



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT SIAYA

ENVIRONMENT AND LAND COURT CASE NUMBER 39 OF 2021

BENEDICT OKOTH OWIYE &.....1ST PLAINTIFF

PETER OUMA OWIYE [Suing as the administrators of

the estate of SELESTINUS OWIYE STAND

(DECEASED)].....2ND PLAINTIFF

VERSUS

GEORGE WILLIAM ONYANGO.....1ST DEFENDANT

WYCLIFFE MUTANDA ONYANGO.....2ND DEFENDANT

SYLVESTER OLALO.....3RD DEFENDANT

DORINE AKINYI.....4TH DEFENDANT

NICKANOR JEREMIAH AJUOGA.....5TH DEFENDANT

ALICE GRACE AJUOGA.....6TH DEFENDANT

STEPHEN OLWANDA OBWOLO.....7TH DEFENDANT

CALISTO OWINO OWUOR.....8TH DEFENDANT

GEORGE OMIRE.....9TH DEFENDANT

BENTA ATIENO ODAGA.....10TH DEFENDANT

PETER ONYANGO ODUOR.....11TH DEFENDANT

KENNETH OWINO OOKO.....12TH DEFENDANT

GEORGE OWINO OMIRE.....13TH DEFENDANT

EUNICE AUMA ODHIAMBO.....14TH DEFENDANT

MARGARET ANYANGO OWUOR.....15TH DEFENDANT

DIDACUS OTIENO OPONDO.....16TH DEFENDANT

CHRISPINE OWINO OCHIENG.....17TH DEFENDANT

JUDGMENT

Introduction

1. By way of a plaint dated 7/06/2013, the plaintiffs as administrators of the estate of Selestinus Owiye Stand instituted suit against the defendants. The substratum of the dispute revolves around the subdivision and sale by the 1st defendant, his father one Ladslaus Onyango Stand(deceased) and his brother Stephen Ochieng' Onyango (deceased) of parcels of land emanating from **land parcel Uholo/Ugunja/ 401** [*the suit property*] to the 2nd to 17th defendants. In response, the 1st defendant filed a defence dated 30/07/2013, the 2nd defendant neither entered appearance nor filed a defence, the 3rd and 4th defendants filed a joint defence dated 9/09/2013 while the 5th to 17th defendants filed a joint defence dated 27/08/2013. They all denied the existence of illegalities in the process of subdivision, sale and purchase of the suit property.

The plaintiffs' case and evidence

2. The plaintiffs' case is contained in their plaint dated 7/06/2013, witness statement dated 7/06/2013, list and bundle of documents dated 7/06/2013 and oral evidence tendered in court during the hearing. In summary, their case was that their grandfather Stanslaus Ofula was the original owner of land parcel **Uholo/Ugunja/ 401**. The plaintiffs' father [Selestinus Owiye Stand(deceased)] and the 1st defendant's father [Ladslaus Onyango Stand(deceased)] were respectively the only sons of Stanslaus Ofula. During the land adjudication process in the locality, Ladslaus Onyango Stand was registered as the proprietor of the suit property and he was to hold it in trust for the family of Stanlaus Ofula. Upon the death of Selestinus Owiye Stand in 2006, Ladslaus Onyango Stand and his sons including the 1st defendant, secretly and fraudulently subdivided and sold the suit property to 3rd parties who are the 2nd to 17th defendants.

3. He stated though the "green card" for **land parcel Uholo/Ugunja/ 400** had been produced in court which demonstrated that the said Selestinus Owiye Stand had his own separate and distinct registered parcel of land, the same was in the possession of Charles and Paul Opondo who were his relatives. He stated that though a determination on the suit property had been made by the Siaya Land Disputes Tribunal, he was dissatisfied by the decision hence the reason he filed the instant suit. He stated he has always lived on the suit property. He stated the burial site of his deceased parents were on the suit property. He stated he was familiar with the boundaries of the suit property and that of **land parcel Uholo/Ugunja/ 400**.

4. Apart from his testimony, the plaintiffs led evidence by Lazaro Odera (PW2). He stated that he was a relative to the plaintiffs and the 1st defendant and that the suit property is ancestral land and should be shared by the family. He contended that he came to know of the existence of **land parcel Uholo/Ugunja/ 400** when the suit was being heard by the court.

5. The plaintiffs sought the following reliefs in the plaint; (i) a permanent injunction to restrain the defendants whether acting by themselves, or by their agents and employees from in any way interfering, entering or in any manner whatsoever from dealing with the suit property, (ii) the court declare that Ladslaus Onyango Stand was registered as the proprietor of the suit property in trust for the family of Stanslaus Ofula, (iii) the court declare the subdivision was unlawful and void, (4) an order that the subdivision be nullified and cancelled, (5) that the initial registration be restored and subdivided equally between the family of Selestinus Owiye Stand and Ladslaus Onyango Stand, (6) that the Defendants be ordered to pay mesne profits for the trespass and, (7) that the Defendants pay costs of the case.

The 1st defendant's case

6. The 1st defendant's case is contained in his defence dated 30/07/2013, witness statement dated 4/04/2013, list and bundle of documents dated 30/07/2013 and 4/04/2013 and oral evidence tendered in court during the hearing. In summary, during the adjudication process in the locality in 1970, his father Ladslaus Onyango Stand was registered as the proprietor of the suit property while his brother Selestinus Owiye Stand was separately registered as the proprietor of **land parcel Uholo/Ugunja/ 400**. As a result, trust could not be inferred in the suit property. He denied that there had been fraud in transactions related to the suit property and stated that the transactions giving rise to the subdivisions were proper and legal. He stated that the suit had previously been litigated in Siaya Land Disputes Tribunal between the 1st plaintiff as a claimant and the 1st, 2nd, 3rd, 4th, 5th and 7th defendants as objectors. The decision of the tribunal was adopted as a judgement of the court in **Siaya PM- Land Case No.39 of 2011**. He alluded that the plaintiffs utilise an acre of the suit property with his permission. He urged the court to dismiss the plaintiff's case with costs to him.

3rd to 17th defendants' case

7. The 3rd to 17th defendant's case is contained in their defences dated 9/09/2013 and 27/09/2013. They stated that they legally purchased the various subdivided plots emanating from the suit property. They contended that the subdivided portions of the suit property were legally transferred to them.

The Plaintiffs' submissions

8. The plaintiffs contended that the suit property was ancestral land which rights were overriding rights. They contended that the plaintiffs' rights to the suit property emanated from their possession and occupation. He placed reliance on **Sections 24 (a), 25 and 26 of the Land Registration Act, Sections 27 and 28 of the Registered Land Act (repealed)** and the Court of Appeal decision in the case of **Alan Kiama vs Ndia Mathunya & Others (C.A. 42/1978)**. He alluded that the "green card" for the suit property showed that suit the property was 1st registered in their grandfather's name before being succeeded by the 1st defendant's father. He contended that the 3rd to 17th defendants had failed to produce evidence that they had purchased part of the suit properties and as a result, they were in breach of **Section 3 (3) of the Law of Contract Act**. They prayed for the plaint to be allowed with costs. The plaintiffs condensed their issues for determination into two; (i) Whether the 1st defendant was holding the suit land in trust for the plaintiffs, and, (ii) Whether the plaintiffs are entitled to the reliefs sought.

The Defendants' submissions

9. In their submissions, the defendants contend that trust does not arise because Ladslaus Onyango Stand was registered as the sole proprietor of the suit property. They firmly stated that each son of Stanslaus Ofula was given their own share of property as demonstrated in the extract of the register for **Uholo/Ugunja/ 400** and **Uholo/Ugunja/ 401** with land parcel number **Uholo/Ugunja/ 400** being registered in the name of Selestinus Owiye Stand and land parcel number **Uholo/Ugunja/ 401** being registered in the name of Ladslaus Onyango Stand.

Analysis and determination

10. I have considered the pleadings together with the parties' respective evidence and submissions tendered together with the relevant legal and jurisprudential framework. The following are the key issues for determination: (i) whether the suit is *res judicata*, (ii) whether the plaintiffs have established that a customary trust exists over the suit property, (iii) whether the Plaintiffs are entitled to the reliefs sought and lastly, (iv) what order should be made on costs of this suit. I will sequentially make pronouncements on the issues.

11. The first issue is whether the suit filed is *res judicata*. The answer to this lies with understanding the elaborate legal framework provided for under the repealed **Land Disputes Tribunals Act, Section 4** of the **Land Disputes Tribunals Act (repealed)** established the Land Disputes Tribunals while Section 3 thereof set out the jurisdiction of the tribunal as follows;

“ (1) Subject to this Act, all cases of a civil nature involving a dispute as to—

a) the division of, or the determination of boundaries to land, including land held in common;

b) a claim to occupy or work land; or

c) trespass to land, shall be heard and determined by a Tribunal [Emphasis added]

12. **Sections 7 and 8** of the **Land Disputes Tribunals Act** provided as follows on the modalities of enforcing the decision of or appealing against the decision of the tribunal;

“7. (1) The chairman of the Tribunal shall cause the decision of the Tribunal to be filed in the magistrate's court together with any depositions or documents which have been taken or proved before the Tribunal.

(2) The court shall enter judgement in accordance with the decision of the Tribunal and upon judgement being entered a decree shall issue and shall be enforceable in the manner provided for under the Civil Procedure Act.

8. (1) Any party to a dispute under section 3 who is aggrieved by the decision of the Tribunal may, within thirty days of the decision, appeal to the Appeals Committee constituted for the Province in which the land which is the subject matter of the dispute is situated.

13. My understanding of these provisions of law is that once the 30-day window period for appeal to the land disputes appeals committee had lapsed, the tribunal would remit its decision to court which would then adopt the decision as its judgement. It henceforth became a valid court judgement capable of execution. In the case of **John Mungai Tama v Anjelica Muthoni Tama [2005] eKLR**, the court was of a similar view and held thus;

“...In law once a decision of a Land Disputes Tribunal has been adopted by a court of law as a judgment of that court, it is unsound for a party thereof to ignore that judgment of the court ...”

14. In the case of **Florence Nyaboke Machani Vs Mogere Amosi Ombui & 2 Others (2014) eKLR**, the Court of Appeal had this to say on valid court judgements;

“...it is trite law that a valid judgment of a court unless overturned by an appellate court remains a judgment of court and is enforceable...”

15. Having laid out the legal and jurisprudential framework, I now turn to the facts of the case. Looking at the pleadings in the court record and an evaluation of the evidence adduced, it is common ground that there were proceedings between the 1st Plaintiff and the 1st, 2nd, 3rd, 4th, 5th and 7th defendants before the defunct Siaya Land Disputes Tribunal.

16. The 1st plaintiff's statement of claim that was filed at the tribunal was not tendered before this court but it can be deduced from the proceedings of the tribunal that the 1st plaintiff had laid a claim of customary trust over the suit property and claimed that the resultant subdivisions were irregular. Upon hearing the parties, the tribunal on 16/3/2011 dismissed the 1st plaintiff' claim.

17. The proceedings of the tribunal were remitted to court on 18/3/2011 and adopted by the court as its judgement on 15/11/2011. This adoption was made after the **Environment and Land Act** came into existence. Was this adoption invalid? The answer to this lies with **Section 30 (1)** of the **Environment and Land Act** which provides;

“All proceedings relating to the environment or to the use and occupation and title to land pending before any Court or local

tribunal of competent jurisdiction shall continue to be heard and determined by the same court until the Environment and Land Court established under this Act comes into operation or as may be directed by the Chief Justice or the Chief Registrar.

18. My understanding of this provision is that matters that were pending before a competent court and in this case Siaya Principal Magistrate's Court had jurisdiction to adopt the award as a judgement of the court. In the case of **Christopher Wafula Mutoro v Richard Lordia Lokere [2017] eKLR**, the Court of Appeal held as follows on this transitional clause and the jurisdiction of a competent court;

"... section 30 (1) of the ELC Act is a transitional provision. As expressly stated in that section, it operated until the ELC established under the Act comes into operation. The Act commenced on 30th August, 2011... Judges of the ELC were appointed on 1st October, 2012... practice directions No. 7 ... refers to proceedings which were pending before a Magistrate's Court having been transferred thereto from the defunct District Land Disputes tribunals... as section 23 (3) of the Interpretation and the General Provisions Act provides, the repeal of the Land Disputes Tribunal Act did not affect its previous operations or anything done under it nor affect a right, privilege, obligation or liability acquired, accrued or incurred under it unless a contrary intention appears. The ELC Act does not convey a contrary intention. ... That means, amongst other things, that the appellant was entitled to pursue his right to appeal which had accrued under the repealed Act before a competent Court.

19. What was this judgement that was adopted by the court? I quote the ruling of the Siaya Land Disputes Tribunal as follows:

"The case therefore as brought by Benedict Owiye is dismissed. All events and transactions particularly the first time (sic) took place during his presence at home and he was already 22 years old"

20. Having looked at the legal framework and facts of the suit, is the suit *res judicata*? The answer lies with **Section 7** of the **Civil Procedure Act** which reads: -

"No Court shall try any suit in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

21. The Court of Appeal in the case of **Uhuru Highway Development Limited v Central Bank of Kenya & 2 others [1996] eKLR** set out the following principles in establishing *res judicata*: there must be; (i) a previous suit in which the matter was in issue, (ii) the parties were the same or litigating under the same title, (iii) a competent court heard the matter in issue, and, (iv) the issue has been raised once again in a fresh suit.

22. It is quite evident that the dispute in Siaya Land Disputes Tribunal involved the 1st plaintiff herein as a claimant against the 1st, 2nd, 3rd, 4th, 5th and 7th defendants, the issue in dispute in the tribunal and this suit revolved around the same subject matter that is the suit property and its resultant subdivisions and the dispute was determined by a competent tribunal and adopted as a judgement of the court and the same issues have been raised once again before this court. The judgement of the court has never been overturned on appeal, quashed by a competent court or otherwise. Consequently, it is my finding that this suit is *res judicata*.

23. If this suit was not *res judicata* which it is, what would be my legal analysis and finding on the 2nd issue of whether the plaintiffs have established that a customary trust exists over the suit property.

24. A Customary trust flows from **Sections 25 and 28** of the **Land Registration Act (Sections 27, 28 and 30** of the retired **Registered Lands Act**). Under **Section 28 (b)** of the Land Registration Act, customary trust is recognised as an overriding right over a registered parcel of land.

25. The party who alleges customary trust must prove that it was the intent of the parties or family members that the parcel of land would be registered in trust for other family members and once this onus is discharged, then the court would render its decision on the intent. It is never the duty of the court to infer trust. A determination on the existence of trust is on a case by case basis and the Supreme Court settled 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**. In the case of **Alice Wairimu Macharia v Kirigo Philip Macharia [2019] eKLR** the court held thus on customary trusts;

"The legal burden to prove the existence of the trust rests with the one who is asserting a right under customary trust...the person must prove that:- (a) the suit properties were ancestral clan land; (b) during adjudication and consolidation, one member of the family was designated to hold on behalf of the family; (c) the registered persons were the designated family members who were registered to hold the parcels of land on behalf of the family... A trust can never be implied by the Court unless there was intention to create a trust in the first place."

26. Has the plaintiff proved that it was the intent of Stanslaus Ofula that the suit property was to be held in trust by Ladslaus Onyango Stand for the family? My answer to this is in the negative. The decision by the family patriarch Stanslaus Ofula to divide his ancestral interest in the suit property and land parcel number **Uholo/Ugunja/ 400** between his sons Selestinus Owiye Stand and Ladslaus Onyango Stand shows that the patriarch's intent was to ensure that each of his two sons had their respective interests distinct and separate. The registers to the two parcels of land were both opened on 10/9/1970. The suit property was registered in the name of Onyango Stadi while **Uholo/Ugunja/ 400** was registered in the name of Owiye Stadi. It would have been the finding of this court that customary trust has not been proved.

27. On the 3rd issue of whether the plaintiffs are entitled to the reliefs sought, it is the finding of this court that having found the 1st issue in the affirmative, it therefore follows that the plaintiffs are not entitled to the reliefs sought.

28. On the last issue as to what order should be made on costs of this suit. Costs follow the event; however, it is the considered opinion of this court that in view that the plaintiffs and 1st defendant are close family relations, each party shall bear their own costs.

Disposal orders

The court finds that the case against the defendants is *res judicata* and the orders sought in the plaint dated 7/06/2013 are declined. Each party shall bear their own costs.

Judgment delivered virtually.

DATED, SIGNED AND DELIVERED THIS 9TH DAY OF NOVEMBER 2021

In the Presence of:

Ms. Nyanga for the plaintiff –present

Defendants' counsel - absent

Court assistant – Sarah Ooro

HON. A. Y. KOROSS

JUDGE

9/11/2021