



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

ENVIRONMENT AND LAND COURT CASE NO. 113 OF 2016 (O.S)

PETER OKOCHI OLOO.....APPLICANT

- VERSUS -

JUSTUS MAGINA WANYAMA.....RESPONDENT

JUDGEMENT

1. The Applicant commenced these proceedings by way of the Originating Summons dated 7th September, 2016 and filed in court on the 8th September, 2016 brought against the Respondent. The Applicant impleaded that he has acquired three (3) acres of land parcel **No. SAMIA/BUBURI/212** adverse possession and posed the following questions for determination:

- a. Whether or NOT the land parcel No. SAMIA/BUBURI/212 is an ancestral land inherited from their late grandfather, MAGINA;**
- b. Whether or NOT the Respondent's father WANYAMA MAGINA and the Applicant's father OLLO MAGINA were biological brothers and sons of the late MAGINA;**
- c. Whether or Not the Applicant is entitled to three acres out of land parcel No. SAMIA/BUBURI/212;**
- d. Whether or NOT the Applicant has been in quiet, peaceful. Lawful and uninterrupted occupation of the said three acres of land out of L.R No. SAMIA/BUBURI/212 from 1979 to date;**
- e. Whether or NOT the RESPONDENT should be condemned to pay costs of this suit.**

2. The Applicant urged this Honourable Court to declare him as the beneficiary and entitled to three acres from L.R **No. SAMIA/BUBURI/212** and the Respondent be condemned to pay costs.

3. The Originating Summons was supported by the Applicant's supporting affidavit dated 7th September, 2016. Annexed to the affidavit in support was a copy of summons issued by the Assistant Commissioner Samia Sub-County, various letters from the Chief to the Land Registrar and to the Court Busia, and a certificate of official search in respect of the suit land. The Applicant deposed that Oloo Magina and Wanyama Magina (the Respondent's father) inherited the suit land from their father Magina. That his father died in the year 1963 and his uncle Wanyama Magina brought him up. He stated further that his father and his grandfather died before adjudication causing the land to be registered in the name of Wanyama Magina. That after Wanyama's death in 1974 the family in 1979 decided to have the suit land shared out as follows the Applicant given 3 acres, Violet Wanyama received 2 acres and the Respondent 4 acres. That the land was demarcated as agreed which demarcation the Applicant urges this Court to enforce so that each of them get their respective title deeds.

4. The Respondent filed his Replying Affidavit on the 19th day of October, 2016 wherein he stated that:

- a. Land parcel **No. SAMIA/BUBURI/212** was not ancestral land and that their grandfather Magina never owned or resided on the said land;
- b. The Applicant's parents separated when he was young and he went to live with his mother away from home;
- c. During demarcation of the suit land, his late father's brothers grabbed all of his grandfather's land including his father's land and the Applicant's father's land;

- d. When his father died, he was buried on the land given to him by one Mzee Oluoch Messo which land the Applicant was also staying on;
- e. He tried evicting the Applicant from the land without success and even filed an eviction suit against the Applicant Busia CMCC No. 188 of 2003 which suit is yet to be concluded;
- f. A claim of adverse possession does not apply if the parties are related by blood and if permission was granted for one to settle on the disputed land;
- g. He has two sisters who are already married who have no problem with the Respondent inheriting his father's land. That Violet Wanyama is his stepsister sired through wife inheritance by his father;
- h. It is true that he wants to evict the Applicant from his land as he has no right being there;
- i. It will be unfair if this Court grants the Applicant part of his land yet the Applicant's father's land still exists and he can lay claim to it and be given his home; and
- j. The suit be dismissed with costs.

5. The trial kicked off on the 16th of October, 2019 and the Applicant called three (3) witnesses. The Applicant testifying as **PW1** stated that he is a business man who sells maize. He adopted his witness statement filed in court on the 21st of February, 2017 in which he stated that his grandfather had two sons, Oloo and Wanyama and a daughter, Auma. That the Applicant's father called Oloo who died in the year 1963. The Applicant added that he was born in the year 1954 and has been living on the suit land since he was born. **PW1** continued in evidence to state that the title of the land was registered in Wanyama's name during demarcation since he was the only surviving son of the late Magina. That Wanyama took care of him after the death of his parents.

6. The witness stated that during sharing of the land **PW1** was given 3 acres, the Respondent 4 acres and Violet Wanyama 2 acres instead the Respondent wants him to be removed from the land. **PW1** stated further that the suit land was divided in the middle and he is still living on his said portion to date as per the planted boundary. It is his case that the Respondent removed the sisal boundary on the side of Violet's land. His claim before the Court is that all of them should retain their apportioned shares.

7. In cross-examination **PW1** stated that although his mother left, he remained in the home of Wanyama and even got married in the year 1976. That he never left the home even when the Respondent left to stay in Mombasa. That the clan did not grab Magina's land as this is the land that he has been living on and its their ancestral land. That the suit land did not belong to Oluoch Meso who was one of the elders present during the sharing of the suit land. That it was Wanyama's brothers who shared the suit land between Oluoch, Wandera and Auma. This sharing was done in the year 1979. **PW1** stated further that Violet was given the land because her mother was the one who took care of the land until they were all able to have their shares.

8. On re-examination, **PW1** confirmed that the land belonged to his grandfather and that that Wanyama Magina took care of the suit land on his behalf from 1963 to date. That he has lived on the suit land in excess of 12 years without any interruption and peacefully.

9. VIOLET AJIAMBO WANDERA testified as **PW2** by adopting her witness statement filed in court on the 20th February, 2017. In the statement she said that she knew Magina as her grandfather who had two sons Wanyama Magina, the Respondent's father, and Oloo Magina the Applicant's father. That Wanyama Magina had two wives Anna Nekesa and the Respondent's mother Wilfridah Ajwang'. That she was born of Wilfridah Ojwang who is the Respondent's step mother together with some other sons who died. She stated further that the suit land is ancestral land which was shared according to the houses and Peter had 3 acres, the Respondent has 4 acres while she had 2 acres.

10. PW2 stated further that the land was registered in their father's name since they were all still young but she discovered that the Respondent had succeeded the entire estate without their knowledge. She urged the Court to help each of them have their own title. Upon cross examination, **PW2** confirmed that she was born in the year 1960 and that Wanyama Magina is her father. That although she did not see her grandfather, she was told that he had lived on the suitland. She stated further that she did not know the Applicant's mother neither did she know the year the Applicant was born.

11. SYLVESTER ODHIAMBO KHADULI testifying as **PW3** also adopted his witness statement dated 30th November, 2020 as his evidence in chief. He stated that Wanyama Magina was his grandfather. That in the year 1979, the clan elders sat and decided to partition the suit land between Peter Okochi Oloo who was given 3 acres, Justus Magina Wanyama who was given 4 acres and Fridah Wanyama 2 acres. That Justus decided to grab all the land claiming that it all belonged to him and even went to the District Officer seeking permission to evict Peter and Fridah but Peter placed a caution in the land and later filed this suit.

12. Upon cross-examination, **PW3** stated that he is 62 years old and a clan member with both the Defendant and the Plaintiff. That in 1979 he was 22 years old and he remembers that the Defendant's father died in 1974. He stated that he does not know when the Defendant's grandfather died since he was not born at that time but the Plaintiff's father died around 1963 and he was buried on the land he was born in and not the suit land. That although he did not know how the Defendant's father got the land, the Applicant grew up on the suit land.

13. BONIFACE WANDERA OCHARA, PW4 adopted his witness statement dated 30th November, 2020 where he stated that he was present during the clan meeting in 1979 for the partition of the suit land between the Respondent, Applicant and Fridah. That the partition was in the ratio of 4 acres to Respondent, 3 acres to the Applicant and 2 acres to Fridah. That the sharing was witnessed by the Assistant Chief of Rumbiye sub location Joseph Buyekha, village elder Ojiambo Toto, Senior Chief James Pamba, Oluoch Meso, Sabastian Ochara and Julius Wandera.

14. During cross-examination, **PW4** stated that the parties were his cousins and he saw their fathers when he was young and he was buried at the big family home when he died. He stated that the Plaintiff and Defendant's fathers were buried on separate parcels of land. That the clan decided to share the land because there was a fracas. He stated that the fathers of the Defendant and Plaintiff had one sister and they also shared a father. That the family land was taken by the Defendant to hold the Plaintiff's share in trust as the Plaintiff's father died before land could be registered. He concluded by stating that he was not aware how the Defendant's father was registered as the owner of the suit land and neither was, he aware that the home land was taken by the uncles of the Plaintiff and Defendant.

15. On re-examination, **PW4** stated that the Defendant's father was the elder brother of the Plaintiff's father and they died in 1974 and 1963 respectively. That Peter was to be given his father's share upon becoming an adult and the elders came and shared land among the three.

16. During the Defence hearing on 13th of April, 2021, the Respondent testified as a sole witness and adopted the contents of his replying affidavit filed on the 19th of October, 2016 as his evidence in chief.

17. Upon cross examination **DW1** stated that his father was called John Wanyama Magina and his grandfather was called Oloo Magina and that he died in before **DW1** was born in 1954. That although his grandfather owned land, that land was not Samia Buburi/212. The Respondent said the suit land was given to his father by Oluoch Meso. That the Plaintiff came to the suit land with his wife and child in 1984. That he has filed a case for the eviction of the Plaintiff from the suit land. In re-exam, **DW1** stated that he mentioned the eviction case in paragraph 16 of his affidavit. He concluded by stating that although he reported the matter to the Chief, the matter has never been resolved.

18. The Applicant filed his submissions on the 12th of May 2021 which submissions raised three questions for determination i.e.; whether land parcel number SAMIA/BUBURI/212 was ancestral land; whether the applicant and Violet Ajiambo Wandera are entitled to any portion of parcel number SAMIA/BUBURI/212 and whether the applicant has been in quiet, lawful and interrupted possession of three acres of land parcel number SAMIA/BUBURI/212 for a period of more than 12 years. On the first issue, the Applicant submitted that all the Plaintiff's witness confirmed that the suit land belonged to Magina who was the Applicant's and Respondent's grandfather. That the Respondent did not call any witnesses to corroborate his testimony which alleged the suit land never belonged to their grandfather.

19. With regards to the second issue, the Applicant submitted that all the Applicant's witnesses asserted that the clan elders sat in 1979 and ruled that the suit land be partitioned into three portions with the Applicant getting 3 acres, the Respondent 4 acres and Violet Wanyama 2 acres in place of her late mother Fridah Wanyama.

20. On the final issue, the Applicant submitted the Applicant has been in occupation of a three-acre portion of the suit land from 1979. Further DW1 testified that the Applicant moved into the land in the year 1984 which period is still more than 12 years that he has been inhabiting the land and the occupation has been peaceful open and continuous for all those years. That the Defendant failed to attach documents to aid the Court know the position of his eviction suit against the Applicant. The Applicant urged this Court to grant the reliefs sought since he has proved his case to the required standards. The Applicant relied on the case of **Mtana Lewa vs. Kahindi Ngata Mwangandi (2015) eKLR.**

21. The Respondents filed his submissions on the 4th of May, 2021 which raised the following issues for determination; whether or not the land parcel number SAMIA/BUBURI/212 is ancestral land; whether or not the Respondent's father Wanyama and the Applicant's father Oloo Magina were biological brothers and sons of the late Magina; whether or not the Applicant is entitled to three-acre portion out of the land parcel SAMIA/BUBURI/212 and whether or not the Applicant has been in quiet, peaceful, lawful and uninterrupted occupation of the said three acres of land out of the parcel No. SAMIA/BUBURI/212 since 1979. The Respondent submitted that he did not dispute that their fathers were brothers.

22. On the 1st issue the Respondent submitted that none of the Plaintiff's witnesses stated that the land was ancestral since they only stated that the elders subdivided the land. That because neither his grandfather nor the applicant's father was buried on the suit land was further proof that it is not ancestral land. With regards to the third issue, the Respondent submitted that the Applicant was basing his claim on a meeting in 1979 which meeting if it occurred as claimed amounts to intermeddling in contravention to section 45 of the Law of Succession Act. While submitting on the fourth issue, the Respondent stated that the Applicant's stay on the land was not peaceful as he filed the eviction suit in 2003 as well as the Applicant's summons for revocation of the grant issued to him.

23. After considering the parties' pleadings, submissions and the applicable law, the issues which have been raised by both parties and which in my opinion if resolved will determine the dispute are as follows:

- a. Whether or not the Applicants' occupation of the Suit Land is adverse to that of the Respondent; or**
- b. If the adverse rights were terminated by Busia SRMCC 188 of 2003**
- c. Whether the Respondent's father was registered as the Proprietor of the Land in trust for the Applicant; and**
- d. Who bears the costs of this suit?**

24. The doctrine of adverse possession in Kenya is embodied in **Section 7** of the Limitation of Actions Act, CAP 22 Laws of Kenya, which provides that: ***"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."***

25. For a claim premised on the law of adverse possession, the burden lies on the Applicant to show that he has been in peaceful, continuous and uninterrupted occupation of the claimed land for a minimum period of twelve (12) years. In this case, the Applicant avers that he has

been living on the suit parcel since 1979 when the clan subdivided the said parcel and gave him 3 acres out of it. The Respondent on the other hand avers that the Respondent started living on the suit land 1984 and that in 2003 he filed a suit to have the Applicant evicted. From the evidence of both the Applicant and the Respondent it is not in dispute that the Applicant is in occupation.

26. The dispute is whether or not the occupation extinguished the rights of the Respondent. In contradicting the averments of the Applicant and his witnesses that the occupation was peaceful, the Respondent stated that he had filed a suit to remove the Applicant from the land. The Respondent also pleaded that the stay of the Applicant was by consent thus a right under adverse possession could not accrue. I begin by answering the questions of time which if counted from the year 1984 (when the Applicant entered the land as per the Respondent) then by the year 2003 when the suit for eviction was filed, the rights of the Respondent over the portion occupied by the Applicant had been extinguished.

27. It is a principle of the law that the filing of a suit stops time from running in a claim such as this. The Respondent stated that he filed Busia SRMCC No 188 of 2003 which according to him is still pending almost twenty years after it had been filed. The Respondent failed to provide this Court with any copies of documentation from the said court case nor did he request that the lower court case to be consolidated with the present suit nor that filed be produce as part of his evidence. The application for revocation of grant relates to the administration of an estate of a deceased person and cannot in my view stop time from running. Again the details or the content of the summons for revocation of the grant was not produced in these proceedings. In the circumstances, it is difficult for this court to assume that the claim in the former suit was for eviction. The burden rested on the Respondent to prove that time had stopped running but it is my finding that he failed to discharge this burden.

28. Although the Respondent stated that the Applicant was living on the land with consent, he did not elaborate who gave the consent. In any event, if consent was granted, then it brings to question whether constructive trust was created. On whether the Respondent's father and subsequently the Respondent held the land in trust for the Applicant. Trust is a question of fact which must be established through evidence. In *Mbui Mukangu v. Gerald Mutwiri Mbui* (2004) eKLR (*O'kubasu, Githinji & Waki, JJA*) the Court in embracing the concept of a customary trust, stated:

“It cannot be argued too strongly that the proper view of the qualification or proviso to Section 28 is that trusts arising from customary law claims are not excluded in the proviso. Such claims may stem from possession and occupation of part of the registered land which **strictly it (sic) may not be an overriding interest under Section 30(g), it nevertheless gives rise to a trust which is capable of protection under the Act.**”

29. In the Supreme Court of Kenya Case **ISACK M'INANGA KIEBIA vs ISAAYA THEURI M'LINTARI & ANO (2018)eKLR SCOK** held that 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... At paragraph [53] We also declare that, rights of a person in possession or actual occupation under Section 30(g) of the Registered Land Act, are customary rights. This statement of legal principle, therefore reverses the age old pronouncements to the contrary in **Obiero v. Opiyo** and **Esiroyo v. Esiroyo**. Once it is concluded, that such rights subsist, a court need not fall back upon a customary trust to accord them legal sanctity, since they are already recognized by statute as overriding interests.

30. The plaintiff's witnesses stated that the land had been initially owned by the grandfather to both the parties before adjudication. That Magina had two sons Wanyama Magina and Oloo Magina and Oloo (the Applicant's father) died in 1963 just before land adjudication began hence the family land had to be registered in Wanyama's name as he was the only surviving adult relative of the late Magina. The Respondent does not deny the family tree but alleged that the family land was grabbed and the suit title Buburi/212 was gifted to his father by Messo.

31. First, proceeding on the presumption of the land not being family land yet the Respondent allowed the Applicant to settle on the land in 1984 was on the basis of the appreciation of their family relationship. Having led the Applicant to believe that he settled on family land, the Respondent is now estopped from running away from the trust he created. Secondly, the evidence adduced indicate that Wanyama Magina was the first registered owner of the suit land and no evidence was led to show that the land previously belonged to Oluoch Messo. Added to this is the fact that the Respondent did not disclose the relationship of Oluoch Messo to their family. IHowever, Oluoch Messo seems to be from the same clan as the parties herein since the Applicant referred to him during cross-exam that he was one of the elders present during the distribution of the land in the year 1979. The Respondent thus acquired the land based on his ancestry and has no better rights to it than the Applicant.

32. The Court of Appeal in the case of Twalib Hatayan Twalib Hatayan & Anor vs. Said Saggah 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...”

33. The Supreme Court in the case of **Isack M'inanga Kiebia supra** had this to say on what constitutes customary trusts:

“**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:

- a. The land in question was before registration, family, clan or group land;
- b. The claimant belongs to such family, clan, or group;
- c. 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;
- e. 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 is directed against the registered proprietor who is a member of the family, clan or group.”

34. In light of the foregoing analysis, it is my opinion and I so hold that the Applicant has met the conditions in proving customary trust and or that he is entitled to a portion of the suit land he is in occupation of. The Applicant gave that portion to be three acres and which size the Respondent has not disputed. Consequently, I enter judgement for the Applicant and hold that:

- a. It is hereby declared that the Applicant is entitled to three (3) acre portion of land comprised in land title number Samia/Buburi/212 registered in the name of the Respondent by virtue of adverse possession and constructive trust.
- b. The suit title Samia/Buburi/212 be subdivided to enable the Applicant receive title for his three (3) acre portion.
- c. The Respondent shall execute subdivision and transfer documents for the property in favour of the Applicant within thirty days hereof failure to which the Deputy Registrar shall execute the same to facilitate the registration of the three (3) acres portion of the Suit Property in the name of the Applicant respectively;
- d. The costs of this suit awarded to the Applicants.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 14TH DAY OF OCTOBER, 2021

A. OMOLLO

JUDGE