



**Raballa & 2 others v Abuya (Environment & Land Case 50 of 2018)  
[2022] KEELC 4836 (KLR) (21 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 4836 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
ENVIRONMENT & LAND CASE 50 OF 2018  
AA OMOLLO, J  
SEPTEMBER 21, 2022**

**BETWEEN**

**WILHEMINA KALANDE RABALLA ..... 1<sup>ST</sup> PLAINTIFF**

**EVANS KALANDE ..... 2<sup>ND</sup> PLAINTIFF**

**BERNADETTE JULIET ACHIENG ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**PETER OKUMU ABUYA ..... DEFENDANT**

**JUDGMENT**

1. The plaintiffs brought this suit against the defendant via their plaint dated 16/5/2018 seeking the following reliefs:-
  - a. A declaration that the defendant holds land parcel title Samia/Budongo/249 in trust for himself and the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs in the manner detailed.
  - b. For orders that the suit land be subdivided into two equal portions, each measuring 2½ acres following the already existing and demarcated ground boundaries, for the transfer of one half of 2½ acres to the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs.
  - c. Costs.
  - d. Any other suitable reliefs this honourable court deems just and said.
2. The plaintiffs pleaded that the 1<sup>st</sup> plaintiff was the first registered owner of the suit parcel number Samia/Budongo/249 measuring 2.0ha. The plaintiff pleaded that the said registration was in trust for herself and other family members. They stated that the 1<sup>st</sup> plaintiff took in the 2<sup>nd</sup> plaintiff and they lived with him on the suit parcel from 1975 and the 2<sup>nd</sup> plaintiff continues to live on the said land to date. The plaintiffs further pleaded that in February 2002 the 1<sup>st</sup> plaintiff gave the defendant 2½ acres



- and transferred the whole land to the defendant to hold the 2½ acres for himself and the other 2½ acres for the rest of the family. The plaintiff's claim is for a declaration that the defendant holds the suit land number Samia/Budongo/249 in trust for himself and for the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs.
3. The defendant contested the claim and filed a statement of defence on July 2, 2018. He pleaded that the 1<sup>st</sup> plaintiff transferred the whole land to him as a gift. That in appreciation of the gift, his family gave the 1<sup>st</sup> plaintiff a token of appreciation. He denied ever starting the process of sub-dividing the land or being asked by the plaintiff to do so. The defendant further denied the jurisdiction of this court. He urged for the dismissal of the plaintiffs' suit.
  4. On July 26, 2021, the 1<sup>st</sup> plaintiff testified as PW1. She started by saying that she was allocated the land by her father – deceased in 1964. That in 1975 she took in the 2<sup>nd</sup> plaintiff – her nephew to stay with her. PW1 continues that in the year 2002, the family decided that she gives half of this land to her cousin, the defendant. Consequent to this arrangement, a portion measuring 2½ acres was marked for the defendant which according to PW1 was securely fenced. Later, she transferred the whole land to the Defendant.
  5. According to PW1, the defendant was to hold the land in trust for the family. So in 2009, she asked the defendant to subdivide the land into 3 parts. 1<sup>st</sup> part to defendant, 2<sup>nd</sup> part to 2<sup>nd</sup> plaintiff and 3<sup>rd</sup> part to the 3<sup>rd</sup> plaintiff. However the defendant became evasive and unco-operative necessitating the filing of this suit. In cross-examination, PW1 agreed they appeared before the Land Control Board together with his brother Mathias and sister. PW1 was aware of the appreciation agreement which indicated the amount of monies received by her husband. She admitted the dispute started before the Funyula Land Disputes Tribunal although she did not recall the award but filed this case because she was not satisfied with the outcome of the Land Disputes Tribunal case.
  6. Mathias Opande Kalande testified as PW2. He confirmed accompanying PW1 to the Land Control Board. That PW1 agreed to give the defendant a portion of LR No 249 (suit land) that abuts the tarmac road and he is the one who fenced it on behalf of the defendant. PW2 stated that it was agreed the defendant was to subdivide and share it with the sisters. PW2 avers that the family instruction to the 1<sup>st</sup> plaintiff was to sub-divide the land into two portions but instead she transferred the whole land to the defendant. The 3<sup>rd</sup> plaintiff came to the land in 2005 following the collapse of her marriage and the family decided that they share the 2½ acres with the 2<sup>nd</sup> plaintiff. PW2's evidence is that the defendant has no right to hold on to the whole 5 acres.
  7. In cross-examination, PW2 stated that consent of the Land Control Board cannot be issued if you are not accompanied with family members. That the defendant's share was measured by foot. He was not present when the appreciation agreement was drawn and according to him it is a forgery. He was not a witness before the Funyula Land Disputes Tribunal. That the 1<sup>st</sup> plaintiff's husband is buried on a land in Dahio not the suit parcel. That the suit land was registered in the defendant's name because the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs did not have money for sub-division.
  8. The 3<sup>rd</sup> plaintiff gave similar evidence as the 1<sup>st</sup> plaintiff. In cross-examination, PW3 said his rights over the suit land accrues through his aunt – PW1. His contention is that the defendant was not faithful to the family agreement. He was an adult when the transfer to the defendant was done. That none of his parents are laying a claim to this land.
  9. Benedette Juliet Achieng was PW4. In her statement dated 16/5/2018, PW4 said the 1<sup>st</sup> plaintiff is her elder sister. That the suit parcel was registered in PW1's name to hold in trust for their family. She also gave the evidence similar to that of PW1, 2, & 3 that PW3 lived with PW1 from the 1970's while she



- (PW4) entered the land in 2007. That she has put a home on the 2½ acre portion and is carrying on farming activities. It is her case that they are entitled to half share of the land.
10. During cross-examination PW4 confirmed that she was aware the 1<sup>st</sup> plaintiff transferred the land to the defendant. She was not aware if the 1<sup>st</sup> plaintiff signed all the necessary documents. She learnt the defendant was given the land when he came to settle there. She finished school in 1983 in Nairobi and the land was not registered in her name because she was away in Nairobi. In re-examination, PW4 said it was unfair to have the whole land transferred to the defendant since she was entitled to a share.
  11. The defence opened his case on 24/2/2022 by calling two witnesses. DW1 stated that the suit parcel belonged to his cousin, the 1<sup>st</sup> plaintiff. That in the year 2002, PW2 visited him in Nairobi and informed him about the 1<sup>st</sup> plaintiff's intention of gifting him the land. He told Mathias (PW2) to wait until he had returned home. When he came home, PW1 confirmed her intention of gifting him the land and in return, he gave her a token of appreciation of Kshs 200,000. The dispute started when the 1<sup>st</sup> plaintiff said he had not gifted the whole land. The matter was referred to the District Commissioner who then referred them back to the chief. Before the chief, it was agreed that the suit parcel was properly given to him. The defendant denies the claim by the plaintiffs that he was holding the land in trust for anyone. DW1 added that he took possession of the parcel and allowed the 3<sup>rd</sup> plaintiff to stay on the land briefly as she sorts her life.
  12. In cross-examination, DW1 said he lived in Murumba before he came to the suit land. That he did not buy the suit land but was invited on it. He has put a home on part of the land and the homestead is fenced. DW1 admitted that the fenced part is approximately half the plot. DW1 denied that the 2<sup>nd</sup> plaintiff is also living on the land. The appreciation agreement was made in 2011 and it was not money for purchasing the land.
  13. DW2 Martin Omondi Wamalwa Abuya stated that he is the son to the defendant. He stated that the 1<sup>st</sup> plaintiff and PW2 regularly visited their father in Outering estate in Nairobi in the 1990s. That during these visits, they informed the defendant of the 1<sup>st</sup> plaintiff's intention to relocate from the suit parcel to join her husband in Dahire Village. They sat as a family and accepted the gift from the 1<sup>st</sup> plaintiff.
  14. That between 2002 – 2005 they sourced for money to build their home on the suit land and actualized the building in the year 2005. DW2 continued that when his aunty (PW4) had problems, the family requested his father (DW1) to give her a section on the suit land to build on which request he complied with. That since 2005 until the dispute started in 2015 there was never mention of his father holding the land in trust for anyone. It is only in 2015 that the 1<sup>st</sup> plaintiff raised the matter of the sub-division and said she will be proceeding to court to pursue the matter.
  15. In cross-examination, DW2 admitted their land in Murumba was small which is why the 1<sup>st</sup> plaintiff invited the defendant to the suit land. According to DW2, the entire land is fenced. That the relatives have been cultivating a small portion outside their fence. The complaint was that the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs have a house outside their fenced compound. DW2's evidence brought to a close the hearing.
  16. The advocates agreed to file written submissions with the defendant's filed on 6/4/2022 and the plaintiffs on 5/4/2022. The plaintiffs submissions contains phrases lifted from the evidences of their witnesses. They added that the evidence presented show they are close relatives and the only point of divergence was whether the defendant was given half or the entire suit land. They urged the court to believe the evidence availed by the plaintiffs and find in their favour. The plaintiffs supported their submissions with the decision in *Isaac Minanga Kiebia Vs Isaya Theuri & Ano* (2018) eKLR. The plaintiffs also distinguished the Case of *Esther Nduati Njiru & Ano Vs Leonard Gatei* (2014) eKLR stating that in the case cited, title was challenged which is not applicable in instant case.



17. The plaintiffs submit that the circumstances under which the plaintiffs hold possession of, and are in actual occupation of the suit land easily puts the defendant as a person holding the land as trustee for the plaintiffs under customary law. They made reference to the provisions of section 28(b) of the [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 -

(b) trusts including customary trusts;”

18. The defendant submitted that the burden of proving the trust was the responsibility of the plaintiffs. That the 1<sup>st</sup> plaintiff who was a teacher transferred the suit land to him freely and willingly. That the property was not family land and the transfer was between consenting parties. The defendant stated that the nature of the trust has not been established by the plaintiffs thus the prayers sought cannot be granted. He urged the court to dismiss the suit.

19. From the pleadings, the evidence and the submissions, I frame one question;

Whether there was a trust created and established between the plaintiffs and the defendant.

It is not in dispute that the parties herein are related. The 1<sup>st</sup> & 3<sup>rd</sup> plaintiffs father is the brother to the defendant’s father making them first cousins. The 2<sup>nd</sup> plaintiff is son to PW2 who is also a cousin to the 1<sup>st</sup> & 3<sup>rd</sup> plaintiffs and the defendant. It is not in dispute that the 1<sup>st</sup> plaintiff was the first registered owner of the suit. The 1<sup>st</sup> plaintiff stated that she was given a portion of the family land by her father Alexander Kalande Wamalwa – deceased. It is also not in dispute that the land was lawful transferred to the defendant by the 1<sup>st</sup> plaintiff.

20. The dispute arose when the 1<sup>st</sup> plaintiff stated that the registration of the defendant was in trust for the benefit of himself and the family. From the evidence provided, the transaction between the 1<sup>st</sup> plaintiff and the defendant started with an approach made PW2. The defendant stated that PW2 visited him in Nairobi in the year 2002 and expressed the intention to gift him the land. DW2 confirmed that the 1<sup>st</sup> plaintiff and PW2 visited them in their house in Nairobi severally in the 1990s stating the intention to gift DW1 the suit land. At page 2 of his statement, DW2 said thus; “the 1<sup>st</sup> plaintiff and her husband had initially intended to sell the land at Kshs 200,000. However, they were impressed upon by the Kalande Family to instead give it as a gift to my father the defendant Peter Okumu Abuya. We therefore approached the 1<sup>st</sup> plaintiff Wilhemina Kalande Raballa and informed her of our decision to reciprocate her initial kind gesture of giving us the land. She informed us that she would have to consult her husband Mr. Raballa. They were both in agreement to our gesture and we remitted the entire Kshs 200,000 to them in instalments. It was in one of these meetings that the matter of sub-division of the land first surfaced in 2012 when 1<sup>st</sup> Plaintiff Wilhemina Kalande Raballa’s husband enquired about the rumours he had heard about a plan to sub-divide the land. The 1<sup>st</sup> plaintiff Wilhemina Kalande Raballa informed us that there was discussions about whether/when 3<sup>rd</sup> plaintiff Bernadette Juliet Achieng was moving out to join her husband at her marital home and also witness Mathias Obande Kalande had expressed a desire to have the land allocated to his second wife Harriet as she was being disturbed at her marital home by witness Mathias Obande Kalande’s children. The matter was not discussed exhaustively as in the first case, my father the defendant Peter Okumu Abuya and I said that we were happy to accommodate the 3<sup>rd</sup> plaintiff Bernadette Juliet Achieng until she was ready to move out whilst in the second case the 1<sup>st</sup> plaintiff Wilhemina Kalande Raballa appeared to be uncomfortable with witness Mathias Obande Kalande’s desire of allocating land to his wife. It was



- agreed that defendant Peter Okumu Abuya's should continue enjoying ownership of the land and any changes would be discussed and settled as and when they arose. There was no mention then of an agreement my father the defendant Peter Okumu Abuya had made to hold the land in trust.”
21. In his submission, the defendant stated the suit land was not ancestral. Yet he did not give evidence to contradict the plaintiffs that the land was given to the 1<sup>st</sup> plaintiff by her father. Secondly, the defendant said there was no family decision to transfer the land to him. Yet his own evidence and that of his witness confirm that PW2 went to him to Nairobi to express the intention to gift him the suit land. PW2 was not the owner of the land so that makes the decision to transfer not one solely undertaken by the 1<sup>st</sup> plaintiff. When he moved onto the land to build, DW2 says they were welcomed by the Kalande and Abuya family.
  22. The next issue is whether the intention expressed was to transfer the entire parcel or otherwise. According to the plaintiffs, only half of the land was gifted which averment the defendant refutes. From the evidence adduced, part of the land where the homestead of the defendant is was fenced off. PW2 stated the defendant engaged him to fence it off and its approximately half of the entire land. DW2 stated that after the meeting before the senior chief, “they asked their workers/farm hands to move to the fallow/unutilized piece of the land towards the hill to clear the same, remove weeds and prepare it for plaintiff. While the workers were up there, PW2 stopped them saying they were encroaching on his land.”
  23. The defendant stated that he did not fence the whole land because the 1<sup>st</sup> plaintiff was still living on the remainder part. When the agreement to transfer the land to the defendant was reached, it was not reduced into writing. The defendant was registered as the owner on 28/2/2002 while the appreciation agreement was made on 3<sup>rd</sup> June 2011. Therefore the terms of that arrangement can only be deduced from the intention of the parties presented orally and not on the basis of the contents of the agreement reached some 8 years later on 3/6/2011 when the defendant had also settled on the suit land. The agreement was made in appreciation and can only be taken if corroborated by other independent evidence.
  24. In my view, I find that the evidence presented by the defenant was contradictive so it could not corroborate the size of land contained in the agreement of 3/6/2011. He was invited to put a home on the land which he did and went ahead to fence it. The fenced portion is said to be approximately half of the entire land. In cross-examination, DW1 said he did not know the 3<sup>rd</sup> plaintiff was also given a portion of this land. In his statement in chief, he said he had no problem with the 3<sup>rd</sup> plaintiff living on the portion of suit land outside his fence. Although DW2 tried to state that it was his father (DW1) who gave the 3<sup>rd</sup> plaintiff permission to settle on this land, it appears to be an afterthought since DW1 was better placed to explain this but which he never did.
  25. In a claim for trust, the validity of the title is never in question. I agree with the finding of J G Kemei Judge in the case of *Alice Wairimu Macharia* supra which quoted the SCOK decision of Isaack M'inanga (supra) that the intention to create a trust must be established. In this instance, I find the intention expressed from the evidence of all the plaintiffs' witnesses i.e. the fact that the defendant only fenced off half of the land, and that all this time the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs used the remainder portion. PW1 who was the donor of the gift expressed as much that she only gave the defendant a portion of the land. The other issues of family relationship has already been discussed in the earlier part of this judgment.
  26. Consequently, I am persuaded to find that the plaintiffs have proved that the defendant is holding the title for the suit land for himself and for the benefit of the 2<sup>nd</sup> & 3<sup>rd</sup> plaintiffs. Therefore judgement is entered in favour of the plaintiffs and I make an order that:



- i. The land Samia/Budongo/249 be shared in the manner occupied on the ground ie one equal part to the defendant and the other equal part to the plaintiffs.
- ii. Noting however that in the event the area already fenced is more than half, the same shall be retained by the defendant. If the fenced part is less than half, the defendant's portion be increased to reach the 2½ portion of the land.
- iii. The plaintiffs shall meet the cost of sub-division and transfer to get title for their portion of the land in their name.
- iv. The defendant to execute the requisite documents to facilitate the sub-division and transfer process. In default of the defendant complying, the Deputy Registrar is authorised to execute their documents.
- v. Each party to meet their costs of the suit.

**DATED, SIGNED AND DELIVERED AT BUSIA THIS 21<sup>ST</sup> DAY OF SEPT. 2022.**

**A. OMOLLO**

**JUDGE**

