



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT KISUMU**

**Misc . Appli . 195 of 2006**

**LIVINGSTONE O. NAKUTI ..... APPLICANT**

**VERSUS-**

**NEWTON O. OTTICHILO ..... DEFENDANT**

**R U L I N G**

**Coram:**

J. Mwera Judge

Applicant in person present

Ayodo for the defendant

CC. Raymond.

The summons under review was filed by Livingstone Omongo Nakuti seeking to revoke and annul the temporary grant which was issued to the respondent Newton Cheya Ottichilo in respect of the estate of the deceased Nakuti Ambwa by the Senior Resident Magistrate Maseno on 5/9/2006.

This followed the petition the respondent (Newton) filed in that court describing himself as the step-son of the deceased Nakuti whose estate included a parcel of land NO. WEST BUNYORE/ITUMBU/786. Newton was about to succeed that parcel of land when the applicant/objector (Livingstone) got wind of it and filed this summons on 25.10.2006. In the application and as he said it in evidence, he Livingstone, is the biological son of the deceased Nakuti and thus he with his other brothers (Muteywa, Indayi, Omindo) have the right to obtain a grant to administer their late father's estate and not the respondent, Newton – their cousin.

Livingstone, the objector (PW1) told the court that he was born in 1944, the son of Nakuti Ambwa, while Newton's father was Otichilo Ambwa, Nakuti's younger brother. That during adjudication, consolidation and registration in early 1960's, the Otichilo family was the owner of Plot NO. W/BUNYORE/ITUMBU/110. The proprietorship section of the title extract (Exh. D2) showed that on 30.6.64 Onjiko Otichilo was the owner of that plot. Onjiko was Newton's mother. On 30.11.84 it passed to Newton and he got a title on 16.7.86. According to PW1, Newton sold this land on 4.8.2002 and a

certificate of official search showed the new proprietor as Bramwel Philip Apwoka. Newton denied that he sold that shamba.

The search certificate on record showed that Plot 786 was registered in the name of Nakuti Ambwa (the deceased). And PW1 said that he lives on plot 16 while his brother Omindo who ought to succeed plot 786 also lives with him there. The court heard that the area, now plot 786, initially was tilled by the grandmother of the litigants called Andeso. When she died it was given to Newton's mother to cultivate. Then after due processes including consolidation some 2 plots at the river side, produced plot no. 110 and Newton's mother was registered over plot 110 for her own and the benefit of her sons, including Newton. After more or less a similar exercise the deceased was registered over plot 786 but Newton, as a relative, has been cultivating it all along. He did not build a house there. Then he had moved to succeed that parcel of land, a thing that prompted Livingstone to lodge a caution against the title (Exh. P1). The court heard that:

**“ Otichilo did not have land of his own. He lived on our elder uncle's land. He was buried there,”**

and that that was long before registration took place.

It was heard that Livingstone's father had his mother only for a wife. Then when he “inherited” Newton's mother as per the customs, he sired two sons – Amukowa and Nyoka with her. Therefore Newton had no right to petition to succeed plot 786.

On his part Newton (DW1) told the court that he was born in 1946 to Otichilo Ambwa.

**“Initially we were living on the land of my elder uncle – not plot 786.”**

That he petitioned as he did because their grandmother used to till the land now comprising plot 786, and he himself cultivates it to date. But that at registration time Livingstone's father got registered over this plot and did not instead put forth Newton's father's name. Well. He was since dead. Probably to have the name of Newton's mother, Onjiko, on the register. She was still alive because PW1 said that when she was ailing in 1984, she passed her plot 110 to Newton with his brothers. The witness said that he was not concerned with that plot 110. His concern shifted to plot 111 (not subject here). DW1 claimed that during registration he was still small and his mother was illiterate. So he told the court that registering her over plot 110 was a fraud by some villagers. The court was not told and or for what reasons. And that culturally Nakuti could not inherit Onjiko as well as take the land of her late husband (Otichilo). On 18/7/98 clansmen met and found that the respondent should go to court and get land no. 786 back from the name of Nakuti who died in 1968 or 1966 (dates vary or seem to have been altered – See P & A forms 38, 80, 5, 12). There was nonetheless death certificate of 13.12.1968 despite the fact that on 14.7.2006 the District Civil Registrar reported that if Nakuti died in 1966, registration of deaths had not yet become compulsory. Now one wonders why Newton raised the complaint in 1998 and only petitioned in 2006. In cross – examination Newton told the court that it was in the 1980's when he discovered that plot no. 110 was in his name. It was a mistake and a fraud made by villagers. Plot 110 was never theirs. So a Kakamega case changed that and gave this plot to its owner, one Opati. In re – examination DW1 told the court that while his mother always lived on plot 110, the respondent was on plot 111. This bit of where she died and was buried was not very clear. Anyway Newton had the right to be, and a tribunal gave him part of Plot 111 in KAK. MISC. APPLIC. 62/97.

Omindo or Omido Nakuti (DW2), Livingstone's elder brother, testified that Newton lived on one of his father's shamba's while he tilled the other – no. 786. The Otichillo's were cultivating this plot long before the registration of titles. When Newton's father died, he left it to his mother, Onjiko. When registration came, their father Nakuti made a mistake by getting registered over plot 786. The mistake was not meant to disinherit Newton. When DW2 discovered the mistake he took the case to the elders and Livingstone did not attend the baraza because he, DW2, was trying to get from him part of plot 16 which their father left for them. The applicant got it all in his own name. DW2 has a pending case in Kakamega about this plot 16. To him plot 786 was never theirs.

In cross – examination DW2 said that he was in and out of the village as he was employed in Nairobi. This was during the period up to 1964 when land adjudication and registration took place. He knew nothing about plot no. 110 or that it was once in the name of Newton.

In his last remarks Livingstone maintained that Newton owned plot 110 while plot 786 was registered in his father’s name. He should not inherit it. This was in response to Mr. Ayodo, for the respondent, who submitted that plot no. 786 was registered in the name of the deceased in trust for Newton. It was Newton’s father’s land and this court should so find.

The law of trusts is an interesting one. But it cannot be assumed. Many principles have been formulated over history on how to go about it. These include rules of proof. Here there must be proof that there existed a customary trust over plot no. 786 registered in the name of deceased for the benefit of Newton. From the evidence given here, was such a trust established? Was it in question? A copy of title for no. 786 was not produced here. But even if it had been, a customary trust could not be endorsed on it. So we are left with the evidence. The respondent must show that the land comprising plot 786 was owned and cultivated by his father Otichilo with his mother Onjiko before Nakuti got registered over it after Otichilo died. Or by other evidence Newton has to show interest and right over this shamba by the Otichilo family. Livingstone did not hesitate to admit that Newton has been cultivating this land. But he seemed to say that he was allowed to do as a family member. However, when he moved to own it, that had to be stopped.

In Newton’s evidence he said:

**“Initially we were living on the land of my eldest uncle – not plot 786.**

**I petitioned to succeed plot no. 786 because my grandmother was tilling it.”**

He does not say that his father lived on the land now comprising plot 786 or even cultivated it. It’s their grandmother who used to cultivate it.

And Livingstone said:

**“The plot belonged to out grandmother, Andeso. When she died the mother of Newton was given the plot.”**

It is not said when this took place whether before or after Otichilo died. For how long did Onjiko till this land until she got registered over plot no. 110 after adjudication? And why did she take plot 110 and stake no claim on plot 786 if indeed it was Oticho’s shamba? She lived, died and was buried on plot 110 (or 111). Where did no. 110 come from? To answer this question, this court after hearing both sides decided that after adjudication and consolidation of plots plot no. 110 was registered in the name of Onjiko Otichilo after 2 plots were put together. When she died it was transferred to Newton. The documents before court show that. And after the same exercise plot no. 786 was registered in the name of Nakuti, the deceased, as his property. It has not been shown that despite cultivating it, the area comprising plot no. 786 was ever used/owned by Otichilo Ambwa when he was alive. Or that Newton’s mother had a claim over it as belonging to her late husband. Then she was registered over plot 110 in 1964 and Nakuti got plot 786. She did not complain. Does that mean that she was satisfied that that was not her late husband’s right which should pass to her son, Newton?

Then the land passed to Newton in 1984, he took a title with his identity card on 16/7/1986. He then terms the registration of plot 786 in the name of Nakuti, a mistake, a fraud perpetuated by villagers and adjudication officers. Is that so?

In answering this question the court noted that Newton was the registered owner of plot 110 by way of transfer, in 1984. His mother Onjiko was the first registered owner since 30.6.64. As stated earlier, Newton maintained that it was an error or fraud to have in the first place registered plot 110 in his mother’s name. It was not their land. It belonged to some other villager. However Newton was unable

to clearly and satisfactorily explain to the court what he did after discovering the error yet he had the title. Livingstone had told the court that in fact Newton sold this land to one Bramwel Philip Apwoka on 8.4.2002. (See entry 4 Exh. D1). But Newton denied that. He did not however tell the court how the title passed from him to Apwoka. Was it by gift, surrender or what? Newton told the court that instead, a Kakamega case gave the land to one Opati. No such case was placed before this court. With that, the court was left with the impression that Newton sold land no. 110. The property section thereof has entry no. 3, the land certificate issuing to him (Exh D2), while entry no. 4 the proprietor is Bramwel Philip Apwoka. Nowhere does Opati or other person appear.

Some proceedings were placed before this court e.g. the proceedings of the Luanda Land Disputes Tribunal (Exh. D3) dated 14.11.1994. Newton Otichilo, the respondent was the defendant in the case filed by one Opati Kutwa involving a certain plot no. 111. The two were said to be living on that land even as plot no. 110 was in the name of Newton. The tribunal heard that the original owner of that plot was one Micah Sibbo. Plot no. 786 was not in issue. The tribunal however ruled that both Opati and Newton:

**“---- rightfully own Plot 111 ----“**

Newton may have brought forth these proceedings to support his claim that he had no concern with plot 110. But the land office records show otherwise. Anyway, the decision was irrelevant to the present cause involving plot. 786.

In order for Newton to make any sensible moves against Plot 786 relying on a customary trust between him and the deceased Nakuti, it could have been by way of a suit if the registered proprietor were alive. In this court's view a customary trust runs with the land no matter who is registered over it as at the time of the suit unless of course if that land has been transferred to a purchaser for value without notice. Here plot no. 786 was in the name of Nakuti Ambwa on first registration. As per S. 28, Registered Land Act, that registration stands subject to some conditions there:

**“Provided that nothing in this section shall be taken to relieve the proprietor from any duty or obligation to which he is subject as a trustee.”**

In the context of the above, this court is inclined to the position by Mr. Ayodo that a customary trust is created e.g. where a man inherits his brother's wife and property, he is deemed to hold on trust the property for the family of the deceased brother. For indeed it is that protection that is central in inheriting. Now if Newton is of the view that such a customary trust was there between him and the deceased Nakuti, the course to follow is to sue the estate of Nakuti or seek to prove the trust against the administrators of the estate of Nakuti, that in fact land no. 786 was held by Nakuti for his benefit. This court does not see how Newton could directly seek to inherit the estate of Nakuti without laying the basis first. The estate of Nakuti should be administered by his sons including Livingstone and that estate includes plot 786. It is in his name. The elders can only give evidence in a court of law on Newton's behalf to prove that there was a customary trust, and by it he is entitled to the estate of Nakuti. There was no reason why all on his own he chose to petition for letters of grant here without seeking the consent of all seven sons or so of Nakuti including Livingstone. He claimed that he sought and got consent of Indai Nakuti, the brother of the objector. There was no such consent filed and in any case there are about six or so sons of Nakuti.

All in all Newton did not take the right course when he petitioned to obtain a grant to administer the estate of Nakuti without knowledge and consent of Nakuti's sons. They have not stopped him from using the land. He should leave them to agree on how to petition to administer Nakuti's estate and there he may move the court by proof that he is entitled to that estate as a beneficiary under a customary trust. Mr. Ayodo asked this court to find so but that was not the purpose of these proceedings. And in any event evidence was not led here on that basis.

In the result that the grant issued to Newton is revoked. Costs to the applicant.

Orders accordingly. Delivered on 5/6/2008.

**J. W. MWERA**

**JUDGE**

*JWM/hao*