



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUSIA

ELC CASE NO. 32 OF 2016

**JOSEPH NGIRA MANYASI (Suing on his behalf and as Legal Rep. of the Estates of
OWOUR MANYASI & FRANCIS MANYASI OWUOR).....PLAINTIFF**

VERSUS

GETRUDE JUMA BWIRE

SYLEVESTER JUMA NAGERI.....DEFENDANTS

J U D G M E N T

1. By an amended plaint dated 26th January 2019, the plaintiff brought this suit on his behalf and as the legal representative of the estates of Owour Manyasi and Francis Manyasi Owour to recover their ancestral land from the defendants. He pleaded that his grandfather OWOUR MANYASI owned a large piece of land which constituted land parcels nos. BUNYALA/BULEMIA/355 and BUNYALA/BULEMIA/361. Prior to the land adjudication process, the plaintiff's father FRANCIS MANYASI OWUOR moved out of the homestead of OWOUR MANYASI on land parcel BUNYALA/BULEMIA/361 and established his own homestead at the present ground position of land parcel BUNYALA/BULEMIA/355. During the commencement of the land adjudication process the plaintiff's grandfather was deceased and his father was ill and bedridden attending treatment in Uganda. As a result, the defendants' father being the adult member present was designated to be the owner of parcel No. BUNYALA/BULEMIA/361 in trust for the plaintiff. He prayed for judgment against the defendants jointly and severally for;

a) An order of declaration declaring that the late WANJALA NGAYO and the defendant held and continue to hold the interest of ownership of $\frac{1}{5}$ of land parcel No. BUNYALA/BULEMIA/361 which portion has been excised therefrom to create land parcel No. BUNYALA/BULEMIA/3849, in trust for the estate of FRANCIS MANYASI OWOUR as represented by the plaintiff.

b) An order directing the County Land Registrar to strike out the name of WANJALA NGAYO from the register of land parcel Nos. BUNYALA/BULEMIA/361 and BUNYALA/BULEMIA/3849 and in its place to insert the name of JOSEPH NGIRA MANYASI as the legal representative of FRANCIS MANYASI OWUOR.

c) An order directing the County Land Registrar to rectify the register of Land Parcel No. BUNYALA/BULEMIA/3849 by striking our entries no.8, 9 and 10 dated 17/2/2016, 18/2/2016 and 18/2/2016 respectively.

d) Costs of the suit.

e) Any other or further relief.

2. The plaintiff pleaded the particulars of trust in paragraph 13 of the plaint as follows;

i. Prior to the land adjudication process, the plaintiff's grandfather OWOUR MANYASI occupied the block of land which upon the conclusion of the land adjudication process, fell within the areas of land parcel No. BUNYALA/BULEMIA/355 and 361.

ii. the late OWOUR MANYASI had married 3 wives and had erected a homestead for his 3 wives within the area of land parcel No. BUNYALA/BULEMIA/361.

iii. The late OWUOR MANYASI sired FRANCIS MANYASI OWUOR from his 1st wife whom he had settled in his homestead was

situated in the area of parcel No. BUNYALA/BULEMIA/361 located at MUMBAKA area of Budalangi sub-location but his 1st wife was inherited and taken away by OGAO upon the demise of OWUOR MANYASI.

iv. The 1st defendant's father named WANJALA NGAYO was a relative to the larger extended family of OWOUR MANYASI and he lived on his ancestral land at Sisenye sub-location which parcel came to be registered as BUNYALA/BULEMIA/265 after the conclusion of the adjudication process.

v. Upon the demise of OWOUR MANYASI, the said WANJALA NGAYO came and inherited the 2nd and 3rd widows of OWOUR MANYASI and these two widows had also been settled on land parcel No. BUNYALA/BULEMIA/361 within the same homestead but WANJALA NGAYO eventually took them away to his home at Sisenye.

vi. The act of WANJALA NGAYO coming to inherit the widows also culturally required that he takes charge of guiding the home of OWOUR MANYASI in matters that would have required the presence of the man of the home.

vii. At the time of the land adjudication process, FRANCIS MANYASI OWOUR the son of OWUOR MANYASI was bedridden and on treatment in Uganda and his being away forced the elders who were assisting in the land adjudication panel over parcel number BUNYALA/BULEMIA/361 to call for WANJALA NGAYO to come and give them evidence and facts surrounding the land.

viii. When other neighbours also laid claim to parcel No. BUNYALA/BULEMIA/361, the adjudication officer and the panel required WANJALA NGAYO to come and testify but WANJALA NGAYO who was physically residing on his land at Sisenye sub location left that mantle to be taken up by the plaintiff and his father as the real owners of the land.

3. The defendants filed their defence to the amended plaint on 10th May 2019 and denied the allegations raised in the plaint. They averred that L.R. No. BUNYALA/BULEMIA/361 was on 2nd October 1985 registered in the joint names of JAMES OMBERE, OMBWOGO MUGABE, OSODO ONGUBA, OWINO OFUMA and WANZALA NG'AYO with each being entitled to $\frac{1}{5}$ share thereof. The defendant further denied that OWOUR MANYASI and FRANCIS MANYASI OWUOR ever lived on BUNYALA/BULEMIA/361 as alleged and that WANZALA NGAYO inherited the named widows of OWOUR MANYASI. They averred that OWOUR MANYASI had one wife who stayed on BUNYALA/BULEMIA 355 and that WANJALA NGAYO was born and brought up on BUNYALA/BULEMIA/361 and later on moved to BUNYALA/BULEMIA/265 due to perennial floods.

4. They further averred that in an effort to grab the portion of land belonging to WANJALA NGAYO, the plaintiff secretly filed succession cause No. 341 of 2009 claiming to be the son and was issued with grant of letters of administration which were confirmed on 4th November 2010 and the plaintiff did not make provisions for the true beneficiaries of the estate of the deceased. The Defendants stated that they moved to court for revocation of grant once they discovered the attempt to defraud them. They further averred that they are not privy to the alleged particulars of trust enumerated in the plaint and the same could only be raised against WANZALA NGAYO and not the defendants. They prayed that the plaintiff's suit be dismissed with costs.

5. The matter proceeded for hearing on 9/7/2020 with the plaintiff testifying as **PW1**. He stated that he is the son of Francis Manyasi Owour-deceased while the 1st defendant is the child of Wanjala and the 2nd defendant is the son of Nageri. **PW1** adopted his witness statement dated 10/5/2019 and affidavit dated 17/10/2019 as his evidence in chief. He continued in evidence that Wanjala Ngayo who lived in Sisenye sub-location was a clan cousin to Owour Manyasi. That Wanjala Ngayo inherited Owuor's (PW1's grandfather) two widows named NAKHATUNDA and NASINYAMA while his biological grandmother TERESA OKEYA was inherited by the late OGAO who also took her away from his grandfather's home to his own.

6. **PW1** stated further that prior to the land adjudication process FRANCIS MANYASI OWUOR had moved out of his father's homestead and had erected his home on the upper part of their land and which was adjudicated as BUNYALA/BULEMIA/355. That a portion of the land that had his father's homestead was registered in the name of his father FRANCIS MANYASI OWOUR. However, some neighbours known as OMBERE and OMBWOGO MUGABE sought to take the whole of land parcel for themselves and this brought a prolonged dispute before the Adjudication panel. During pendency of the dispute, his father was taken ill and got admitted to Mulago Hospital in Uganda for treatment where he stayed for about 2 years. This necessitated their clan members to nominate Wanjala Ngayo be registered as owner of the suit land to hold in trust for OWUOR MANYASI's grandchildren.

7. That WANJALA NGAYO stayed on his land parcel no 265 and only came on occasions to conduct anniversary rites of his grandfather since he had inherited his widows. According to **PW1**, Wanjala Ngayo wrote a letter to the Adjudication Officer and his fellow disputants and stated that he did not want to participate in the case since FRANCIS MANYASI OWUOR and his children were still alive and could litigate to recover their land. He added that since his father was ill, **PW1** participated in the adjudication case on his father's behalf and he succeeded in the case wherein the Adjudication Officer decided to register 5 persons as being entitled to the suit parcel of land. That when WANJALA NGAYO passed on in 1978, he was buried on his land parcel No. BUNYALA/BULEMIA/265 at Sisenye area.

8. The suit land got subdivided into 4 titles BUNYALA/BULEMIA/3847, 3848, 3849 and 3850 with 3849 being the homestead and this homestead has remained intact and has big grown trees. The plaintiff stated that he filed Busia HC Succession Cause 341 of 2009 so that he could remove the name of Wanjala Ngayo who had been chosen by the panel of elders to hold his family's portion comprised in the title BUNYALA/BULEMIA/361 resulting in his registration as the owner of land parcel No. BUNYALA/BULEMIA/3849 by transmission. However, the daughters of WANJALA NGAYO raised an objection that they were left out as beneficiaries and the parties entered into a consent in which the grant in cause No. 341 of 2009 was revoked that his rights in respect of $\frac{1}{5}$ interest that was held by WANJALA NGAYO was to be determined by the Environment and Land Court before the matter of confirmation proceedings could be undertaken in respect of WANJALA NGAYO's estate.

9. Subsequently, the daughters of WANJALA NGAYO moved court and had a grant re-issued and they took the suit land claiming it as their

ancestral land and presently and gave it to the 2nd defendant in breach of the consent order aimed at pre-empting his claim. He concluded his evidence stating that the orders sought herein will not in any way interfere with the succession cause since rectification will compel the defendants to only deal in the net estate of Wanjala Ngayo as compromised in BUNYALA/BULEMIA/265. Pursuant to the succession cause, BUNYALA/BULEMIA/3849 has also been split into several titles.

10. On cross examination PW1 stated that BUNYALA/BULEMIA/361 was being claimed by 5 people i.e. Osodo Okuba, James Ombere, Obwogo, Owino and Wanjala Ngayo with Wanjala Ngayo claiming the land on their behalf. That he appeared in the case on behalf of Wanjala before the adjudication authority because he had inherited his step-grandmothers. PW1 admitted that it was not recorded on green card that Wanjala was holding in trust for them though Wanjala did a letter to say that he was holding the land on their behalf. BUNYALA/BULEMIA/361 was partitioned and Wanjala got registered as owner of number 3849. He further stated that he did succession in the estate of Wanjala in respect of L.R. 3849 and not the other parcels where his home is.

11. William Nafula Barasa, giving evidence in chief as **PW2** stated that he is a retired senior assistant chief of Budalangi sub-location. He testified that in 1972, the land demarcation and adjudication process started in Bulemia area and at the time FRANCIS MANYASI OWUOR was ill and getting treatment in Uganda. Owing to the plaintiff's father's absence, the elders involved in the exercise required that WANJALA NGAYO be called to come and stand in for the children and grandchildren of OWUOR MANYASI. That the plaintiff had attended to the case but the elders asked for someone of advanced age to come and testify in order to inform them more about the land. Therefore, the plaintiff called Wanjala Ngayo to attend the hearing before the elders but he declined to proceed with the case stating that the land belonged to the family of OWUOR MANYASI who were properly placed to pursue the case. The disputed land became registered as BUNYALA/BULEMIA/361 and the portion meant for OWUOR MANYASI and FRANCIS MANYASI OWUOR was held by WANJALA NGAYO as a trustee. In cross examination, PW2 stated that he was aware that there was a case before the elders over L.R. 361 and the elders left Wanjala's name because he was grown up man amongst the Owuor family but the defendants have never lived on the suit land.

12. On 7/10/2020, PASCAL OMEDA NGIRA gave evidence as **PW3** by adopting his evidence affidavit dated 2/8/2017. Within their clan structure, PW2 said he is the plaintiff's cousin. That he knew the plaintiff's father and grandfather. On cross examination, **PW3** stated he saw Wanjala Ngayo and witnessed the inheritance ceremony in 1970. That Wanjala Ngayo did not live on the suit land and the title was not registered that Wanjala was holding the land in trust for anyone. He denied that Wanjala went to live on L.R. 265 because of floods on L.R. 361. **PW3** went on to say that they belonged to the same clan as Wanjala Ngayo, the Wamulembo clan, which is how he came to inherit Owuor's wives.

13. The defense case was heard on February 24, 2021, with the 2nd defendant, Sylvester Juma, testifying as **DW1**. He stated that his great grandfather Romanus Wanjala Ngayo was the owner of L.R. BUNYALA/BULEMIA/3849 and 265. That L.R. No. 3849 was derived from L.R. No. 361 which was registered in five names during the adjudication, and after the partition, Wanjala received parcel no. 3849. **DW1** stated that he does not believe Wanjala was registered in trust for the plaintiff's family because there is no indication of that in the green card. That during the adjudication, Wanjala Ngayo objected to having his portion curved out of parcel no. 361. He continued that the letter dated 18/5/1977 referring to case No.361 is a forgery because it is unclear who wrote it. He denied that Wanjala Ngayo inherited the two (2) widows of the plaintiff's grandfather. He further stated that he belongs to the same clan as the plaintiff but they are not immediate siblings.

14. **DW1** testified that the plaintiff had filed Busia ELC NO. 18 of 2012 as an originating summons alleging that he had been in open, physical, and notorious possession and occupation L.R. BUNYALA/BULEMIA/3849 for more than 12 years and that he had attempted to sell the suit land to third parties in an attempt to deprive the true beneficiaries of their inheritance on the mistaken belief that women are not entitled to inherit land. He avers that the current suit is an afterthought and an abuse of the legal system, and that the plaintiff's claim should be dismissed. **DW1** testified that the plaintiff had filed Busia ELC NO. 18 of 2012 as an originating summons alleging that he had been in open, physical, and notorious possession and occupation L.R. BUNYALA/BULEMIA/3849 for more than 12 years and that he had attempted to sell the suit land to third parties in an attempt to deprive the true beneficiaries of their inheritance on the mistaken belief that. The witness relied on their list of documents dated 22/2/2018 which he produced as DEX 1-10.

15. On cross-examination, DW1 stated that Wanjala Ngayo died in 1978 when he was about 11 years. That his father was called Joseph Nageri Nafula and was a brother to the 1st defendant. DW1 stated that after L.R. No. 361 was registered in the names of five people; no objections were filed. He also stated that Wanjala lived and was buried on L.R 265. He took part in the case before the Budalangi Land Disputes Tribunal, but he did not testify.

16. The 1st defendant case continued with Getrude Juma as **DW2** adopted her witness statement as her main piece of evidence, testified that her ancestral home is in Sisenya sub location and her father is Romanus Wanjala- deceased. Her father, she said, did not have a son named Francis Manyasi. **DW2** added that Wanjala Ngayo is her biological father and the registered owner of L.R. 3849 and he was not registered as the plaintiff's family trustee. She stated further that the plaintiff lives and works on L.R. No. BUNYALA/BULEMIA/355, which does not share a common boundary with BUNYALA/BULEMIA/3849. On cross examination. **DW2** claimed to know parcel 361 in Mumbaka but does not know if Owuor Manyasi's home was on that parcel of land. She was also aware of a case involving parcel number 361 at the adjudication office although she did not participate in those proceedings.

17. At the close of hearings, parties agreed to file their written submissions which the court has considered. The Supreme Court in the case of **Isack M'Inanga Kieba versus Isaaya Theuri M'Lintari & another [2018] eKLR**, expressed itself as follows on customary land rights:

“[52] Flowing from this analysis, we now declare that a customary trust, as long as the same can be proved to subsist, upon a first registration, is one of the trusts to which a registered proprietor, is subject under the proviso to section 28 of the Registered Land Act. Under this legal regime, (now repealed), the content of such a trust can take several forms. For example, it may emerge through evidence, that part of the land, now registered, was always reserved for family or clan uses, such as burials, and other traditional rites. It could also be that other parts of the land, depending on the specific group or family setting, were reserved for various future uses, such as construction of houses and other amenities by youths graduating into manhood. The categories of a customary trust are therefore not closed. It is for the Court to make a determination on the basis of evidence, as to which category of such a trust subsists as to bind the registered proprietor.”

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.” [emphasis added].

18. Using the above criteria, the plaintiff's explanation why Wanjala Ngayo was one of registered as the proprietors of the land parcel number 361 which gave birth to the suit land known as L.R. 3849 was because the elders on the land adjudication panel for the area needed a mature person to represent the family of OWUOR MANYASI-deceased and his son Francis Manyasi Owour who was taken ill and receiving treatment in Uganda. Among the documents produced by the plaintiff is a letter dated 18/5/1977 (*Pex 13*) written by Wanjala Ngayo to the Land Adjudication Officer requesting that the said officer contact Francis Manyasi Owour and his children to assist in determining the ownership of the suit land. Further documents produced (*Pex 8, 9, 10 & 11*) show that when the Land Adjudication dispute hearing commenced, the summons was served upon Francis Manyasi Owour. The plaintiff stated that he was the one who attended to the proceedings to represent the family of Owour Manyasi and Wanjala Ngayo was at the time deceased. The plaintiff stated that the objection lodged by Wanjala Ngayo before the Land Adjudication Panel was done so on behalf of the Owour Manyasi family for having inherited his two widows.

19. Despite the defendants' claim that their father's registration as the proprietor of the suit land was absolute rather than as a trustee, DW1 admitted that they are members of the Namulengo Clan, which includes the plaintiff. The defendants attempted to discredit the letter dated 18/5/1977 written by Wanjala Ngayo as a forgery stating that the author was not known. However, they did not go further to bring a report to corroborate their evidence that indeed the thumbprint appearing on the document did not belong to Wanjala Ngayo. Section 107 of the Evidence Act places burden on the person who alleges a fact to prove its existence.

20. Further, the plaintiff and his witnesses stated that Wanjala Ngayo's home was on parcel no 265 in Sisenyi area which was 4kms from the suit land. Although the 1st defendant said they initially they lived on 361 before moving on to parcel number 265, she could not remember the years these took place. The 2nd Defendant's evidence could not corroborate 1st defendant's evidence since all these took place when he was still a minor. They did not call any evidence to purposefully contradict the narrative presented by the plaintiff regarding the history of the suit title. Consequently, from the evidence adduced at trial and the documents produced, I am inclined to agree that plaintiff has proved the existence of customary trust which needed not to be entered in the register of the suit title.

21. In conclusion, I enter judgement for the plaintiff as against the defendants jointly and severally thus;

a) An order of declaration be and is hereby made that the late WANJALA NGAYO and subsequently the defendants held and continue to hold the interest of ownership of $\frac{1}{5}$ of land parcel No. BUNYALA/BULEMIA/361 which portion has been excised therefrom to create land parcel No. BUNYALA/BULEMIA/3849, in trust for the estate of FRANCIS MANYASI OWUOR as represented by the plaintiff.

b) An order is hereby made directed at the County Land Registrar, Busia rectify the register by striking out the name of WANJALA NGAYO from the register of land parcel Nos. BUNYALA/BULEMIA/361 and BUNYALA/BULEMIA/3849 and in its place to insert the name of JOSEPH NGIRA MANYASI as the legal representative of FRANCIS MANYASI OWUOR.

c) An order directed at the County Land Registrar, Busia to rectify the register of Land Parcel No. BUNYALA/BULEMIA/3849 by striking our entries No. 8, 9 and 10 dated 17/2/2016, 18/2/2016 and 18/2/2016 respectively.

d) Costs of the suit.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 23RD DAY OF SEPTEMBER, 2021

A. OMOLLO

JUDGE