMOLLO, J
SEPTEMBER 27, 2022**

BETWEEN

**MAGDALINA ATIENG 1ST PLAINTIFF
MICHAEL ELEKOTU OBARI 2ND PLAINTIFF
STEPHEN OMUSOLO 3RD PLAINTIFF**

AND

**EVALINA AKISA OMELA (SUED IN THEIR OWN CAPACITY AND IN THE
LEGAL REP OF THE ESTATE OF ENJESLOYS OMUSOLO OBARI - DECEASED
AS ITS LEGAL REPRESENTATIVE) 1ST DEFENDANT
CHRISTIAN WAFULA OMUSOLO 2ND DEFENDANT**

JUDGMENT

1. *Vide* a plaint dated April 19, 2016, the three plaintiffs impleaded the defendants claiming a share in the land parcel No South Teso/Asinge/377 (hereinafter referred to as the suit land). The plaintiffs plead that before registration, the suit land belonged to Itadi who chose to adopt Augustino Wafula and his nephew Itadi Obare. That subsequently after their adoption, the suit land was shared equally between the two. The plaintiffs aver that Itadi Obari gave 2 acres of land from his share to Enjesloys Omusolo and the three people peacefully occupied their portions as clearly demarcated on the ground.
2. The plaintiffs pleaded that during registration, Itadi Obari and Enjesloys Omusolo were registered as owners in equal share but they forgot to include Augustino Wafula's name. They continued that Augustino and his family lived on their portion and on their demise were buried on it. The plaintiffs contend that Augustino's sons disposed off their share in the suit land to 3rd parties before their death. They assert that the 1st & 2nd defendants are only entitled to 2 acres out of the suit land while the 3rd defendant is entitled to ¼ share of the Itadi – deceased portion. The plaintiffs aver that they have



acquired title to the land they occupy by way of customary trust to the exclusion of everybody else despite the registration as reflected in the register.

3. The plaintiff seek to be granted judgment in the following terms;
 - (a) A declaration be made that they be absolute registered proprietors and they be registered as such to 2.25 acres each or as demarcated on the ground while the 1st and 2nd defendants remain with 2 acres to administer or as demarcated on the ground and the 3rd defendant remains with his own share of 2.25 acres or as demarcated on the ground out of land parcel No South Teso/Asinge/377 and as to be determined by the county survey, Busia and they be declared to have acquired the same by way of customary trust.
 - (b) An injunction for permanent injunctions to issue restraining the defendants, jointly and severally, their agents, servants, family members and/or persons working under them from evicting the plaintiffs, their families and their licencees from land parcel No South Teso/Asinge/377 or in any other manner interfering with, selling, disposing off, sub-dividing and or transferring any part of land parcel No South Teso/Asinge/377.
 - (c) An order that the deputy registrar of this honourable court be empowered to sign all relevant documents to effect transfer and the land registrar to dispense with production of original title should the defendants be unco-operative.
 - (d) Costs
 - (e) Interest
 - (f) Any other or further relief this honourable court deems fit and just to grant.
4. The 1st and 2nd defendants entered appearance and filed their joint defence on September 26, 2016. They denied the plaintiffs claim specifically that there were 3 portions of land demarcated out of the suit property. They pleaded that Itadi Obari – deceased and his family continue to occupy unknown portion of the suit land and denied that Enjesloys Obari occupied only 2 acres as he was in occupation of half of the suit property. The 1st and 2nd defendants pleaded that the 1st plaintiff as widow of Itadi Obari – deceased is only entitled to occupy the share of her deceased husband and that customary trust cannot be used to, defraud and disinherit other beneficiaries off their customary rights to property.
5. The 1st and 2nd defendants pleaded that the plaintiffs are trying to lay a claim to a property that does not belong to them and which property belonged to their (1st & 2nd defendants) father. They prayed for judgment against the plaintiffs for;
 - 1) Plaintiff's suit be dismissed with costs.
 - 2) An order of eviction as against any plaintiff who will be found to have encroached on the 1st and 2nd defendants portion of land out of that parcel of land known as South Teso/Asinge/377.
 - 3) An order of permanent injunction as to any of the plaintiffs that the order in 2 above will have been issued against.
 - 4) Any other orders as the honourable court may deem fit to grant.
6. The plaintiffs responded to the 1st & 2nd defendants defence and denied that Enjesloys occupied ½ share in the property nor that the 1st & 2nd defendants are entitled to half share. They denied using unethical means to defraud the defendants since they are claiming what rightfully belongs to them. The 3rd defendant filed a statement of admission on September 21, 2018. He admitted the plaintiffs



claim as contained in paragraphs (a) to (f) of the prayers save for costs which he said should not be visited upon him.

7. The 1st plaintiff, Magdalena Atieno gave her evidence on November 30, 2021 by adopting her statement she wrote on August 4, 2016. PW1 stated that she was married to Itadi Obari – deceased and they were blessed with 4 sons who are the 2nd & 3rd plaintiffs and the 3rd defendant while the fourth son died. PW1 further stated that when she got married, the suit land was already physically divided into 3 portions between Augustino, Itadi and Omusolo Obari (who had the smallest share). That the sons of Augustino sold the entire portion owned by their father to 3rd parties and the said 3rd parties are residing on the land. PW1 continued that the boundaries she found when she got married are still intact todate. That her husband shared his portion amongst his 4 sons before he died. She added the 1st and 2nd defendants are also tilling their portion.
8. PW1 avers that if the 1st and 2nd defendants are given the ½ share in the land, it will result in their taking of the land belonging to Itadi Obari – deceased and this will render her family landless since the other half of the land owned by Augustino is occupied by buyers/3rd parties. PW1 at paragraph 27 – 29 of her statement wrote that when she got married, the land had not been sub-divided and that the sub-division was carried out in her presence. That Omusolo who was staying in town was given 2 acres as a gift because he did not have anywhere to go. That the boundary planted between Omusolo and her husband exists to-date. She added that there is an access road which separates Omusolo’s portion and Itadi’s. She produced the documents in her list as Pex 1 – 8.
9. Under cross-examination, PW1 said when she got married, the land had been demarcated into two – between Itadi and Obari – deceased. That Augustino was a biological brother to Itadi Obari – deceased. That it is true the green card bears only 2 names although she thought Augustino’s name had also been included. She is also not aware if the suit plot has been sub-divided.
10. Michael Elekot Obari who is the 2nd plaintiff testified as PW2. He described his family relationship with the parties in this suit which brought out evidence of belonging to one family. PW2 said the suit land was sub-divided into 3 portions although previously it was divided into 2 between Augustino and Itadi. It is his further evidence that neither their family nor the 1st & 2nd defendant’s family have ever occupied the portion owned and occupied by Augustino Wafula. He also stated that Omusolo – deceased owned 2 acres out of the suit land.
11. PW2 continued to narrate that their share was divided among the 4 sons with his deceased brother having sold one acre out of his share to Richard Odeke. That before their demise Augustino’s sons sold their portion to 5 people who are all residing and utilizing the land to the exclusion of anybody else. That although the land was jointly registered in the names of Omusolo and Itadi, Itadi was entitled to 9 acres by way of customary trust. That they stand to be evicted if the sub-division is undertaken as per the title since Augustino’s share was already sold.
12. In cross-examination, PW2 stated that the suit title is in the name of the 3rd defendant pursuant to transfer by transmission. That the 3rd defendant was allocated 11 acres which was their father’s share. That Augustino is his biological father. The witness said he had no evidence to support the statement that Augustino was entitled to 9 acres out of LR No 377. He also had no evidence of the sub-division.
13. The 3rd plaintiff made a similar statement of facts as PW1 and PW2. In cross-examination, PW3 said he was born in 1978 and he does not know how Omusolo and Itadi got themselves registered as owner of LR No 377. That he had no evidence to support the averment that Augustino was entitled to 11 acres out of the suit land. PW3 added that he grew up with the boundaries existing between the land of Augustino, Itadi and Omusolo and Omusolo owned 2 acres. In re-examination, the witness stated the



land was sub-divided on the ground, and no one has interfered with those boundaries. This marked the close of the plaintiffs' case.

14. The 1st defendant gave his evidence as DW1 on February 8, 2022. He is the son to Enjesloys Omusolo – deceased who he said was the first born brother of Itadi Obari – deceased. That his father died in 1998 and was buried on the suit property and his mother was also buried on the same land. DW1 said the suit land was owned in equal shares between his father and Itadi. That before Itadi got very ill, he started selling parts of his land and his successor the 3rd defendant also sold land to other buyers. That they ended up selling a part of Omusolo's land. DW1 continued in evidence that he was approached by the area assistant chief in 2014 who persuaded sell him a part of his father's land which request he replied to that he would consider the request during his visit to the village.
15. The 1st defendant continued that when he visited the village, he was shown two certificates of searches – one that reflected Itadi and Omusolo each owned ½ share of the land. The second search reflected the land owned by the 3rd defendant and Omusolo at ½ share each. His uncles asked him to sell them one acre and leave another acre to 2nd defendant because he had bought land in Eldoret but he declined and demanded for the entire ½ share. Later on he was served with summons in this case.
16. During cross-examination by Mr Onsongo learned counsel for the plaintiffs, DW1 stated the suit land was registered in the two names in 1972. The 8 people on the land are not his relatives and he does not know how they came on the land. That some of the 8 people have homes on the land. He denied having an adopted uncle called Augustino Wafula and denied the alleged uncle was entitled to 11 acres. DW1 did not know whether Augustino or his sons were buried on the suit land. He could not tell whether the share they use is smaller or bigger than the portion occupied by the 8 people. In re-examination, DW1 stated that he does not remember if the family of Augustino ever brought up a claim over his share in the land. This marked the close of the 1st & 2nd defendants' case. The 3rd defendant did not call any evidence.
17. Both parties filed written submissions which I have read and the relevant parts will be referred to in the body of this judgment. From the pleadings and evidence adduced, the court frames one question for determination, whether or not Enjesloys Obari held 9 acres out of his share in the suit land in customary trust for the plaintiffs and the 3rd defendant.
18. The undisputed facts of this case is that the plaintiffs are related to the defendants as they are first cousins. It is also not disputed that the suit title was registered in 1972 in the names of Itadi Obari and Omusolo with their share clearly spelt out as ½ share each. What is disputed is the averment that although the registration was in equal shares, on the ground, 11 acres was owned by Augustino Wafula – deceased, Itadi Obari – 9 acres and Enjesloys Omusolo – deceased owned 2 acres.
19. In bringing this claim, the plaintiffs stated that the 11 acres share of Augustino Wafula – deceased was already sold. That they live and are entitled to 9 acres out of the remainder 11 acres which according to them is now held by the 1st and 2nd defendants sued as the administrators of the estate of Enjesloys Omusolo. To support this assertion, the plaintiffs produced a green card for South Teso/Asinge/377, registry index map for Asinge registration, certificate of death of Enjesloys Obari, letters of administration issued to the 1st & 2nd defendants, and a demand letter dated 13/1/2016 addressed to the 1st and 2nd defendants.
20. Under order 2 rule – of the *Civil Procedure Rules*, it is a mandatory requirement to specifically plead trust and give particulars thereof. The land in question was registered in equal shares in favour of Omusolo (father to 1st & 2nd defendants) and Itadi (husband and father to the plaintiffs and 3rd defendant). The claim has been brought by the plaintiffs claiming 9 acres on the belief that the first



- registration had a mistake of not capturing the share of Augustino Wafula – deceased. They further claim that the land was shared between Itadi and Augustino by their adoptive father called Itadi – deceased.
21. PW1 began by saying that when she got married, she found the land already divided on the ground into 3 (paragraph 9 of her statement). At paragraph 27, she said when she got married, Augustino was already dead except his sons Francis Muyodi and Andrew Omuse were occupying his portion. Then at paragraph 28, PW1 states that when she got married, the land had not been sub-divided and the sub-division was done in her presence. She does not go further to tell the court who did this later ground sub-division or when this was done. At paragraph 32, PW1 added that when her husband gave Omusolo the 2 acres as a gift, the land had already been shared equally between Itadi Obari and Augustino Wafula. She also does not disclose the person/people who planted the boundary between Omusolo and her husband.
22. The plaintiffs want this court to believe that on the ground, the land is divided into 3 parts. This statement of fact was repeated by all the plaintiffs but nothing concrete to corroborate it. I have taken into account that Augustino’s name does not appear in the register and that the buyers occupy is 11½ acres. This court already made a finding in Busia ELC case No 35 of 2016 that the 3rd parties who were the applicants in that case had proved their interests as owners of 11½ acres comprised in the suit title South Teso/Asinge/377 by way of adverse possession. In case No 35 of 2016 mentioned, Jesca Ejakait Orubia who was the 5th applicant stated that only the 1st – 4th applicants had bought land from the Augustinos. While herself and the 6th and 7th had purchased their portions from the family of the plaintiffs. The 3rd defendant who was also sued in the former suit did not contradict that evidence. The shares of these applicants from the judgment in that case summed up to 3¾ acres therefore the plaintiffs are lying under oath when they want 9 acres out of the remaining 11 acres when already they had disposed of 3¾ acres of the 9 acres if at all.
23. PW2 admitted that his brothers and himself have also sold portions of this land to 3rd parties but did not produce no evidence to support the size of land sold is the same size disclosed in paragraphs 22 – 24 of his witness statement dated April 19, 2016. The further statement of PW2 dated January 4, 2021 was more of evidence in favour of Augustino and the purchasers which is not a matter for determination before this court. It is interesting to note that the plaintiffs allocated Augustino 11 acres of the land under customary trust then come to this court to award them 9 acres by way of customary trust from the remainder 11 acres.
24. The register for the suit land was opened in 1972 when the applicable law was the Registered Land Act (repealed). The share of each owner was specified as ½ each. Section 103 of the repealed Act stated thus;
- “(1) Where any land, lease or charge is owned in common, each proprietor shall be entitled to an undivided share in the whole, and on the death of a proprietor his share shall be administered as part of his estate.
- (2) No proprietor in common shall deal with his undivided share in favour of any person other than another proprietor in common of the same land, except with the consent in writing of the remaining proprietor or proprietors of the land, but such consent shall not be unreasonably withheld.”
25. Registration in equal shares means either party is entitled to an undetermined half.
- Section 91(4) of the Land Registration Act No 3 of 2012 provides as follows;
- “(4) If land is occupied jointly, no tenant is entitled to any separate share in the land and, consequently-



- (a) dispositions may be made only by all the joint tenants;
 - (b) on the death of a joint tenant, that tenant's interest shall vest in the surviving tenant or tenants jointly; or
 - (c) each joint tenant may transfer their interest inter vivos to all the other tenants but to no other person, and any attempt to so transfer an interest to any other person shall be void."
26. From the provision of the law and the registration reflected in the green card produced, it is a misdirection for the plaintiff to have taken it upon themselves in distributing part of this land to Augustino. The net effect of their registration in common is that both owners bear the liability or burden for the portions of land sold by the members of the Augustino's family. Secondly, even if the plaintiffs were entitled to the 9 acres, part of the 9 acres has been reduced since PW2 admitted they have sold a part of it. In any event, submission by counsel for the plaintiffs that the 1st and 2nd defendants' deceased father was holding 9 acres for Itadi Obari and his family since this is where they lived fails for two reasons. First because Itadi Obari's share was clearly provided for and secondly there was no demonstration that the plaintiffs are wholly occupying 9 acres on the ground.
27. In my conclusion, I find that the so called 11 acres share of Augustino had not been determined. The 3rd parties awarded the 9½ acres of land received the same because the rights of the registered owners had been extinguished. The other 2 acres part sold by the family of the plaintiffs is to be automatically subtracted from their share. The entire land is given as 8.8ha (translates to approximately 21.745 acres). Therefore 21.745 – 9½ acres leaves approximately 12.245 acres. The 12.245 is divided by two to give us 6.1 acres each. The plaintiffs already disposed off 3 acres or thereabouts meaning they are only entitled to approximately 3 acres or less taking into account roads of access to be provided for during sub-division to take care of the several 3rd parties now in possession.
28. The plaintiffs prayer as pleaded in paragraph 26 of the plaint fails. Instead I make an order;
- i. That they are entitled jointly and severally (3 plaintiffs and the 3 defendants) to 3 acres subject to provision of road of access of title No South Teso/Asinge/377 which rights accrued to them by virtue of their relationship of co-ownership of the suit title.
 - ii. No customary trust could arise against a co-owner.
 - iii. That an injunction for permanent injunctions is issued restraining the defendants, jointly and severally, their agents, servants, family members and/or persons working under them from evicting the plaintiffs, their families and their licencees from land parcel No South Teso/Asinge/377 or in any other manner interfering with, selling, disposing off, sub-dividing and or transferring the 3 acres part in land parcel No South Teso/Asinge/377.
 - iv. That the deputy registrar of this honourable court is empowered to sign all relevant documents to effect sub-division and transfer and the land registrar to dispense with production for the 3 acres of original title should the defendants be unco-operative.
 - v. Costs of this suit awarded to the 1st and 2nd defendants.

Dated, signed and delivered in BUSIA this 27th day of Sept., 2022.

A. OMOLLO

JUDGE

