



**Okwemba (Suing as Administrator of the Estate of Peter Omutola
Okwemba - Deceased) v Osiako (Environment & Land Case 18 of 2021)
[2021] KEELC 4741 (KLR) (16 December 2021) (Judgment)**

Neutral citation: [2021] KEELC 4741 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
ENVIRONMENT & LAND CASE 18 OF 2021
E ASATI, J
DECEMBER 16, 2021
(FORMELY KAKAMEGA ELC NO. 119 OF 2019)**

BETWEEN

**SARAH OWENDI OKWEMBA (SUING AS ADMINISTRATOR OF THE
ESTATE OF PETER OMUTOLA OKWEMBA - DECEASED) PLAINTIFF**

AND

FANUEL OSIAKO DEFENDANT

JUDGMENT

A. Introduction

1. This suit was initiated vide a Plaint dated 8th November, 2021 wherein the Plaintiff seeks the following relief against the Defendant:
 - a. A declaration that the defendant holds land parcel number East Bunyore/Ebunangwe/1644 in trust for the plaintiff and the plaintiff is thus entitled to a portion measuring 0.31 Ha.
 - b. An order directing the Defendant to surrender the title deed and execute all necessary documents to enable sub-division and transfer of the 0.31 Ha of the subject land into the name of the plaintiff failure to which the Executive Officer execute such necessary documents.
 - c. Costs of this suit and interest thereon
 - d. Any other or further relief as may be just to grant.
2. The Defendant, in response to the Plaint filed a defence dated 25th November, 2019 wherein he denied all the allegations in the Plaint and prayed that the suit be dismissed with costs.
3. The case was heard and closed on 18.11.2021. Both called witnesses and filed written submissions.



Summary of the evidence

The plaintiff's case

4. The plaintiff's case is that she is the widow of Peter Okwemba deceased and that she had taken out letters of Administration to sue on behalf of his estate. Her claim is that the estate of her late husband is entitled to a portion of land measuring 0.31 hectares out of land parcel known as East Bunyore/ebunangwe/1644 (the suit land herein). The basis of her claim is that the suit land is ancestral land which is registered in the name of the Defendant to hold in trust for her late husband and another family member.

Her evidence in chief is contained in her witness statement dated 8th November 2019 which was adopted as evidence. In the statement she states that she has her matrimonial home and reside on 0.31 hectares of the suitland with her family while the Defendant resides on parcel number East Bunyore/ebunangwe/278. She testified that immediately before his death, Omutola her father-in-law called a meeting and shred out his parcels of land among his sons. That her father-in-law directed that the suit land be shared between her husband and the other son called Tom Omutola. That the father in law allocated land parcel no East Bunyore/ebunangwe/278. That further, the father-in-law directed that his wife's grave on the suit land be on the side of the share belonging to Peter Okwemba, the Plaintiff's husband. She stated that the Defendant has however to date failed to transfer the suit land as directed and is threatening to evict her from her matrimonial home.

In court she added that the Defendant is her elder brother-in-law. That she had sued him because when their father left the land to him to subdivide and share to them, he refused to do so. That she had stayed on the suit land for the last 37 years since she was married and has developed the same by building a residential house, two houses for her 1st born son and some rental units. That she interred the remains of her late husband on the land.

She produced exhibits namely; the green card in respect of the suit land as P exhibit 1, Grant of letters of Administration in respect of the Estate of her late husband (Peter Omutola) as P exhibit 2, a green card in respect of land parcel known as East Bunyore/ebunangwe/278 as P exhibit 3 and a copy of minutes dated 29th September, 2016 as P exhibit 4.

On cross examination, she denied that the suit land was the property of the Defendant and stated that the Defendant was a trustee as the eldest son in the home. She further stated that her husband had asked the Defendant to transfer the land to him but he refused.

The Plaintiff testified that she had stayed on the suit land for the last 37 years since she was married and has developed the same by building a residential house, two houses for her 1st born son and some rental units. That she interred the remains of her late husband was buried on the land. She called two witnesses.

PW2, Peter Harrison Ngota, had his witness statement dated 8th November 2019 adopted as his evidence in chief. He stated in the statement inter alia that on 26th September 2016 the Plaintiff called a meeting and that he was in attendance and recorded what transpired in the meeting. That all the family members who were in the meeting were in agreement with the fact that the deceased, Omutola, had distributed his parcels where he gave the Defendant herein land parcel number East Bunyore/ebunangwe/278 while the suit land was to be shared by Peter Omutola the Plaintiff's husband and Tom Omutola. He identified the Minutes P exhibit 4) of the meeting.

PW3 Edward Okanga Lweyelo testified and had his witness statement dated 8/11/2019 adopted as his evidence in chief. In the statement he states that the father of the parties herein, one Omutola,



was a member of the church he pastors. That before his death, the deceased called a meeting in order to distribute his two parcels of land. That the meeting was attended by himself, One James Marunga(deceased), Abednego Mukabo,(deceased) Rev Laban Mwando (deceased) Rev Florance Opanga, the Defendant(Fanuel Osiako, Peter Omutola, Sarah Owendi a sister and a sister of the Defendant. That the deceased stated that he had made a mistake to cause the suit land to be registered in the name of the Defendant. That he directed that the Defendant takes land parcel East Bunyore/ebunangwe/278 which is the land where the Defendants resides and that the suit land be shared between Peter Omutola and one Tom Okwemba also called Mzee. The witness stated that the father directed the Defendant to cause a transfer of the suit land to Peter and Tom Omutola. He further stated that all the people present were agreeable to the directions of Omutola but that to date the Defendant had not complied with the father's wishes. In court he added that the Plaintiff resides on parcel no. 1644 while the Defendant resides on No. 278. On cross-examination, he testified that the father of the Defendant had entrusted the Defendant as the eldest son to hold the land on behalf of his brothers.

The defendant's case

5. The Defendant denied the plaintiff's allegations. He stated that the Plaintiff is his sister- in-law. He further stated that his late father left him two pieces of land namely East Bunyore/ebunangwe/278 and East Bunyore/ebunangwe/1615. That he does not have evidence that Parcel No. 1615 exists but the people that Sarah sold NO. 1615 to, are there. That Sarah bought her land in Narok. He testified that the suit land is his that the Plaintiff has a house on it which she has rented out. That she bought the suit land from one Benjamin Okanda but he does not have the land sale agreement. He stated that Tom is only entitled to a share of parcel No. East Bunyore/ Ebnangwe/278. He stated that he lives on land parcel no 278. He denied that he attended the meeting of the elders.
6. He called one witness Tom Okwemba Omutola as DW2. DW2 stated that land parcel No.s 278 and 1615 belonged to his late father. That parcel No. 1644 belongs to the Defendant. That parcel No. 278 was to be shared between the Defendant and him while No. 1615 was given to his late brother who sold it. On cross examination he stated that he had no documents on parcel No. 1615. That he was not a witness when his late brother was selling the land in the year 1976. That a tenant of the plaintiff lives on land parcel No. 1644. That the Plaintiff has been on the suit land since the time she was married about 37 years ago. He further stated that Fanuel, the Defendant was in the meeting of the elders but did not say anything and refused to sign the minutes. He stated further that PW2 was in the meeting and chaired the same. He testified that his late brother Peter Omutola Okwemba who was the husband of the deceased was buried on the suit land.

Submissions

The Plaintiff's submissions

7. In her submissions she stated that the Defendant holds 0.31 hectares of the suit land in trust for her. She relied on the provisions of section 28 of the *land Registration Act* which makes customary trust one of the overriding interests. She also relied on the case of Isaack Kieba M'inanga -vs- Isaaya Theuri M' Linturi & Another SCOK No.10 of 2015 to demonstrate the point that the evidence she tendered proved the existence of a customary trust.

She submitted that she had proved the elements that constitute a customary trust. That the relation of the Plaintiff and Defendant was that of family. That the Defendant is the brother-in-law of the Plaintiff. That a meeting was held by the elders wherein it was agreed that the Defendant do transfer that land and that although the Defendant denied being in the meeting his presence was confirmed by



all the witnesses including DW2. That the grave yards for the parties' parents are on the suit land thus proving the customary trust.

The Defendant's submissions

In his submissions the Defendant stated that his father's name was Omutola Okwemba alias Henry Omutola. He was survived by 3 sons namely himself, DW 2 and the husband of the plaintiff. According to him the deceased left two land parcels to be shared as follows; Fanuel Osiako (the Defendant) and Tom Okwemba to get East Bunyore/ebunangwe/278 and Peter Okwemba the Deceased(husband of the Plaintiff to get East Bunyore/ebunangwe/1615.

He submitted further that after the death of their father, their brother Peter Okwemba (the plaintiff's husband) sold land parcel No. East Bunyore/ebunangwe/1615 vacated the land and went to buy another land elsewhere. He however submits at the same time that it was after the death of her husband that the Plaintiff started land disputes in the family after selling her parcel no. East Bunyore/ebunangwe/1615. He states that land parcel East Bunyore/ebunangwe/1644 is his personal property and not family land.

Issues for determination

8. From the pleadings filed, the evidence adduced and the submissions, I find the following to be the issue that present themselves for determination:
 - a. Whether or not the Defendant holds a portion of the suit land in trust for the plaintiff.
 - b. Whether or not the plaintiff has proved her case on a balance of probabilities.
 - c. What order to make on costs.

Analysis and determination

Whether or not the Defendant holds the suit land in trust for the plaintiff

9. The existence of land parcel known as East Bunyore/ebunangwe/1644, the suit land is not disputed. In any event, a copy of register (green card) in respect of the same was produced as plaintiff exhibit 1. It is not disputed that although the suit land is registered in the name of the Defendant, the Plaintiff has occupation thereof as the Defendant resides on parcel No. East Bunyore/ebunangwe/278.

It is also not disputed that the parties herein are related. The husband of the plaintiff and the defendant were brothers, the Defendant being the elder brother. The dispute is whether registration of the suit land in the name of the defendant conferred upon him absolute ownership or he holds it in trust for others; the Plaintiff's late husband included.

10. Indeed section 28 of the *Land Registration Act* No. 3 of 2012 secures customary trust as an overriding interest to which registered land is subject. Section 28(b) provides

“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...”
11. I have read the copy of register (green card) produced as exhibit. The same shows that the register in respect of land Parcel No. East Bunyore/ebunangwe 1644 was opened on 21/7/1965. The parcel was



registered in the name of the Defendant on the same day as a first registration. The land measures 1.29 Ha. That Title deed in respect of the same was issued on 1/7/2019. And that on 24/4/2019 a restriction was placed by the Plaintiff claiming beneficiary interest. While the Plaintiff claims that the registration was in trust for the Defendant's siblings, the Defendant insists that the registration was absolute.

In the case of *Justus Maina Muruku vs Jane Waithira Mwangi* [2018] eKLR the court noted that customary trusts are an encumbrances on land. That they are non-registrable rights which run with the land.

The Court of Appeal in *Mbui Mukangu vs Gerald Mutwiri Mbui* C. A no. 281 of 2000 stated that customary trust is an intergenerational equity where the land is held by one generation for the benefit of succeeding generations. It further held that in order for one to establish a claim in customary trust one had to prove that they are in actual physical possession or occupation of the parcel of land.

In *Isack M'inanga Kieba vs Isaya Theuri M'lintari & another* [2018] eKLR relied on by the Plaintiff in her submissions, the Supreme Court declared that 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 regime (now repealed) the content of such 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...the categories of a customary trust are therefore not closed.

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 vs 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, the 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.”

From the above cited authorities, a customary trust must be proved to subsist and the proof must be by way of evidence that the nature of the holding of the land and the intention of the parties demonstrate existence of a trust.

The evidence as analyzed herein above shows that although the land is registered in the name of the defendant he does not reside therein. He resides on a different parcel. The Plaintiff has resided on the suit land for more than 37 years. She has her home there. She has rented out parts her house(s) to a tenant. She interred the remains of her late husband thereon. The parents of the parties were buried thereon. The Plaintiff called evidence that, before his death, the father had asked the Defendant to transfer the suit land. She also adduced evidence that there was a meeting of the elders called to sort out the issues of the suit land between the plaintiff and the Defendant. Minutes of the meeting (Pexhibit 4) were produced. That it was resolved in the meeting that the Defendant transfers the suit land. While the Defendant denied attending the meeting, his witness DW2 testified that the Defendant attended the meeting but declined to talk and sign the minutes. No explanation was given, why the Defendant has allowed the plaintiff and her late husband and their parents to do all the stated activities on the suit land for so long. The land was registered in his name in 1965.

The Defendant insisted that the land given by the parents to the Plaintiff's husband was land parcel known as East Bunyore/ebunangwe/1615. But no documentary evidence was produced that such land exists or that the same was given to the Plaintiff's husband. Further the Defendant claimed that the land parcel No. East Bunyore/ Eburnangwe/1615 was sold but while at one point he said it was sold



by his brother Peter Omutola before he died, at other time he said the land was sold by the Plaintiff after the death of her husband.

In the Isack M'nage Kieba case(supra) the Supreme Court proceeded to identify some of the elements that would qualify a Claimant as a trustee. These elements are:

- a. The land in question before registration was family or 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.
 - d. 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.
12. On the basis of the evidence in the instant case the court finds that the above stated elements have been proved on a balance of probabilities. That a customary trust has been proved in respect of 0.31 hectares of the suit land which is held by the Defendant in trust for the Plaintiff as a personal representative of the estate of her late husband Peter Omutola.

Whether or not the Plaintiff has proved her case on a balance of probabilities

13. Having found that the Plaintiff has proved that the Defendant holds a portion of the suit land in trust for her, I find that the Plaintiff has proved her case on a balance of probabilities.

On costs

14. The parties are members of one family and in the circumstances it is in the interest of justice that each party bear own costs.

Conclusion

15. On the basis of the findings herein I make the following orders:
1. It is hereby declared a customary law trust exists over the suit land namely that the Defendant holds a portion measuring 0.31 ha of land parcel known as east bunyore/ebunangwe/1644 occupied by the Plaintiff on the ground in favour of the Plaintiff
 2. The Defendant do subdivide land parcel known as east bunyore/ebunangwe/1644 and transfer a portion thereof measuring 0.31 hectares to the Plaintiff forthwith in default the Deputy Registrar of the Court to execute the requisite documents to effect subdivision and transfer.
 3. Each party to bear own costs.

Orders accordingly.

**JUDGEMENT PRONOUNCED, DATED AND SIGNED IN OPEN COURT AT VIHIGA THIS
16TH DAY OF DECEMBER 2021.**

**E. ASATI
JUDGE**



In the presence of:
for the Appellants
for the Respondents
Ajevi Court Assistant.

E. ASATI

JUDGE.

