



**Auko v Oyoo (Environment and Land Appeal E034 of 2021)  
[2023] KEELC 760 (KLR) (7 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 760 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MIGORI  
ENVIRONMENT AND LAND APPEAL E034 OF 2021  
MN KULLOW, J  
FEBRUARY 7, 2023**

**BETWEEN**

**MARICUS ONYANGO AUKO ..... APPELLANT**

**AND**

**JOHN ORWA OYOO ..... RESPONDENT**

**JUDGMENT**

1. This Appeal emanates from the Judgment and Decree of Hon RK Langat in Principal Magistrates Court at Rongo in SRM ELC Case No 63 of 2018, delivered on June 8, 2021. The grounds in the Memorandum of Appeal are that: -
  - i. The Learned Trial Magistrate failed to cumulatively and/or exhaustively evaluate the entire evidence on record and hence failed to capture the salient issues and/or features of the suit before him and thus arrived at an erroneous conclusion, contrary to and in contraction of the evidence adduced.
  - ii. The Learned Trial Magistrate erred in fact and law in finding that the Appellant failed to prove the averments contained in the Statement of Defence against the Respondent herein on a balance of probabilities thus dismissing the averments of the Appellant herein.
  - iii. The Learned Trial Magistrate erred in fact and law in finding and holding that the Respondent herein had proved that the same was the owner of land reference number North Sakwa/Kanyamgony/550, measuring approximately 1.6 Hectares or 4 Acres (hereinafter referred to as the suit property) contrary to the evidence adduced during trial. For clarity, the suit land is an ancestral land which was owned by the Appellant's late grandfather Okumu Opundo.
  - iv. The Learned Trial Magistrate erred in fact and law in finding that there was no evidence adduced by the Appellant in regards to the issue of trust in accordance with the Customary Law despite the suit land was registered in the name of the Respondent's late father Anthonius



Orwa Okumu who was the eldest brother to the Appellant's late father Aloice Auko Okumu. In short the Respondent's late father and the Appellant's late father were blood brothers and both were the sons of the late Okumu Opundo who is the grandfather of the Appellant herein.

- v. The Learned Trial Magistrate erred in fact and law in finding and holding that because the Respondent had adduced the title deed of land reference number North Sakwa/ Kanyamgony/550, measuring approximately 1.6 Hectares or 4 Acres, confirming the ownership of the same, the Appellant's averments against the Respondent could not stand. However, the Appellant has demonstrated that the suit land being an ancestral land was never succeeded in accordance with the *Law of Succession Act*, Cap 160 Laws of Kenya despite the suit land being in the name of the Respondent's late father Anthonius Orwa Okumu who died intestate in the year 1999.
  - vi. The Learned Trial Magistrate erred in law and fact in disregarding evidence adduced by the Appellant as concerns the land reference number North Sakwa/ Kanyamgony/81, measuring approximately 1.6 Hectares or 4 Acres. For clarity, the land reference number North Sakwa/ Kanyamgony/81, was equally in the custody of the Respondent's late father Anthonius Orwa Okumu and accordingly, the said parcel of land was also held in trust by the Respondent's late father by virtue of the fact that he was the eldest brother to the Appellant's late father and that both were the sons of the late Okumu Opundo who is the grandfather of the Appellant herein and was the previous legitimate owner of the said parcels of land. Thus, the Respondent's late father Anthonius Orwa Okumu mysteriously lost the said parcel of land to one Thomas Okelo vide the Land Adjudication Case No 1/75/76 in unclear circumstances to the Appellant's family.
  - vii. The Learned Trial Magistrate hence arrived at a slanted and erroneous judgment, based on the failure to appreciate and/or discern the claim by and/or at the instance of the Appellant which claim was pegged on the suit land held in trust by the Respondent's late father Anthonius Orwa Okumu to the Appellant's late father Aloice Auko Okumu owing that the suit land being an ancestral land and the same could not be inherited by the family of the Respondent only.
  - viii. The Learned Trial Magistrate misdirected himself by dismissing the Appellant's averments against the Respondent herein while the Appellant herein put a tough defence to counter the averments advanced by the Respondent.
  - ix. The Learned Trial Magistrate erred in law and facts in disregarding the formidable evidence tendered by the Appellant.
  - x. The Learned Trial Magistrate erred on all points of facts and law in so far as his decision on the case is concerned.
2. The Appellant therefore prays for: -
- a. The Appeal herein be allowed and Judgment and Decree of the Trial Magistrate dated June 8, 2021, vide RONGO SRMC ELC Case No 63 of 2018, in so far as it relates to the Respondent be set aside, reviewed, varied and/or quashed.
  - b. The Honourable Court be pleased to substitute therefore an Order allowing the Appellant's averments that the suit land in the Subordinate Court vide Rongo SRMC ELC Case No 63 of 2018 was an ancestral land and the same was held in trust by the Respondent's late father Anthonius Orwa Okumu to the Appellant's late father Aloice Auko Okumu since both were blood brothers and were the sons of the late Okumu Opundo who was the previous legitimate owner of the suit land and the grandfather of the Appellant herein.



- c. The Honourable Court be pleased to substitute therefore an Order indicating that the Appellant's averments were sound since land reference number North Sakwa/ Kanyamgony/ 550, measuring approximately 1.6hectares of 4 Acres, being the suit land in the subordinate court vide Rongo SRMC ELC Case No 63 of 2018 was never succeeded in accordance with the *Law of Succession Act*, Cap 160 Laws of Kenya.
  - d. Costs of this Appeal and costs incurred in the Subordinate Court be borne by the Respondent.
  - e. Such further and/or other orders be granted as this Honourable Court may deem fit and expedient.
3. A brief background to bring the Appeal herein into perspective; the Plaintiff's (now Respondent) claim against the Defendant (now the Appellant) was on trespass and he sought an Order of; Eviction against the Defendant from the suit parcel, Permanent Injunction restraining the Defendant from interfering with the Plaintiff's use of the suit parcel and costs of the suit.
  4. The Defendant filed a Statement of Defence dated November 27, 2018; wherein he denied all the allegations made against him in the Plaint. He further stated that the suit land was an ancestral land and he was therefore entitled to a portion/ share of the same by virtue of being the grandson of the late Okumu Opundo. That the suit land was originally owned by the said Okumu Opundo.
  5. He also stated that he had constructed a house on the suit land with the consent of the Plaintiff and thus urged the court to dismiss the plaintiff's suit with costs and further for the court to make an Order directing the Lands Registrar to cancel the title deed issued to the Plaintiff unlawfully and for the suit land to be subdivided amongst all the bonafide beneficiaries of the estate of Okumu Opundo.
  6. The matter proceeded for main hearing and subsequently judgment was delivered on the June 8, 2021, whose effect was to allow the Plaintiff's suit with costs and to issue an Order of permanent injunction and eviction against the Defendant hence the instant Appeal.
  7. The Appeal was canvassed by way of written submissions; both parties filed their rival written submissions which I have taken into account and summarized as hereunder;

### **Appellant's Submission**

8. He reiterated the grounds outlined in the Memorandum of Appeal. He maintained that the suit land is an ancestral land originally owned by his late grandfather Okumu Opundo and that the same was registered in the name of Anthonius Orwa Okumu as the eldest son to hold in trust for the Appellant's father; who was the youngest son of Okumu Opondo.
9. He further submitted that the suit land was never succeeded in accordance with the provisions of the *Law of Succession Act*, in order to enable him get his rightful share of the suit land which is an ancestral land. He therefore urged the court to allow the appeal and grant the orders as sought in the Memorandum of Appeal.

### **Respondent's Submission**

10. It was his submission that the learned magistrate did not error in law or fact in his judgment delivered on the June 8, 2021. He maintained that the copy of the title deed and certificate of official search produced as Pexh 1 & 2 were undisputed evidence of ownership.



11. It was further his submission that parties are bound by their pleadings and he relied on the case of *Independent Electoral and Boundaries Commission & Anor vs Stephen Mutinda Mule & 3 Others [2014] eKLR* to that effect. He thus urged the court to dismiss the Appeal with costs.
12. Having looked at the Memorandum of Appeal, the Record of Appeal and the rival submissions in totality; I find that the main issue for determination is whether this Court should interfere with the exercise of discretion by the trial court and set aside its Judgment dated and delivered on June 8, 2021.
13. The Court of Appeal in *Selle v Associated Motor Boat Co [1968] EA 123*) held as follows: -

' This court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard the witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or of the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.'
14. This court's jurisdiction as a first appellate court is to reappraise the evidence or issues which were before the trial court and make its own conclusion. The main issue for determination before the trial court was on the ownership of the suit parcel and whether or not the Defendant had encroached and/or trespassed onto the Plaintiff's suit land.
15. I will now proceed to re-evaluate and re-assess each of the party's claim from the trial court record and the resultant judgment in order to determine whether the trial magistrate rightly exercised his discretion in allowing the Plaintiffs' claim against the Defendant. I will proceed to discuss the same on account of: -
  - i. Customary Trust
  - ii. Ownership of the Suit Property
  - iii. Trespass
16. The Appellant herein has pegged his entire Appeal on the issue/concept of Customary Trust. It is his contention that the suit land in question is an ancestral land; having previously been owned and registered in the name of one Okumu Opundo who is his grandfather. He further maintained that the Plaintiff's late father Anthonius Orwa Okumu was the elder brother to his late father Aloice Okumu. He averred that before the death of their grandfather, the said Anthony Orwa was asked to hold the suit property in trust for his younger brother as per the customs and traditions. It is for that reason that the late Anthony Orwa became the registered owner of the suit land but in reality; the said land was to be held in trust and be subdivided and used by both families. He urged the court to make a declaration that the said land was held in trust for his late father and that he is equally entitled to a portion as a beneficiary of the late Okumu Opundo.
17. The Respondent on the other hand maintained that he is the rightful owner of the suit parcel, following a successful Succession process. He further stated that the Appellant's late father had his rightful share of land LR No North Sakwa/Kanyamgony/81, which was separate and distinct from the suit parcel herein. He denied the claims of customary trust and restated that parties are bound by their pleadings. He maintained that he produced the necessary ownership documents which proved that he was the registered owner of the suit land.



18. Section 28 of the *Land Registration Act* which 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—
- (b) Trusts including customary trusts.'
19. The Supreme Court while discussing the guiding principles of customary trust in the case of *Isack Kieba M'Inanga Vs Isaaya Theuri M'Lintari & Another, SCoK No 10 of 2015* held as follows;
- ' Each case had to be determined on its own merits and quality of evidence...Some of the elements that would qualify a claimant as a trustee were:
- (a) The land in question was before registration, family, clan or group land,
- (b) The claimant belonged to such family, clan, or group,
- (c) The relationship of the claimant to such family, clan or group was not so remote or tenuous as to make his/her claim idle or adventurous.
- (d) The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.
- (e) The claim was directed against the registered proprietor who was a member of the family, clan or group.'
20. I have critically looked at the pleadings of the Appellant from the trial court record and I do note that the issue of customary trust was never pleaded; either as a response to the averments in the Plaint or as a Counter- Claim. The Appellant in his statement of defence merely stated that the suit land is an ancestral land.
21. It is trite law that 'he who alleges must prove' and section 107 of the *Evidence Act* is clear on this regard. The Appellant did not provide any proof to support his averments of customary trust or that the subject land is a family, clan or group land. The Appellant merely stated that the suit land is an ancestral land and that the same was registered in the Respondent's late father's name as the eldest son in accordance to customs and traditions.
22. However, no evidence was adduced by the Appellant in the form of a Green Card; showing the history of the subject land or at all, this court is therefore unable to find that the subject land is indeed a family or clan land in the absence of proof or to make a declaration that the suit land was held in trust for the benefit of the Appellant and the beneficiaries of the estate of the late Aloice Okumu. Neither the Appellant nor his witness adduced any evidence during trial in support of his claims; no evidence was adduced to show that the Appellant belonged to the family or clan of the late Okumu Opundo, either in the form of a birth certificate or Chief's letter.
23. Therefore, in the absence of any proof/ evidence tendered by the Appellant in support of his claims; this court is unable to ascertain the correctness of such averments and thus cannot find that the suit land was held in trust by Anthony Orwa for the benefit of the late Aloice Okumu, the Appellant's late father. The issue of customary trust as claimed does not therefore arise.
24. The Respondent on the other hand produced a copy of the Title Deed of the suit land as Pexh 1 and a copy of Certificate of Official Search as Pexh 2 in support of his ownership claims. Section 26 of



the Land Registration Act provides that a certificate of Title shall be deemed as a prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner of the said land and the said title can only be challenged on grounds of fraud or misrepresentation. In the instant case, there was no proof adduced that the Respondent procured the said title deed by fraudulent means or misrepresentation in any manner. I therefore find and hold that the Respondent is the absolute proprietor/ owner of the suit land herein.

25. I will now proceed to the issue of trespass which was the basis of the Respondent's claim in the trial court. Section 3 (1) of the Trespass Act, Cap 294 provides that:

' Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.'

26. It is not in dispute that the Appellant has built and is in occupation of a portion of the suit land herein. What appears to be in dispute is whether such occupation is lawful or not. The Appellant on the one hand testified that he was given permission by the Respondent to settle on the suit land, a fact that was further confirmed by his witness DW2. On the other hand, he contends that the said occupation was as a result of being a beneficiary of the late Okumu Opundo and he was thus entitled to a share of the said estate. As result thereof, his occupation was lawful since he was on his share of the ancestral land. Having held that the issue of customary trust does not arise in the instant case, I will proceed to determine the initial averment by the Appellant's that his occupation was by permission.

27. The Respondent on the other hand maintained that the Appellant trespassed into the suit land while he was away in Nairobi and that he has never given the Appellant any permission to build/ settle on the suit land.

28. Regrettably, no evidence was adduced by the Appellant or his witness to prove his assertions that he was indeed granted permission to settle on the suit land by the Respondent. As pointed out above, the Appellant has failed to demonstrate that he was given consent by the Appellant to occupy the suit land and without proof I find that there is no reasonable excuse or justification to warrant the continued occupation of the suit parcel by the Appellant.

29. In view of the foregoing, I find that the Trial Court arrived at its judgment after a careful consideration of all the facts of the case, the evidence tendered in support of the rival claims and the applicable law in the subject. I find no reason to interfere with the same.

### **Conclusion**

30. In conclusion, I accordingly find that the Memorandum of Appeal dated June 23, 2021 is not merited and is hereby dismissed with costs to the Respondent. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 7<sup>TH</sup> DAY OF FEBRUARY, 2023.**

**MOHAMMED N. KULLOW**

**JUDGE**

**In presence of; -**

Appellant present in person

Nonappearance for the Respondents



