



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
HCC NO. 78 OF 1998

TERESINA MUKELE RAPANDO..... 1ST PLAINTIFF

SALOME NATSALA MALALA..... 2ND PLAINTIFF

VERSUS

GRACE OMUKWAYA MALALA.....1ST DEFENDANT

PETER WASWA RAPANDO 2ND DEFENDANT

WILLIAM WAMBANI RAPANDO 3RD DEFENDANT

DESTERIO MANGO RAPANDO 4TH DEFENDANT

BILDAD ACHIENG RAPANDO 5TH DEFENDANT

JUDGMENT

The two plaintiffs filed their suit vide a plaint on 29th October 1998 claiming for;

(a). General damages for breach of trust and transfer of L.R. No. E. Wanga/Malaha/626, 627,628,629,630, & 631 into their names.

(b). Costs of the suit.

0. Interest at court rates.

I have perused the court file. I only found a memorandum of appearance filed on 4th November 1998 by E.K. Owinyi & Co. advocate on behalf of the defendants. Thereafter statement of issues were filed on 3rd March 1999 with additional issues filed on the same date. Since the defendants participated in the proceedings, I presume there was a defence filed but I did not trace any within the file and this matter has been in court for too long.

Trial commenced on 22nd June 2000 when **PW1** testified. She is the first plaintiff and daughter of Malala Rapando – deceased and Grace Omukwaya Malaha – 1st defendant. They were four siblings of which two of her brothers died in their infancy and left the two of them. Her evidence is that her father owned land where they lived, i.e. E. WANGA/MALAHA/208. The 2nd defendant inherited her

mother while they were young as she used to see him come to their house.

In 1977 as shown in the green card (Ex P1), the 2nd defendant subdivided the L.R No. E. WANGA/MALAHA/208 into six portions and shared out amongst his brothers as follows;

1. Peter W. (2nd defendant) -----5.1 acres as 627
2. William (3rd defendant) ----- -5.1 acres as 628
3. Mathew (father to 5th Def.) ----- 5.1 acres as 629
4. Desteris (4th defendant) ----- 5.1 acres as 630
5. Peter L. (6th defendant) -----, 5.1 acres as 631
6. Grace Wamukhwale (1st defendant) 5.1 acres 626

Mathew Rapando transferred land to the 5th Defendant Bildad A. Rapando in 1998. The 1st Plaintiff had six (6) children. She claimed the land was registered based on customary trust because at the time Peter was taking care of them when he registered himself as administrator of the land. She was a minor. The 1st defendant has already transferred the piece given to her to the plaintiffs. It is her evidence that she started demanding for the land once they were mature. Their uncles who are the 2nd to the 5th defendants have their separate parcels of land they inherited from their father.

In cross examination, she claimed to be ready to refund monies paid towards her education by the 2nd Defendant. She admitted that she brought the case after 21 years. The court has noted from the green card (exp.1) the transfer was by way of succession from Malala Rapando to the name of 2nd defendant. There was no entry made in the register of the land being held in trust for the plaintiffs. At the time of her father's death, the near male relatives were the uncles as he had no surviving son or brother. She did not agree that only male children inherit their fathers land. She had a case in point where daughters were allowed to inherit their father's land.

PW2 Anacet Sakwa, testified on 21st September 2000. She is 82 years old a Luhya of Wanga of clan of Shitsetse. According to her, the Wanga customs allowed inheritance with the inheritor taking care of widow, children and property of the deceased. If the deceased left daughters only, the daughters would inherit the land. She gave a case in point where her colleague at work died and his daughters took over his land. It is her evidence that the inheritors held the deceased's property for the benefit of the children alone.

On cross examination by Mr. Owinyi for the defendants, she mentioned the name of her colleague as Fanuel Ongato Mwimali but could not recollect the details of the case. She maintained Wanga customs allowed daughters to get their fathers land and she had herself acquired 2 acres from her father's land. According to her all children would be given land irrespective of marital status.

I note from the proceedings an order was made for the in charge High court Civil registry at Kakamega to produce succession file No. 231 of 1995. It was not produced at the close of the proceedings. The plaintiff then chose to annex copy of certificate of grant as well as the judgment of the court in the said cause to their submissions. In this case the land was shared equally amongst the daughters

On 7th December 2009 when the matter came up in court before Justice F. Muchemi, Ms. Nanzushi for plaintiffs informed the court that 3 of the defendants have died (not indicating which ones) and two bedridden (no specifics). She asked for a nearer hearing date.

On 24th May 2010 **PW3 John Omuemia Kulondo** testified. He is 62 years old. He Knew the plaintiffs and the defendants as they are his neighbours. At the time of death of Rasimu Malaha Rapando, his children were young. The 2nd defendant inherited the 1st defendant. The 2nd defendant was registered as personal representative when Rasimu died in respect of E. WANGA/MALAHA/208. According to him Peter (2nd defendant) should have been registered as trustee of the land for the benefit of the children not owner. He knew the land was subdivided but does not know who got what. He knew the plaintiffs were denied a share of their father's land.

He was cross examined by Mr. Abok for the defendants. He confirmed he was aware the land was subdivided. Two of the defendants are deceased and have not been substituted. The plaintiffs closed their case and Mr. Abok sought adjournment on behalf of 2nd, 3rd & 5th defendants.

The matter came up twice for further hearing when the defendants were not ready. On 9th October 2012 before Justice Muchelule, the plaintiffs' advocate asked the court to mark the defendants case as closed. The court proceeded to have the defence case closed without any evidence adduced in favour of the defence. The plaintiffs then filed their written submissions. The defendants' advocates was served with mention notice for 27th May 2013. There was no appearance made and the court set a judgment date.

I would have treated this case as unopposed however given the defendants participated in the proceedings, I will analyze the evidence to verify if indeed the plaintiffs have proved their case within the required standards. Secondly being a land matter, it cannot be treated casually and it requires reasons to be given on why the plaintiff would win or lose the case. The plaintiffs' in their written submissions filed cited the case of **Bengawa Vs. Priscilla Njondo [1912] 4 EALR 160** though copy was not availed to this court. The court was unable therefore to read it. A statement in the said case is quoted to have stated that succession of an African's estate followed customs of his tribe. She also referred to the case of **Re Maangi [1968] EA 637** that Indian Acts did not apply to natives.

Counsel also referred the court to case of **Kimani Vs. Gikanga [1965] EA 735** on the applicability of customary law in our legal systems/jurisprudence. She further cited the case of **Re Fanuel Onga'to Mwinali Kakamega succession cause No. 231 of 1995** where the estate was distributed amongst the 6 daughters. The said Ong'ato was of the Wanga tribe like the parties in this case. The rest part of the submissions generally summarized the evidence as adduced and I will not repeat them here.

As briefly set out in the evidence of the plaintiff (PW1), it is not disputed that L.R. No. E. WANGA/MALAHA/208 was initially owned by Malala Rapando who was registered in 1966. The land was 25 acres as shown in green card produced as Ex. P1. It is also not disputed that the plaintiffs were daughters of Malala Rapando – deceased. It is further not disputed that the 2nd defendant inherited the 1st defendant as per customs of the Wanga Clan. He therefore automatically was nominated to be the administrator of the estate of Malala Rapando as per the customs of the Wanga clan. The plaintiffs were minors when their father passed on. Their claim is that the 2nd defendant got himself registered as trustee in respect of E. WANGA/MALAHA/208 in their favour and ought not to have distributed the land in question to the other defendants.

The 2nd defendant however distributed this land between the widow, the brothers and himself. This action did not go well with the plaintiffs. The defendants did not give evidence that would have laid a basis on the sharing out of the land. The green card does indicate how the 2nd defendant got the land transferred from the names of Malaha Rapando to himself in 1970 as by way of succession. Under section 41 of Cap 160 provides;

“Where reference is made in this Act to the “net intestate estate” or the residue thereof, devolving upon a child or children. The property comprised therein shall be held in trust in equal shares in the case of more than one child for all or any of the children of the intestate who attain the age of 18 years or who being female marry under that age...”

Sec. 29 of the Law of succession provides meaning of a dependant as

“(a) the wife or wives or former wife or wives and the children of the deceased whether or not maintained by the deceased immediately prior to his death”.

The provision of the Succession Act gives the wife and children priority over the other relatives listed in section 29 (b). It follows therefore that the 2nd defendant transferring the land to himself should have done so in trust of the plaintiffs and 1st defendant as the administrator of estate of Malala Rapando-deceased and not as owner.

PW2 testified that the Wanga customs allowed girls to inherit land left by a deceased father. She told the court that she was aware of a case of a colleague whose property was shared out to his daughters. She was 82 years old and conversant with the Wanga customs. She stated that where deceased left sons, then the property would be divided according to the houses. That a clan member should not inherit another's land. Her evidence was, the plaintiffs in spite of being daughters are entitled to their father's land. There being no evidence to contradict her averments, the court finds it believable as the custom was also in conformity with the law of succession.

I find therefore that the plaintiffs had a right to inherit land E. WANGA/MALAHA/208 by virtue of the provisions of the Succession Act. I have also read through case law dealing with customary trust created in land ownership. The case law favour the plaintiff's claim. In the case of **Gathiba Vs. Gathiba [E & L] KLR 356** Justice Khamoni at page 387 paragraph 20 said;

“However, from that evidence and from my experience as a “native” judge in this country, I think I am entitled to take judicial notice of the fact not only of the existence of Kikuyu customary law but also of the existence of other African customary laws in Kenya have the “concept” of a trust within the jurisprudence as demanded by sec. 48 & 51 of the Evidence Act” which is to be read with Sections 13 (a), (b) & Section 59 & Section 60 of same Act as well as Section 87 (1) of the Civil Procedure Act.” (underline mine for emphasis).

The judge also referred to Eugene Cotran's book: *Restatement of African law 2: The Law of Succession* which shows the concept of trust is found in customary laws of many tribes in Kenya including Kikuyu, the Kamba, the Luhya, the Kisii e.t.c.It therefore follows that customary law indeed exist among the Wanga clan which is a sub tribe of the Luhya. The Judicature Act chapter 8 and at section 3 provides that customary law shall be applicable in so far as it is not repugnant to law and morality.

In the case of **Mukangu v Mbui (E& L) 1 p 622**, the court of appeal held ***“However, since the same registration recognizes trusts in general terms w/out specifically excluding trusts originating from customary law and since African customary laws in Kenya, generally, have the concept or notion of trust inherent in them where a person holding a piece of land in a fiduciary capacity under any of the customary laws has the piece of land registered in his name ... either describing him or not, the registration signifies recognition by Registered Land Act, of the consequent trust with the legal effect of transforming the trust from customary law to the provisions of the Act because according to the proviso to section 28, such registration does not “relieve a proprietor from any duty or obligation to which he is subject as a trustee”.***

The provisions of section 28 of RLA has been imported to the the Land Registration Act which repealed the RLA. Under the new Act, section 28, ***unless the contrary is expressed, all registered land are subject to the following overriding interests ... without being noted in the register (b) trusts including customary trusts.*** I am aware there has been from the 1990s quite a substantial shift in the law as regards inheritance which previously discriminated against women getting land from their fathers. It is my finding that discrimination channeled through some of the customs are ousted by section 3 of chapter 8 of the laws of Kenya quoted above, section 29 (of the Law of Succession Act and article 27(3) of the Constitution. The plaintiffs are thus legally entitled to inherit their father's land.

In light of the foregoing,I do find that the 2nd defendant got himself registered on this land as trustee on behalf of the plaintiffs in respect to land parcel No. E.Wanga/Malaha/208. The subsequent subdivisions and transfer to himself and the 3rd to 6th defendants was therefore unlawful, irregular and unprocedural. I do allow the plaintiffs claim and do hereby issue an order directed at the District Land Registrar, Kakamega to cancel registrations of title deeds for parcels L.R. Nos. E. WANGA/MALAHA/627, 628, 629, 630, 631 in the names of the defendants and register them jointly in the names of the plaintiffs. The 1st defendant's title shall not be canceled as she is entitled to a life interest in the event she is still alive.

There was no proof of damages and none was submitted on. I therefore award none. This being a family dispute and some of the defendants have been mentioned to have passed on, I order that each

party to bear its own costs.

JUDGMENT DATED, SIGNED, READ and DELIVERED in open court this 4th day of July 2013.

A. OMOLLO

JUDGE.