



REPUBLIC OF KENYA



**Muindi v Omoit & 4 others (Environment & Land Case 39 of 2018)
[2022] KEELC 15099 (KLR) (23 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 15099 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 39 OF 2018
AA OMOLLO, J
NOVEMBER 23, 2022**

BETWEEN

ALFRED ODEMBO MUINDI PLAINTIFF

AND

PETER AKEBA OMOIT 1ST DEFENDANT

SIMON OSABALO OKOLEIT 2ND DEFENDANT

SYLVESTER OBIRIKO OLOKA 3RD DEFENDANT

AUGUSTINE OPEDA OMOIT 4TH DEFENDANT

SEBASTIAN OKOLEIT OMOIT 5TH DEFENDANT

JUDGMENT

1. Vide a Complaint dated 10th May, 2018, the Plaintiff impleaded the Defendants in this suit and prayed for judgement against them for:
 - a. An order of eviction of the Defendants from LR No. Teso South/Chakol/412;
 - b. Costs of the suit;
 - c. Any other relief this Honourable Court may deem fit to grant.
2. The Plaintiff pleaded that he is the registered proprietor of all that parcel of land known as LR No. Teso South/Chakol/412 measuring 4.8Ha. That prior to his father, Marselious Muindi Oduyo's demise, he was the registered proprietor of the said land. That the Plaintiff as the first born son and next of kin, acquired the subject land from his father through succession after he was granted letters of administration and subsequently a certificate of confirmation of grant vide Succession Cause No. 24 of 1999. The Plaintiff pleaded further that the Defendants have without any justification entered onto the said land and are putting the same into their own use with the ambition of occupying the suit land



and constructing a residential house in the suit property without the Plaintiff's consent thus causing him to suffer loss and damages. That despite his efforts to have the Defendants removed from the land by the District Land Registrar and the District Land Surveyor, they have declined to do the same hence the present suit.

3. The Defendants filed their Statement of Defence and Counterclaim on the 1st of October, 2019 and later amended on the 4th of March, 2022. They denied the allegations contained in the plaint that they had encroached the suit parcel and stated that they were born and raised on the suit parcel. They pleaded that they have continued to exclusively occupy, possess and use the land as their ancestral land. That if the Plaintiff registered himself as the proprietor of the said land, he holds the title in trust for the Defendants under customary and constructive trusts and by virtue of prescription rights flowing from adverse possession by the Defendants that ran from the year 1971 to date.
4. In the counterclaim the defendants pleaded that they are the grandsons of Simon Omoit (deceased) of Alaboroi and Amagoro villages of Obuchun sub-location in which area the deceased was born, raised, died and buried. Whereas the Plaintiff is the son of Marselus Muindi Oduyo who hailed from Ugunja area of Siaya County as his place of ancestry. That from the onset of the adjudication process, the Plaintiff's father was expected to go back to his Luo place of birth and claim land there while their father, Simon Omoit remained at his place of birth within the locality of the Teso people where he got a share of his ancestral land passed on to him by his father Okonyo-deceased. That the adjudication process was carried out and their father was allotted parcel number South Teso/Chakol/412 on which he lived on with his family until his demise and thereafter the Defendants continued occupying and sharing portions of the land with the common knowledge that they formed part of the Defendants' ancestral land.
5. The Defendants further pleaded that the Plaintiff's father entered the land as a tenant and disappeared in the year 1968 after Simon Omoit demanded rent. The Defendants aver that in the event that the Plaintiff and his father held title to the land, they did so in trust for the Defendants. They listed the particulars of trust in paragraph 15(a) to (h) of the Counterclaim. The Defendants' prayed for judgement against the Plaintiff as follows:
 - a. A declaration that the Plaintiff and his father Marcelus Muindi Oduyo held and continue to hold title number LR No. Teso South/Chakol/412 in trust for the Defendants;
 - b. An order directing the County Land Registrar to rectify the register of land parcel number LR No. Teso South/Chakol/412 by striking out the name of Marcelus Muindi Oduyo and inserting the name of Simon Omoit (deceased) in its place as the Registered owner;
 - c. An order directing the County Land Registrar to strike out entries no. 2 to 6 as entered on the register of land parcel no. LR No. Teso South/Chakol/412.
 - d. Dismissal of the Plaintiff's suit with costs and allow their counterclaim.
6. The hearing commenced on the 22nd of September, 2021 with the Plaintiff testifying as PW1 and adopted his witness statement filed on the 11th of May, 2018 together with his documents now produced as PEx1 to PEx9. PW1 stated that he was the registered owner of LR No. Teso South/Chakol/412 which belonged to his father, Marsellus Muindi Oduyo (deceased). That sometimes in the year 1995 the defendants invaded the suit land and his attempts to stop them from occupying the land failed. That he has severally attempted to resolve the dispute before District Officer in Amukura who later referred him to the District Land Registrar Busia.



7. The Plaintiff continued to state that on the 8th of April 1998, he visited the District Lands Office and lodged a formal complaint with the Registrar. That he was issued with a formal demand letter to the Respondents which he served upon the Respondents. That on the 19th of August, 1998, the District Land Registrar summoned all parties to meet him on the land during his site visit in order to determine the issue of boundaries. Pw1 concluded by stating that he is the absolute proprietor of the suit land.
8. Under cross-examination, PW1 stated that he was born on the suit land and has lived thereon since his birth and only moved out after there was interference and bought a plot in Ugunja in the year 2004. He confirmed that he was born in Chakol and that the Defendants destroyed their house on the suit land. He confirmed that both his parents were dead, his father having died in 1985 and buried in Rambula while his mother died in 2020 and was buried in his parcel in Ugunja. The Plaintiff admits that the letters produced referred to the boundary dispute because the Defendants had destroyed the boundaries. In re-examination, PW1 stated that the law allowed anyone to own land anywhere in Kenya. He confirmed that his father was the first registered owner of the land, a fact that the Defendants were aware of and made no steps to sue them for the land.
9. Caroline Adhiambo giving evidence as PW2 adopted her witness statement dated 11th May, 2018 as her evidence in chief. She stated that the Plaintiff was her brother-in-law and the registered owner of the suit land having inherited the same from his deceased father. She stated further that the Plaintiff was born and brought up on the suit land. That there was no dispute during the lifetime of the Plaintiff's father until 1995 when the Defendants encroached on to the land. That there has been an ownership dispute between the Plaintiff and his uncles, their children and their grandchildren.
10. During cross-examination, PW2 stated that she was the wife to William Nalo Muindi (deceased). That Nalo Muindi-deceased had informed her that he was born in Teso in the year, 1961. She admitted that she has not built a home on the suit land and that she visited the suit land last in 1996. This marked the close of the Plaintiff's case.
11. The Defence case commenced on the 10th of March, 2022 with the 5th Defendant, Sebastian Okolet Eموit testifying as DW1. He adopted his witness statement filed on the 25th of September, 2020 as his evidence in chief and produced the documents on their list as their exhibits in the case. Dw1 stated that his father Simon Oموit inherited the suit parcel from his grandfather Okonyo. That because his late father had two wives, he established two homesteads thereon for each of them. That when the first wife died their father brought all the children to live in the second wife's homestead and as such the first wife's home remained unoccupied. That Marcellus (the plaintiff's father) came to their home from Tororo Uganda looking for a house to stay in and his father rented to him the first wife's house.
12. DW1 continued in evidence that during adjudication the parcel wife their mother's house was became registered in Marcellus' name while the rest were registered in the names of Simon Oموit's children. That the only boundaries that existed on the ground were those of the five portions for Oموit's five sons as parcel number 412 never existed on the ground and they only came to learn of the existence of the parcel number in the year 2008. That a search later indicated that the land was in the Plaintiff's name. DW1 stated that the Plaintiff hailed from Ugunja, Siaya County, was never their relative and therefore did not deserve to get land that belonged to their father. He concluded that the portion covered by the suit parcel is part of their ancestral land and that together with his brothers and their children; they have been using the shares in a complete state running from the upper area to the lower part of the estate.
13. During cross-examination, DW1 stated that although the land they are occupying is registered in the Plaintiff's name the same belonged to their father. He stated that the Plaintiff has never attempted to evict them from the land and that despite his assertions that there were summons by the Land



- Registrar; they were never summoned to the Land Registrar's office. That although his name appears in the minutes, he was never in attendance in that meeting. That the Plaintiff never bought land in the area and that the Plaintiff's father was registered as owner of land during adjudication but in Wakimba. Under re-examination, DW1 stated that before 2008, there was no boundary separating their home and the disputed parcel. That he never received any summons to visit the Busia lands office.
14. Obiriko Peter testified as DW2 and stated that Sebastian, DW1 was his paternal uncle. He adopted DW1's evidence and documents as part of his evidence. During cross-examination, DW2 stated that he did not recognize that the Plaintiff holds a title for the suit land and that if someone steals your property, your report them to the authority. He confirmed that he did not have a title to the land where he lives.
 15. Joseph Esejeli Emerkwa was DW3 and he adopted his witness statement as his evidence in chief. He stated that he knew Simon Omoit because they were neighbours. Dw3 narrated that his father hailed from the Komolo clan of the Teso people. That Simon allowed Marcellus to stay in one of his compounds while he was working in Tororo, Uganda. That Marcellus however left in 1967 before adjudication which process was done and concluded in 1969. This witness was therefore surprised to learn that Marcellus got registered as the owner of Simon Omoit's land yet he had no right to get land in their village because he was not related to the Teso people and neither had he purchased land among them. That Marcellus never came back to claim the land. He concluded his testimony by stating that he did not know the Plaintiff and his claim to Simon's land is misplaced.
 16. During cross-examination, DW3 stated that he knew the father to the Plaintiff, Marcellus who lived on the suit land in 1966 for a year. He confirmed that he was present during adjudication and that some parcels were registered in the Defendants' name then but the suit land was not registered in Marcellus' name during adjudication. He concluded by stating that the Defendants are the ones in occupation of the suit land. On re-examination, DW3 stated that in 1966 when Marcellus stayed on the land, adjudication had not taken place and the home he lived in was Omoit's home. That Marcellus lived on the land as someone who rented a house from Omoit.
 17. Parties agreed to file and exchange submissions within 21 days each. The Plaintiff filed his submissions on the 7th of June, 2022 and submitted on the issues;
 - i. whether the Plaintiff has made out a case for the grant of the orders sought in the Plaintiff;
 - ii. whether the Defendant has made out a case for the grant of the orders sought in the counterclaim; and
 - iii. what orders should the court pronounce.
 18. On the first and second issues, the Plaintiff submitted that his father Marcellus Muindi Oduyo (deceased) was the first and registered proprietor of the suit land. That after his demise, the Defendants forcefully entered into the suit land, which occupation the Plaintiff opposed on numerous occasions and reported the same to various government offices where they were summoned to no avail. That the Plaintiff has proved that he has made out a case for the grant of the orders sought.
 19. He submitted further that while the Defendants imputed fraud, section 26(1) of the [Land Registration Act](#) protected his title and in the absence of any evidence of fraud by the Defendants, the Plaintiff's title is protected. That the Defendants have illegally and forcefully taken occupation of the Plaintiff's suit land. That the Defendants have not appealed the decision made by the Land Registrar Mr. R.O Sanya who informed them that they had no claim over the land. He urged the Court to enter judgement in his favour as prayed in the Plaintiff and dismiss the counter-claim.



20. The Defendants filed their submissions on the 5th of July, 2022. They submitted that the Plaintiff's suit as filed is statutorily barred under the Limitations of Actions Act due to the fact that the Defendants are and have been in actual possession of the suit land. That the Plaintiff's father, Marcellus was issued with the title deed to the suit land on the 14th of January, 1975 while they on the other hand were born on the suit land and have remained in occupation since they were born. That the Plaintiff took no action to recover the land until belatedly in the year, 2018 and neither did his father between 1975 and 1995 prior to his demise. That section 7 of the Limitations of Actions Act extinguished the ownership rights of the Plaintiff's father and consequently those of the Plaintiff's as well.
21. With regards to the issue of trust, the Defendants submitted that the registration of the Plaintiff's father and the Plaintiff as heir to estate cannot be the sole ground on which the Plaintiff should be affirmed as the owner. That the said registration can be impeached as the said registration was subject to fraud and faulty land adjudication records. That customary trust and overriding interests favored the Defendants as the suit land was the ancestral land for Simon Okoit's family. That customary trust is not subject to the limitation period until it has been declared by the Court. That the provisions of the Land Registration Act, No. 2 of 2012 did not therefore discharge the Plaintiff and his late father from acting as trustees for the defendant's rights of ownership of the suit land.
22. While submitting on their counterclaim, their grandfather the late Okonyo owned the block of land which he is passed on to his son upon his demise. That the block of land was adjudicated into South Teso/Chakol/409, 411, 412, 413 and 430 as shown by the area map being Chakol Sheet No. 6. That the suit parcel number South Teso/Chakol/412 was created by cutting across the upper side of land parcels Nos. 409, 413 and 430. It is their submission that the homestead for Nanjala, the 2nd wife to Simon Omoit was on the upper side of the ancestral block of land falling within the current parcel number 412 and that when she died, the Plaintiff's father rented her house from Simon Omoit. That the Plaintiff's father defaulted on rent and left the property in the year 1967 and never returned.
23. The Defendants urged this Court to allow their counterclaim for various reasons namely: that the land was their ancestral land and the Plaintiff had no claim on the same whereas the Defendants are the sons of the late Simon Omoit and the grandsons of the late Okonyo hence they are entitled to claim the land. That the Plaintiff is rightly sued in this case as his father's legal representative. The Defendants relied on the case of Esther Nyamweru Warubiu & another v George Kangethe Warubiu (2019)eKLR where the Court held thus:
- “...the above finding notwithstanding we also wish to add that in light of the case law assessed above, on effect of the statute of limitation on customary law trusts, even if such a period of limitation had been pleaded and considered by the judge as she did, the finding would not have survived on appeal for the reason that limitation does not run against a customary law trust claim, whether such a trust is noted on the register or not.”
24. Having considered the parties' pleadings, evidence and their submissions and the applicable law, the issues which in my opinion arise for determination are as follows:
- a. Whether the Plaintiff was registered as the Proprietor of the Land in trust for the Defendants;
 - b. In the alternative, whether the Defendants have acquired the suit land by prescription.
 - c. Whether an order of eviction should issue against the Defendants;
 - d. Who pays for the costs of this suit?



25. Before delving on the issue of whether an eviction order should issue, the court shall determine the question of whether a trust exists. The rights of a registered proprietor of land are clearly set out under sections 24, 25 and 26 of the [Land Registration Act](#), 2012. Section 24(a) provides:

“24. Subject to this Act

- (a) The registration of a person as proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

26. Section 25(1) provides that such a registered owner’s rights are indefeasible and are held free from all other interests and claims and that the rights can only be defeated in the manner provided under the Act. The rights of a registered owner are however subject to overriding interests declared by section 28 of the [Land Registration Act](#) as not requiring noting in the register.

27. Section 28 of the [Land Registration Act](#) provides that:

“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—

- (a)
- (b) trusts, including customary trusts;”

28. The Plaintiff pleaded that his father, Marcellus Muindi-deceased was the proprietor of the suit land which registration was done in the year, 1975. The Defendants in their counterclaim pleaded that the land was initially ancestral land and that Marcellus entry on to the land was a tenant and way before adjudication process started. That the deceased had no right to become owner of the suit land hence the Plaintiff had a duty to demonstrate how his father got registered as the proprietor of the land. The Defendants aver that they were born on the land and have lived thereon since their birth and have never been evicted from the said land. From the evidence submitted, the registration was done in the name of the Plaintiff’s father in 1975 and later a transfer registered in the Plaintiff’s name in the year 2013 by way of transmission.

29. The Court of Appeal in the case of [Twalib Hatayan Twalib Hatayan & Anor v Said Saggar Ahmed Al-Heidy & Others](#) [2015] eKLR, while dealing with the issue of trust stated as follows:

“A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. (see [Black’s Law Dictionary](#)) (Supra). It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see. [Halsbury’s Laws of England](#) supra at para1453). As earlier stated, with constructive trusts, proof of parties’ intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment...

A resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee ... This trust may arise either upon the unexpressed but presumed intention of the settlor or upon his informally expressed intention. (See [Snell’s Equity](#)



29th Edn, Sweet & Maxwell p.175). Therefore, unlike constructive trusts where unknown intentions maybe left unexplored, with resulting trusts, courts will readily look at the circumstances of the case and presume or infer the transferor's intention. Most importantly, the general rule here is that a resulting trust will automatically arise in favour of the person who advances the purchase money. Whether or not the property is registered in his name or that of another, is immaterial (see *Snell's Equity* at p.177) (supra)"

30. In the case of *Peter Ndungu Njenga v Sophia Watiri Ndungu* (2000) eKLR the Court stated that:

"The concept of trust is not new. In case of absolute necessity, but only in case of absolute necessity, the court may presume a trust. But such presumption is not to be arrived at easily. The courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust is implied."

31. All the defence witnesses testified that the suit land initially belonged to their grandfather and later on their father. They all stated that the Plaintiff's father was their father's tenant before land adjudication and they did not have any relationship with him (Marcellus-deceased) The Defendants stated that the Plaintiff's father was from Luo Nyanza where he ought to have acquired land through ancestry. The law does allow any Kenyan to acquire land from any part of the country, however such acquisition must have some foundation. The Plaintiff does not deny they are not related with the Defendants and he also failed to explain the basis upon which his father became the registered owner of the suit land.
32. The Defendants also stated that they have been living on the land from their birth to date without knowing that the suit land allegedly belonged to the Plaintiff or his father. According to the Plaintiff, the Defendants encroached on to the land from 1995 or rather started giving them problems in 1995-1996. PW2's evidence does not aid the Plaintiff's case because she reports on information as given to her by deceased husband. PW2 has never lived on this land and last visited it in 1996. Therefore, if the defendants invaded or encroached on to the suit land in 1995 or thereabouts, the plaintiff waited until the year 2018 to bring this suit seeking to evict the defendants from the land.
33. The invasion by the Defendants is confirmed by the Land Registrar's letter dated 8th April and 19th August 1998 and addressed to the Defendants. The Land Registrar was making reference to a complaint lodged in his office by the Plaintiff who stated the Defendants were tilling the Plaintiff's land without his authority. The Land Registrar heard the dispute between the parties on 5th November 1998 and during those proceedings, the 4th Defendant stated that the people tilling the land are all sons of Omoit. The Registrar found in favour of the Plaintiff because he had a title and it was alleged that the Plaintiff's father had bought the land. The effect of the documents produced by the Plaintiff in my view, is that they are in support of the Defendants' claim to the land by prescription.
34. After the Land Registrar found for the plaintiff in 1998, there is no evidence laid before this court that the Plaintiff took steps to get a court order to remove the Defendants from the land. Further, there is no evidence led on how the plaintiff disrupted the occupation and user of the land by the Defendants not to remain peaceful, and consistent. From 1998 to 2018 is a period of twenty years yet, under the *Limitation of Actions Act* section 7, an action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person
35. In the circumstance of the facts presented, the Plaintiff's suit is for the eviction of the Defendants from his land cannot succeed. This is because the Defendants have established that they are entitled to own



the land under the doctrine of resulting trusts and also under the defence of limitation of time. I am thus persuaded to find for the Defendants on their counter-claim.

36. Consequently, I enter judgement in favour of the Defendants as below:

- a. A declaration that the Plaintiff is holding title to land parcel number Teso/Chakol/412 in trust for the Defendants and the estate of Simon Omoit-deceased;
- b. The Defendants have also acquired the land by operation of the law having utilized and lived on the land for a period in excess of twelve (12) years.
- c. An order is issued directing the County Land Registrar, Busia to rectify the register of land parcel number Teso/Chakol/412 by striking out the Plaintiff's name and inserting Simon Omoit's name in its place; and
- d. An order of stay of execution of the judgement is granted to the Plaintiffs for a period of 30 days from 23rd November, 2022
- e. Each party to meet their costs of this suit.

DATED, SIGNED AND DELIVERED ONLINE AT NAIROBI THIS 23RD DAY OF NOVEMBER, 2022.

A. OMOLLO

JUDGE

Sent to advocates on record via email at busia this 23rd day of november, 2022

DEPUTY REGISTRAR, ELC

BUSIA

