



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

CIVIL CASE NO. 124 OF 2016

STEPHEN OLOO AFWANDE.....APPLICANT

= VERSUS =

JOHN FRANCIS MUYODI

PETER LUNANI ONGOMA sued as administrators of the estate of

LAURENT ONGOMA..... RESPONDENTS

J U D G E M E N T

1. This suit was commenced by way of Originating Summons dated 16th September 2016 pursuant to the provisions of Order 37 rule 1 of the Civil Procedure Rules. The applicant Stephen Oloo Afwande listed the following issues for determination;

(i) Whether the Respondent John Francis Muyodi and Peter Lunani Ongoma who are administrators of the estate of the late LAURENT ONGOMA are holding about 30 acres of land parcel number MARACHI/ELUKHARI/415 sheet number 28 in trust for the children of the late AFWANDE WANABWOBA.

(ii) Whether the Respondents John Francis Muyodi and Peter Lunani Ongoma should be compelled to surrender 30 acres from land parcel number MARACHI/ELUKHARI/415 sheet number 28 to the children of the late AFWANDE WANABWOBA.

(iii) Whether the late LAURENT ONGOMA was holding title for 30 acres of land parcel number MARACHI/ELUKHARI/415 in trust for the late AFWANDE WNABWOBA.

(iv) Who shall bear the costs of this suit which application is based upon the affidavit of Stephen Oloo Afwande and other grounds to be adduced during the hearing of the suit?

2. The summons was supported by the supporting affidavit dated 16/9/2016 together with documents annexed thereto. The applicant deposed that he is the administrator of the estate of the late Afwande Wanabwoba who occupied 30 acres of land parcel No. Marachi/Elukhari/415. That during demarcation, the late Laurent Ongoma alias Lawrende Ongoma registered himself as the owner of this land although Afwande's family continued to occupy the 30 acres until his demise. The respondents are sued as the administrators of the estate of Laurent Ongoma.

3. The Applicant urged that the Respondents should be compelled to distribute the estate of the late Laurent Ongoma and give them the 30 acres the deceased was holding in trust for the family of Afwande Wanabwoba. That the family of Afwande Wanabwoba will be rendered destitute unless the orders are granted.

4. The 1st Respondent filed an affidavit-in-reply on 16th November 2016 to oppose the applicant's suit. He deposed that prior to Laurent Ongoma's death in 1980, the family of Afwande Wanabwoba which included the plaintiff were arrested and charged for trespassing on the suit land and sentenced to 6 months imprisonment. They were also restrained from entering the suit land. That upon the death of Laurent Ongoma the said family filed Kakamega HCCC No. 38 of 1992 against John Francis Muyodi, Thomas Omondi and Mark Ayieko Ongoma. That the defendants therein filed a defence and counter-claim. The Case was fully heard and an order issued for the eviction of the plaintiffs who included the Applicant. That they were actually evicted thus this suit is *res judicata* and the same ought to be struck out with costs.

5. The 2nd Respondent also filed a replying affidavit on 15/12/2017. He deposed that L. R. No. Marachi/Elukhari/415 comprised the estate of Laurent Ongoma which title came into existence about July 1966 after the death of Afwande Wanabwoba who is alleged to have died around 1957. The 2nd Respondent deposed further that there exist Kakamega Succession Cause No. 306 of 2011 (now BSA Cause No. 278 of 2012) where the Applicant alleged that the suit land belonged to the late Afwande Wanabwoba. He also mentioned the determination in Kakamega

6. The 2nd Respondent stated that he was also aware of the existence of Case No. 17 of 2008 before Kakamega Provincial Land Disputes Appeals Tribunal between parties similar to this case. That in view of this chronology, he is advised by his advocates that;

(a) *This claim is non-starter as the suit land did not exist when AFWANDE WANABWOBA allegedly died.*

(b) *The plaintiff ought to have agitated their purported claim under the Land Adjudication Act, Cap 283 Laws of Kenya during the adjudication process.*

(c) *The suit land is a 1st registration whose title is indefeasible under the Registered Land Act, Cap 300 Laws of Kenya (now repealed).*

7. The 2nd Respondent continued that this claim is *res judicata* and the proceedings herein is an abuse of the Court process. He urged the Court to dismiss the summons with costs.

8. The case proceeded by way of viva voce evidence. The Applicant called 2 witnesses and the defence one witness. The Applicant who testified as **PW1** relied on the following documents produced in support of his claim;

(1) *Grant in Cause No. 306 of 2011 – Pex 1.*

(2) *Certified copy of register for L.R No. 415 – pex 2.*

(3) *Map sheet No. 27 – Pex 3*

(4) *Map sheet No. 28 – Pex 4*

(5) *Map sheet No. 33 – Pex 5*

9. **PW1** adopted his witness statement dated 19/2/2018 which rehashed what was pleaded. He stated that he was claiming 30 acres from the suit land on behalf of Afwande Wanabwoba. In cross-examination, **PW1** Afwande Wanabwoba died in 1957. That at the time of his death, no demarcation had been done. **PW1** said his brother filed objection to the adjudication process but he did not know its results. **PW1** stated he was evicted from the suit land in 1997 but he did not know what happened in the case that led his eviction. That he knew about the case Kakamega HCCC No. 38 of 1992 which was dismissed. **PW1** said they did not appeal the decision. **PW1** further stated that he sued Mark, John and Peter before the Butula land Disputes Tribunal in April 1988 where the Tribunal advised that they file a case before the Provisional Land Dispute Tribunal. The Applicant testified that they also filed Succession Cause No. 306 of 2011 where he listed the suit title Marachi/Elukhari/415. That he was claiming the land because his father was buried on it and they used to farm it as a family.

10. Francis Ochieng Asuda testified as **PW2**. He comes from Munda village and is a businessman. He adopted his witness statement dated 19/2/2018 as his evidence in chief. That he knew about the suit title when he was about 15 years. That there was a home and “*Mitunji*” of water which he was told was owned by Afwande – deceased. **PW2** said he saw the plaintiff living there for over 10 years before they were evicted.

11. During cross-examination, **PW2** said he was born in 1956 which was after Afwande had died. That the suit land is currently registered in the name of John Ongoma. That he saw the houses on the suit land and was told by his father they belonged to Afwande. That currently the plaintiff lives on a rented premises at Butula. In re-examination, **PW2** said he knew the plaintiff in 1999 when they were returning on the land. That he saw the plaintiff living on the suit land. This marked the close of the plaintiff’s case.

12. Peter Lunani Ongoma testified as the sole defence witness. He said that he is a retired civil servant. That John Francis Muyodi (the 1st Respondent) is his elder brother and he died in April 2019. **DW** states that they were appointed administrators of their father’s estate who died in 1980. The witness said he knew the plaintiff when the plaintiff sued them in civil case Kakamega HCC 38 of 1992 seeking to get this land which case was dismissed and their counter-claim granted. That using that decree, the plaintiff was evicted and has never returned on the land.

13. **DW** further stated that his father was the first registered owner and there was never any objection raised during the adjudication process. He presented the following as exhibits in support of their defence;

(a) *Grant of Administration of Laurent Ongoma’s estate – Dex 1.*

(b) *Adjudication register – Dex 2.*

(c) *Affidavit sworn by plaintiff in 306 of 2011 – Dex 3.*

(d) *Judgment in 38 of 1992 – Dex 4.*

(e) *Eviction order – Dex 5.*

(f) Affidavit by plaintiff in P&A BSA 112/2010 – Dex 6.

(g) Proceedings from Kakamega Provincial Land Dispute Tribunal – Dex 7.

14. In cross-examination, **DW** said that when the eviction order was issued, Laurent Ongoma – deceased was the registered owner. That he obtained a grant in 2016 adding that he was never the administrator as at 1997. **DW** admitted that in 1992, the plaintiff was living on the suit land. That Lawrende Ongoma was a senior chief of Marachi. That the plaintiff came on the land in 1992 around the time they filed the Kakamega case. Currently the defendant's brother called Mark Ongoma uses the portion where the plaintiff was evicted from. This marked the close of the defence case.

15. Parties filed their written submissions. The plaintiff filed theirs on 24/2/2020 while the defence filed theirs on 5th May 2020. I have read both and from the submissions together with evidence adduced, I frame two questions for my determination;

(a) Whether or not this suit is *res judicata*.

(b) If answer to (a) is No, whether or not the plaintiff has proved a trust relationship existed between Afwande Wanabwoba – deceased and Lawrende Ongoma – deceased.

(c) What orders should the Court make.

(d) Who bears the costs of the suit?

16. Section 7 of the Civil Procedure Act provides that for a suit to be determined as *res judicata* a previous suit, the following criteria must be met;

(a) That the former suit must have existed between the same parties or parties who derived a claim through them over the same subject matter.

(b) The former suit must have been determined before a court of competent jurisdiction.

(c) The former suit ought to have been determined on its merits.

17. The Applicant submitted that his suit is not *res judicata* because their former suit Kakamega HCC 38 of 1992 was dismissed for non-attendance and the eviction order issued on the defendants counter-claim. The Applicant thus does not deny that the former suit was in regard to the same subject matter; between the same parties and filed before a court of competent jurisdiction. So was Kakamega HCC 38 of 1992 determined on its merits? The proceedings in Kakamega HCCC No. 38 of 1992 (former suit) was produced as *Dex 4*. In the proceedings before Tanui J on 28/3/1996, an application for adjournment was made on behalf of the plaintiff which application was refused by the trial judge.

18. The trial judge proceeded to dismiss the plaintiff's case with costs. Thereafter the matter proceeded to hearing on the defendant's counter-claim. After hearing the evidence of John Muyodi Ongoma, the trial judge proceeded to render his judgment for the defendant as prayed in the counter-claim. This judgment has never been set aside and or appealed by the plaintiff who was the plaintiff in the former suit. The judgement was rendered after hearing of the defence witness. Hearing on merits in my understanding of the provisions of Order 18(2) of the Civil Procedure Rules is to have a party present his claim before the court which the defendants did.

19. A counter-claim is defined by Black's Law dictionary 10th Edition as **"A claim for relief asserted against an opposing party after an original claim has been made; especially a defendant's claim in opposition to or a set off against a plaintiff's claim – also termed counter suit; cross-demand."** From the definition, it is a cross-demand against a plaintiff. The cross demand by the defendant was heard and determined by the judge in HCC 38 of 1992. Whether or not the defendants had letters of administration hence the validity of their claim then against the plaintiff is a question that should be raised before a court having jurisdiction to reverse that decision. This court which has concurrent jurisdiction to the one that determined the former suit cannot question the capacity of the defendants in that former suit in a separate claim as that amounts to sitting on appeal on a decision of my counterpart. I am therefore persuaded to find that the current suit is *res judicata* the former suit.

20. In the alternative that I am wrong that this suit is not *res judicata*, has the plaintiff proved his case on customary trust? The plaintiff's evidence was that his father died in 1957 before the demarcation/adjudication exercise took place. That Lawrende Ongoma got himself registered in trust for the family of Afwande Wanabwoba in respect of the 30 acres the deceased utilized with his family. It is trite law that trust must be proved by facts as it is an equitable remedy. Black's Law dictionary defines a trust as **"The right, enforceable solely in equity, to the beneficial enjoyment of property to which another person holds the legal title; a property to which another person holds the legal title; a property interest held by one person (the trustee) at the request of another (the settlor) for the benefit of a third party (the beneficiary). For a trust to be valid, it must involve specific property, reflect the settlor's intent, and be created for a lawful purpose."**

21. Section 28 of the Land Registration Act provides that trusts including customary trust are overriding interests without their being noted in the register. The applicable law then was Section 30 of the Registered Land Act Cap 300 (repealed) which provided thus under paragraph (g).

"The rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or

occupation, save where inquiry is made of such person and the rights are not disclosed.”

22. The burden was on the plaintiff to prove the existence of this right. According to PW1, he said that their father was in possession of 30 acres comprised in the suit title. PW1 said that the late Lawrende came from a different clan (sub-location) from theirs but used his position as the senior chief to register himself as the owner of the suit land. PW1 having said that he had no clan relations with the first registered owner created an uphill task for himself to establish how the trust relationship would exist. He called PW2 to corroborate his evidence. However PW2's evidence was more of hearsay as PW2 stated that he was told by the elders that the homestead he had seen belonged to Afwande Wanabwoba – deceased. PW2 was born after the death of Afwande Wanabwoba. Further PW2 said he got to know the plaintiff in 1999 after the plaintiff had been evicted from the suit land.

23. The defence evidence is that the Applicant went to the land in 1992 the same year he filed the Kakamega Case. The plaintiff in my view did not discharge the burden of proving that before his eviction, he together with his siblings (family of Afwande) were living on the 30 acres he claimed. None of his brothers came to support his averment neither did he call any elders to confirm that they lived/occupied 30 acres of the suit land over a period of time before their eviction in 1997. I am persuaded to hold that the plaintiff failed to establish by way of evidence the trust relationship between him and the family of Laurent Ongoma - deceased.

24. I am guided by the holding of Makhandia J (as he then was) in *Susan Mumbi Waititu & 2 others Vs Mukuru Ndata & 4 others (2008) eKLR* that, **“As for trust, the plaintiffs must prove with cogent evidence that the suit premises was ancestral land and thus family land. In the circumstances of this case, the plaintiffs have miserably failed in this onerous task. The 1st defendant has deponed that he purchased the suit premises for value. Accordingly it is not family land passed over through the ages. I have no reason to cast doubts over this averment. The plaintiffs themselves have not in the supporting affidavit deponed to anything to suggest that the suit premises were actually ancestral land. Trust cannot be imputed. It must be proved. In the absence of such proof, I find and rule that there was no trust envisaged by the 1st defendant in favour of the plaintiffs”.**

25. I am further guided by position in the Case of *Esther Nyamweru Waruhiu & Ano Vs George Kang'ethe Waruhiu (2019) eKLR* where the Court of Appeal in dealing with the question of proof of customary trusts said thus;

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.”**

26. The registration of Lawrende Ong'oma – deceased was a first registration that could not be faulted on account of fraud. Therefore the Applicant's allegation that the deceased used his position as the senior chief to extend the boundaries of his land which was in map sheet 27 and acquire the land belonging to Wanabwoba – deceased in map sheet 28 does not assist the Applicant's case. The Applicant also said he had no idea of the outcome of the objection proceedings taken out by his brother against the registration of Lawrende. He was alleging fraud without endeavouring to prove it. The allegations of fraud must be specifically pleaded and proved on a high degree of probability *Hatital G. Patel Vs Lalji Mahan (1957) E.A 314*.

27. In the circumstances of this case, the Applicant neither laid facts to prove the existence of customary trust nor fraud. His claim has not been proved to the required standards and the only order this court can issue is one of dismissal. Accordingly, I dismiss this case both for want of proof and being *res judicata* Kakamega HCC 38 of 1992. The costs of the suit is awarded to the Defendant/Respondent.

Dated, signed and delivered at BUSIA this 7th day of July, 2020.

A. OMOLLO

JUDGE