



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Okiru & 4 others v Ombangai (Civil Appeal E017 of 2021)
[2023] KEELC 17443 (KLR) (9 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17443 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
CIVIL APPEAL E017 OF 2021**

**BN OLAO, J
MAY 9, 2023**

BETWEEN

**BONIFACE OKIRU 1ST APPELLANT
ELISEYO BARASA PAPA 2ND APPELLANT
RODGERS OKIRU 3RD APPELLANT
GREGORY OMUSE 4TH APPELLANT
SAMMY INDEKE 5TH APPELLANT**

AND

MORRIS OJUMA OMBANGAI RESPONDENT

(Being an Appeal from the Judgment of Hon. L. Ambasi – Chief Magistrate delivered on 28th September 2021 in Busia Chief Magistrate’s Court ELC No. E006 of 2021)

JUDGMENT

1. Morris Ojuma Ombangai (the Respondent herein) filed at Busia Chief Magistrate ELC Case No E006 of 2021 seeking the main remedy that Boniface Okiru, Eliseyo Barasa Papa, Rodgers Okiru, Gregory Omuse and Sammy Indeke (the 1st to 5th Appellants respectively) were trespassers on his land parcel No Teso/Moding/103 (the suit land) and should be evicted therefrom.
2. By an amended defence and counter-claim, the Appellants pleaded that the suit land was registered in the name of the Respondent to hold in trust. They denied having forcefully entered the suit land adding that infact they had been in occupation thereof for over 50 years. They added that the 1st, 3rd, 4th and 5th Appellants have been in occupation of a portion of the suit land for over 20 years. That 8½ acres of the suit land is occupied by the 1st, 3rd, 4th and 5th Appellants while the 2nd Appellant occupies 4½ acres. That the said occupation has been peaceful and without interruption todate. The Appellants



therefore counter-claimed that the portions of land occupied by them be registered in their names since the Respondent only holds the title as a constructive trustee. They urged the Court to enter judgment as per their counter-claim and dismiss the Respondents suit.

3. The dispute was heard by Hon L. Ambasi Chief Magistrate who delivered a judgment on 28th September 2021 finding in favour of the Respondent and ordering the eviction of the Appellants from the suit land.
4. The judgment provoked this appeal in which the Appellants have raised the following grounds in seeking to have it set aside:
 1. The learned trial Magistrate erred in law and fact by not considering the evidence on record and therefore arriving at a wrong decision.
 2. The learned trial Magistrate erred in law and fact by misinterpreting the law on trust with the evidence on record.
 3. The learned trial Magistrate erred in law and fact by not considering the pleadings and the evidence of the parties on record thereby arriving at a wrong decision.
 4. The learned trial Magistrate erred in law and fact by giving a contradictory judgment.
 5. The learned trial Magistrate erred in law and fact by misinterpreting the provision of Section 7 of the Law of *Limitation of Actions Act* and the evidence on record.
 6. The learned trial Magistrate erred in law and fact by not considering the standard of proof in civil matters therefore arriving at a wrong decision.
5. The Appellants therefore sought an order allowing the appeal by setting aside the judgment of the trial Magistrate and allowing the Appellants counter-claim with costs.
6. The appeal has been canvassed by way of written submissions. These have been filed both by Mr Kweyu instructed by the firm E. O Kweyu & Company Advocates for the Appellants and by Mr Jumba instructed by the firm of Balongo & Company Advocates for the Respondent.
7. I have considered the record of appeal and the submissions by counsel.
8. This being a first appeal, this Court must re-consider and evaluate the evidence and draw my own conclusions though bearing in mind that I neither saw nor heard the witnesses testify. This Court must, however not be bound by the trial Court's finding of facts if it is clear that the Court failed to take into account particular circumstances. This Court has the jurisdiction to review the evidence in order to determine whether the conclusions made by the trial Court should stand. If there was no evidence to support a particular conclusion, this court will not hesitate to so decide - see *Selle & Another v Associated Motor Boat Co. Ltd & Others* 1968 E.A. 123 and also *Peters v Sunday Post Limited* 1958 E.A. 424.
9. The Respondent's case was premised on the pleading that he is the registered proprietor of the suit land on which the Appellants had unlawfully trespassed. He therefore sought their eviction therefrom. The Appellants on their part argued that the Respondent is a mere trustee holding the suit land in trust for them.
10. The grounds of appeal can be condensed as follows:
 1. Is the Respondent the registered proprietor of the suit land and therefore entitled to evict the Appellants?



2. Is the Respondent infact only a trustee holding the title to the suit land on his behalf and on behalf of the Appellants?
 3. Who bears the costs?
11. It is clear from the copy of the title deed to the suit land that it was first registered in the names of the Respondent on 5th February 1973. He subsequently obtained the title deed on 8th June 2016. As the registered proprietor of the suit land, the Respondent enjoys all the rights and privileges that go with that registration as provided under Section 24 of the *Land Registration Act* and which include the eviction of trespassers therefrom. However, as provided under Section 25(2) of the said *Act*:
- “Nothing in this Section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”
12. On the issue of the registration of the suit land in the name of the Respondent, the trial Magistrate was satisfied that as the registered proprietor, the Respondent was entitled to the order to evict the Appellants from the suit land. This is how she addressed that issue in paragraph 25 of the judgment:
- 25: “I have taken into consideration the Plaintiff’s submission and the evidence on record which on a balance of probability, prove the Plaintiff’s case, and the evidence on record, I hold and find the Plaintiff has proved his case on a balance of probability and judgment is hereby entered in his favour as prayed ...”
13. The trial Magistrate was not persuaded that the respondent’s claim was statute barred by the provisions of Section 7 of the *Limitation of Actions Act* stating that the Appellants only entered the suit land in 2019. As I have already stated above, if the Appellants were trespassers who only entered the suit land in 2019 with no valid justification, then they were liable to eviction therefrom as pleaded by the Respondent in whose favour the trial Magistrate found.
14. However, the Respondent’s counter-claim was to the effect that infact they had lived on the suit land for over 50 years peacefully and without interruption. Eliseyo Barasa Papa (the 2nd Appellant herein) was the only witness for the Appellants while the Respondent called as his witness Elimine Asukute Ojuma. In his testimony during the plenary hearing, the 2nd Appellant said:
- “I know PW1 is my biological brother. Our father was Obangai who had 2 parcels of land 103 and 76. I occupy the suit land with Sebastian Gregory and I since we were born. 76 is occupied by Plaintiff and Semeyo my brother.”
15. PW1 was the Respondent herein and when he was cross-examined by Mr Kweyu during the plenary hearing on 17th August 2021, he said:
- “I have lived on that land all my life since I was born in 1935 and title was issued in 1973. I got the land from my father. We were 5 sons one of whom was adopted i.e. D2 the step brother. My father did not have any other land. 103 is occupied by Sebastian and I. My father was the younger brother to Philip Ekirapa gave my brother his own land.”
16. Earlier on in his evidence in chief, the Respondent testified as follows:
- “I am Morris Ojuma Ombangai resident of Moding Busia. I know D1 my nephew. D2 is my step brother. D3 is my grandson as is D4 and D5. North Teso/Moding/103 is in my name.



The Defendants evicted me and destroyed my house, cut trees and destroyed everything and chased me away.”

17. The persons being referred to above as D1 to D5 are of course the Appellants herein. What is clear from the Respondent’s own testimony above is that the suit land was never his private property. It originally belonged to his father and was therefore family land and the Appellants are part of that family. He referred to the 1st Appellant as his nephew, the 2nd Appellant as his step-brother and the 3rd, 4th and 5th Appellants as his grandsons. This was corroborated by the 2nd Appellant who in his statement dated 10th February 2021 and which he adopted as his evidence during the trial, he said:

“I, Eliseyo Mogoria Bangai of Id No. 7522769 state that I am male adult of sound mind aged 71 years old. My father Peter Bangai had 7 children by names:

1. Ajuma Obangai
2. Gregogor Omuse Obangai
3. Morris Juma Obangai
4. Semeyo Indeke Obangai
5. Eliseyo Mogoria Bangai
6. Sebastian Omukaga Obangai
7. Monica Obangai

We were well born on parcel No. Teso/Moding/103 since time immemorial upto-date.

The Plaintiff and myself are the ones who are alive. The other deceased brothers died while in occupation of part of the suit land No. Teso/Moding/103 and have demarcations. The suit parcel belonged to our deceased father Peter Bangai who died in the year 1961 before first registration was done. At the time of death, we were left in occupation of the suit land. We have been staying on the land until when the Plaintiff brought this case. Our 1st brother Gregory Omuse Obangai now deceased was in occupation of 8½ acres with his children including the 1st Defendant and his grandchildren the 3rd, 4th and 5th Defendants. Morris Juma Obangai the Plaintiff was in occupation of 2½ acres which he sold and left for Uganda.”

18. Buoyed by those undisputed facts, the Appellants mounted a counter-claim to the suit land through a constructive trust and in paragraph 13 of their defence and counter-claim, they specifically pleaded that:

“The Defendants’ counter-claim is therefore for a transfer of 8½ to the 1st Defendant for and on behalf of the 3rd, 4th and 5th Defendants who are his children and 4½ acres to the 2nd Defendant as a result of the creation of a constructive trust.”

19. And in his submissions, the Appellant’s counsel specifically urged the trial Court to find in their favour on the basis of constructive trust and cited the well known case of *Twalib Hatayan & Another v Said Sagar Ahmed Al Heidy & 5 Others* 2015 eKLR.



20. The trial Magistrate made reference to the submissions by the Appellant’s counsel on the issue of trust and said in paragraph 20 of the impugned judgment that:

“As regards the alleged trust, I stand guided by the case cited by the Defendant and find that, as was held in that case, there was no trust as asked in that case, where is the evidence? How can they sue over something they know nothing about? Readily (sic) therefore the evidence is at variance with pleadings which carries with it fatal consequences.”

21. And after citing the case of *Twalib Hatayan & Another (supra)*, the trial Magistrate went on to state at paragraph 22 of the impugned judgment that:

“The cited case found that the Appellants were not privy to the trust agreement between the Respondents and the settlor. Similarly, in the instant suit, the evidence on record is that the late Gregory, father to the 2nd Defendant and grandfather to the 3rd to 5th Defendants, had his own land. This was not clan land held in trust by the Plaintiff to hold in trust but land he inherited in his own right. As rightly submitted by the Plaintiff, the Defendants failed to plead the particulars of the purported trust nor to give cogent evidence of the same.”

22. Clearly, the trial Magistrate erred both in law and in fact in failing to find in favour of the Appellants on the basis of a trust. To begin with, it was not correct for the trial Magistrate to have held, as she did, that the Appellants “failed to plead the particulars of the purported trust”. In paragraphs 9, 10, 11, 12 and 13 of their counter-claim, the Appellants pleaded as follows:

9: “The 2nd Defendant is the brother to the Plaintiff and 3rd, 4th and 5th Defendants are the sons to the 1st Defendant and paternal grandchildren to the Plaintiff.”

10: “The Defendants aver that though the suit parcel No North Teso/Moding/103 measuring approximately 6.0 Hectares is registered in the name of the Plaintiff, the Defendants have been in occupation of the said parcel for over 50 years.”

11: “The Defendants further aver that the 1st, 3rd, 4th, 5th Defendants have been in occupation of part of the suit land measuring approximately 8½ acres jointly and the 2nd Defendant 4½ acres for over 20 years peacefully and without any interruption upto date.”

12: “The Defendants further aver that the Plaintiff is holding the above mentioned portion in trust of the Defendants.”

13: “The Defendants’ counter-claim is therefore for a transfer of 8½ to the 1st Defendant for and on behalf of the 3rd, 4th and 5th Defendants who are his children and 4½ acres to the 2nd Defendants as a result of the creation of a constructive trust.”

23. It cannot therefore be true, as the trial Magistrate held, that the Appellants failed to plead the particulars of the purported trust. The foregoing paragraphs of their counter-claim leave no doubt that the Appellants hinged their claim on a constructive trust by virtue of being members of the same family with the respondent and having occupied the suit land for many years. There is also no doubt that the Respondent understood that the Appellants’ claim was premised on a trust. This is because, in paragraph 3 of his defence to the Counter-claim, the Respondents pleaded that:

3: “The Plaintiff does not hold L.R North Teso/Omondongi/103 (sic) on trust (sic) for any party.”



24. It was therefore clear from the pleadings, that the Appellants were laying their claim to the suit land on the basis of a trust and specifically a constructive trust and that the Respondent was well aware of that claim which he denied.
25. The trial Magistrate went on to add that the Appellants did not “give cogent evidence of the same.” Again, the trial Magistrate erred on the fact because as I have already demonstrated above, there was evidence from the Respondent himself and confirmed by the Appellants that the suit land originally belonged to one Ombangai who was his father and also the father to the 2nd Appellant. It was therefore not the Respondent’s private property to do as he wished with it including, as he sought from the Court, an order to evict the Appellants therefrom. It was family land which the Appellants occupied by virtue of being part of the family of Ombangai. A constructive trust need not be a formal “agreement” as the trial Magistrate appears to suggest.
26. Further, although the trial Magistrate extensively cited the case of *Twalib Hatayan & Another* (*supra*), she appears not to have further comprehended the holding of the Court that:
- “A Constructive trust is an equitable remedy imposed by the Court against one who has acquired property by wrong doing ... 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 ... 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 settler. Imposition of a constructive trust is thus meant to guard against unjust enrichment.”
Emphasis added.
27. It was therefore not proper for the trial Magistrate to find, as she did, that the suit land “was not clan land held in trust” by the Respondent and that it was land which the Respondent “inherited in his own right.” Far from it. This was land which the Appellants had lived on from birth by virtue of being part of the family of the original owner Ombangai long before the land registration process and although the Respondent tried to suggest that the Appellants had been given other land, no evidence was adduced before the trial court to prove that allegation. Indeed, based on the fact that the Appellants and the Respondent were family, they were living on the suit land by right. It was therefore not open for the trial Magistrate to conclude, as she did in paragraph 23 of her judgment, that the Respondent “had invited the Defendants to live on the suit land but this privilege was abused and the son and grandson of PW2 now want to inherit the suit land by force.” The Appellants were certainly not looking for any invitation from the Respondent to have a share of the suit land. They were on the suit land as of right. The case of *Nabashon Karengi & Another v Lawrence Karengi* 2014 eKLR which the trial Magistrate cited was clearly distinguishable because in that case, the children were trying to force their parents to sub-divide and distribute his land which was not even held in trust. In this case, the decision in *Isaack M’inanga Kebia v Isaya Theuri M’lntari & Another* 2018 eKLR is more applicable where the Supreme Court held, inter alia, that where the land is family land, then a customary trust would be presumed and the person holding the title would qualify as a trustee. Further, that in such circumstances, the fact that the person holding the title and those claiming it are members of that family is sufficient for the Court to make a finding that the claim premised on trust is not tenuous or remote.



28. In his submissions, counsel for the Appellants has also submitted that the Appellant's counter-claim was not considered. Counsel has submitted thus:
- “In addition, the counter-claim of the Appellant was not decided as no order was made in respect to the counter-claim thus one wonders what happened to the counter-claim dated 9th March 2021 therefore the Appellants are justified in stating that the judgment issued by the trial Court was contradictory.”
29. There is merit in that complaint. Order 21 Rule 4 of the *Civil Procedure Rules* provides that:
- “Judgments in defended suits shall contain a concise statement of the case; the points for determination, thereon, and the reasons for such decision.”
30. It is clear from the pleadings before the trial Magistrate that among the issues which she was required to make a decision on was the Appellant's counter-claim in which they sought an order that the Respondent holds the suit land for them on the basis of a constructive trust. And although the trial Magistrate did refer to that counter-claim, she was required to make a definitive finding on the same. A perusal of the impugned judgment shows that no decision was made on that counter-claim either allowing or dismissing it. These are the orders made by the trial Magistrate in paragraph 25 of the impugned judgment under disposition:
- “I have taken into consideration the Plaintiff's submissions and the evidence on record which on a balance of probability, prove the Plaintiff's case, and the evidence on record, and I hold and find the Plaintiff has proved this case on a balance of probability and judgment is hereby entered in his favour as prayed for orders that:
- a. An eviction order do issue against the Defendants jointly and severally alongside their kin and servants.
 - b. The Plaintiff is awarded the costs of this suit.”
31. As already stated at the commencement of this judgment, the Respondent sought an order for the eviction of the Appellants from the suit land. The Appellants on their part denied being trespassers on the suit land and counter-claimed for an order that the Appellants is in fact a trustee holding the suit land for their benefit on the basis of a constructive trust. And although the trial Magistrate made reference in her judgment to the issue of trust, in the final disposal orders she did not make any decision either allowing or dismissing the Appellant's counter-claim and giving reasons. There was therefore no compliance with the law as regards what a judgment should contain.
32. Ultimately, and having re-considered and re-evaluated the evidence that was before the trial Magistrate as I should, I am satisfied that this appeal has merit. The suit land is not the Respondent's private property from which he can evict the Appellants as sought in his plaint. Instead, he is a constructive trustee holding the suit land, which is family land, in trust for both himself and the Appellants. This Court must therefore determine the trust and make further and appropriate orders with regard to the ownership of the land.
33. On the issue of costs, the trial Magistrate condemned the Appellants to meet the costs of the suit. While the law is that costs follow the event, in a case such as this where the parties are family, it is desirable that each party meets their own costs so as not to alienate the parties further.



34. The up-shot of all the above is that this appeal is allowed and the judgment of the trial Magistrate is set aside in the following terms:
1. The Respondent's suit is dismissed.
 2. The Appellant's counter-claim is allowed as follows:
 - a. The Respondent holds the title to the land parcel No. North Teso/Moding/103 in trust for both himself and the Appellants.
 - b. That trust is hereby determined and the land parcel No North Teso/Moding/103 which measures 6.0 Hectares (14.8 acres) shall be shared among the Appellants and the Respondent as follows:
 1. 1st Appellant - 6.0 acres
 2. 2nd Appellant - 4.4 acres
 3. Respondent - 4.4 acres
 - c. The Respondent shall within 30 days of this judgment surrender the original title deed to the land parcel No. North Teso/Moding/103 for cancellation and issuance of new title deeds to the parties as decreed above.
 - d. In default of (c) above, the Land Registrar Busia shall, notwithstanding the absence of the original title deed to the land parcel No. North Teso/moding/103, cancel the said title deed and together with the County Surveyor Busia demarcate the land and issue title deeds to the parties as decreed above.
 - e. The Respondent shall also within 30 days of this judgment execute all the necessary documents to facilitate the issuance of new titles to the parties as decreed above.
 - f. In default of (e) above, the Deputy Registrar of this Court shall be at liberty to execute all such documents on behalf of the Respondent.
 - g. Each party shall meet their own costs of the suit here and in the Court below as well as the costs of the survey, demarcation and issuance of the new title deeds.

JUDGMENT DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL AT BUSIA ELC ON THIS 9TH DAY OF MAY 2023 AS WAS ADVISED TO THE PARTIES ON 8TH MARCH 2023.

BOAZ N. OLAO

JUDGE

9TH MAY 2023

