



Baya & 3 others (Suing on their own behalf and personal representative of the Estate of the Late Katana Gunga Baya - Deceased)) v Gunga (Land Case 8 of 2021) [2023] KEELC 18033 (KLR) (7 June 2023) (Judgment)

Neutral citation: [2023] KEELC 18033 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
LAND CASE 8 OF 2021**

MAO ODENY, J

JUNE 7, 2023

BETWEEN

DAVID CHARO BAYA 1ST PLAINTIFF

THOYA BAYA GUNGA 2ND PLAINTIFF

ERASTUS KITSAO GUNGA 3RD PLAINTIFF

PATRICK BAYA GUNGA 4TH PLAINTIFF

**SUING ON THEIR OWN BEHALF AND PERSONAL REPRESENTATIVE OF
THE ESTATE OF THE LATE KATANA GUNGA BAYA - DECEASED)**

AND

ROBERT KAINGU GUNGA DEFENDANT

JUDGMENT

1. By a Plaint dated February 3, 2021 the Plaintiffs herein sued the Defendant seeking the following orders;
 - a. A declaration that there is a customary trust created in favour of the Plaintiffs and their families including Dependants of Katana Gunga Baya in Kilifi/Chilulu/269 which is registered in the name of Katana Gunga Mbaya- deceased and the Defendant.
 - b. A declaration that the Kilifi/Chilulu/269 is held in trust by Katana Gunga Baya-Deceased and defendant for the benefit of both the defendant and the Plaintiff's Dependants.
 - c. There be consequent to grant of prayers above, an order of subdivision of Kilifi/Chululu/269 into four distinct portions per the customary boundary of the subject land as set out in paragraph 8 of the plaint.



- d. That the Deputy Registrar of this court is hereby authorized where necessary to sign any documents required to ensure the transfers order under this judgment are realized, to that end the Land Registrar shall accept documents signed by the Deputy Registrar as being sufficient to effect the transfer.
- e. A permanent injunction against the defendant by himself, his agents and/or appointed Attorneys from any manner obtaining the original title from the custody of the plaintiffs, evicting sub-dividing and/or selling and/or transferring of Kilifi/Chilulu/269.
- f. Costs of the suit.

Plaintiff's Case

2. PW1 David Charo Baya, adopted his witness statement and list of documents dated February 3, 2021 as his evidence in chief and relied on the documents.
3. PW1 stated that the title deed for the parcel of land known as Kilifi/Chilulu/269 was issued on August 3, 1978 and during life-time of the Late Katana Gunga Baya there were no demands by the Defendant to partition the land. Further that Plot No 269 was established and thus was originally owned by one Gunga Baya popularly known as "Kosho" who passed on or about the year 1966.
4. It was PW1's testimony the late Gunga Baya (Kosho) had 4 wives namely:- Kadzo Gunga Baya-Deceased- 1st Wife, Sidi Gunga Baya-2nd wife, Kanze Gunga Baya -3rd wife, Kadzo gunga Baya-4th wife who had been inherited by Kosho.
5. PW1 stated that during the lifetime of Gunga Baya every wife was allocated an equal share of the parcel of land for their use and divided into two portions.
6. It was PW1's evidence that on or about the June 13, 1978 during the adjudication process, the entire family cognizant of the manner in which they occupied and utilized the portions of land paid pay for the adjudication and obtained a receipt in the name of Katana Gunga & Others which PW1 avers that trusteeship exists by virtue of existence of the Title in the Subject matter land which is held in the name of the Defendant and the Deceased Katana Gunga Baya.
7. PW 1 testified that upon the demise Gunga, the 1st, 2nd and 3rd wives joined hands and utilized the various portions of the land under the care and leadership of one Katana Gunga aka Katana wa Kosho who was the eldest son of Kosho being $\frac{3}{4}$ of the land . The 4th wife occupied her portion with her son Robert Kaingu Gunga the defendant herein being $\frac{1}{4}$ of the land and that he is entitled to $\frac{1}{4}$ acre.
8. PW2 Douglas Mwabaya Katana, also adopted his witness statement and which was essentially what PW1 had stated.

Defence Case

9. DW1 Robert Kaingu Gunga adopted his Witness Statement as his evidence in chief and produced a copy of the title deed as an exhibit. He further stated that there was no any intention of creating a customary trust as it was clear from the adjudication period that the land belonged to two brothers who are the direct beneficiaries of the Late Gunga Baya.
10. DW1 also testified that the Plaintiffs who are his nephews are the beneficiaries of the estate of his late brother and not the estate of Katana Gunga Baya. Further that it is common practice that children inherit from their parents and not grandparents therefore the Plaintiffs ought to be satisfied with the estate of their father.



Plaintiffs' submissions

11. Counsel submitted that the Plaintiffs are entitled to a declaration of a trust over the subject land as a customary trust as an overriding interest and relied on the case of *Justus Maina Muruku V Jane Waitihira Mwangi* [2018] eKLR and *Donimic Otieno Ogunyo & 2 Others v Helida Akoth Walori* [2022] eKLR.
12. Counsel urged the court to find that a customary trust had been created hence should be enforced.
13. Counsel for the Defendant submitted that the evidence adduced by the Plaintiff does not show that there was any intention to create a customary trust as it was not demonstrated that the suit land was ancestral or family land.
14. Counsel relied on the case of *Martha Thairora Gikundi v Elizabeth Kananu & Another* [2019] eKLR and urged the court to dismiss the Plaintiffs' case.

Analysis And Determination

15. The only issue for determination is whether the Plaintiff has proved that there was a customary trust created on the suit land.
16. In the Supreme Court case of *Isack Kieba M'inanga v Isaaya Theuri M'Lintari & another* [2018] eKLR, the court explained the issue of customary trusts as follows:

“Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in *Kiarie v Kinuthia*, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:

1. The land in question was before registration, family, clan or group land
 2. The claimant belongs to such family, clan, or group
 3. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.
 4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.
 5. The claim is directed against the registered proprietor who is a member of the family, clan or group.”
17. The Plaintiffs had a duty to prove that there was an intention to create a customary trust to enable them benefit from the suit land. The evidence that the Plaintiffs tendered fell short of the standard of proof to establish a customary trust.
 18. This suit land had a title registered in the name of Katana Gunga and Robert Kaingu Gunga as proprietors in equal shares. The Plaintiffs are nephews to the Defendant who have a right to inherit from their late father's portion and not from the Defendant.



19. The rights of a registered owner of property were provided for under Sections 27 of the Registered Land Act Cap 300(now repealed) which is captured under Section 24 of the Land Registration Act 2012 as follows;

“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.”

20. Section 25(1) which mirrors Section 28 of Cap 300(repealed) 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 which does not require noting in the register.

21. Section 28 of the Land Registration Act which is similar to Section 30 of Cap 300(repealed) 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;”

22. The fact that a person is registered as a proprietor does not preclude him/her from holding an interest in trust for another. Customary trust is an encumbrance on land. They subsist on the land as was held in the case of Kanyi vs Muthiora (1984) KLR 712, that:

“The registration of the land in the name of the appellant under the Registered Land Act(Cap 300) did not extinguish the respondents rights under Kikuyu Customary Law and neither did it relieve the appellant of her duties or obligations under section 28 as trustee.....The trustees referred to in section 28 of the Act could not be fairly interpreted and applied to exclude a trustee under Customary law, if the Act had intended to exclude Customary law rights it would have been clearly so stated.”

23. I find that the Plaintiffs have not established through evidence that there was a customary trust created or that there was an intention to create one. In the case of Njenga Chogera vs Maria Wanjira Kimani & 2 Others [2005] eKLR, which quoted the case of Muthuita vs Muthuita [1982 – 88] 1 KLR 42, the Court of Appeal held that customary trust is proved by leading evidence since trust is a quest of fact which must be proved by whoever is claiming a right under customary trust. A trust can never be implied by the Court, unless there was intention to create a trust in the first place.

24. I have considered the pleadings, the evidence adduced and the submissions by counsel and find that the Plaintiff has not proved that there was a customary trust hence the case is dismissed with costs to the Defendant.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 7TH DAY OF JUNE 2023.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of



Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

