

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO. E056 of 2021

PAULINE TIPIRA TANCHU
PLAINTIFF

VERSUS

JOYCE SINTOYIA TANCHU.....DEFENDANT

J U D G M E N T

1. In the Complaint dated 9th September 2021 the Plaintiff claims that she and the Defendant are the 2nd and 3rd wives of the late Ole Tanchu Koikai Michael (herein after referred to as Michael) who passed away on 16th May 2020. She went on to indicate that the late Michael also had another wife, the late Grace Yiamoi. The late Michael was a member of Osilalei Group ranch and the registered owner of parcel Kajiado/Osilalei/195 approximately 92.073 hectares. However, upon his demise, she discovered that the land had been registered in favour of the Defendant holding it in trust for her three children. She stated that this registration was effected while Michael was still alive. But since the land was ancestral land and the late Michael had three wives and children, the land should be held in trust for the Plaintiff and all the other children.
2. She therefore sought for orders the following reliefs:-

- i. A declaration that the Defendant holds LR No. Kajiado/Osilalei/195 in trust for the Plaintiff- Pauline Tipira Tanchu, and children- Jackline Sionte, Judith Naisoi, Timothy Letina, Jonathan Lengo'one, Kennedy Kores, Martin Malit, Nelson Meitiaki, Francis Letema, Joel Rikoyian, Elizabeth Mpanani, David Mpasoi and Patrick Leyian.
 - ii. Any further orders that this Hon. Court may deem necessary and appropriate.
 - iii. Costs of the suit and interest thereon.
3. The defendant in her statement of defence and counterclaim contested the allegation that the Plaintiff was a wife to the late Michael's ole Tanchu stating her marriage was dissolved under the Maasai Customary Laws over forty 40 years ago. She however stated that she was aware that the Plaintiff had one child with the deceased. She confirmed that land LR No. Kajiado/Osilalei/195 was registered in her favour on 15th May, 2019 having been transferred to her by the Michael ole Tanchu before his demise. As such, she had good title to the property, that the issue of customary trust was inapplicable and the caution placed against the title by the Plaintiff was bad in law.
4. She sought the following reliefs in her Counterclaim:
 - a. A declaration that the registration of the Defendant as owner of Kajiado/Osilalei/195 is not encumbered by Customary Trust in favour of the Plaintiff and her beneficiaries.

- b. A permanent injunction do issue, restraining the Plaintiff, her employees/servants/agents or whosoever from interfering, interrupting or in any way disturbing the Defendant's possession and occupation of Kajiado/Osilalei/195.
 - c. That the Land Registrar Kajiado be ordered to remove the caution entered as entry no. 8 on 04.08/2020 and registered on Kajiado/Osilalei/195.
 - d. General damages for loss incurred.
 - e. Interest at Court rates.
 - f. And other reliefs that the Hon. Court may deem fit to grant.
5. The Plaintiff in her defence to the counter claim reiterated her claim and sought that the counter claim be dismissed.

EVIDENCE OF THE PLAINTIFF

6. PW1, Tipira Michael Tanchu, the Plaintiff adopted her witness statement as her evidence in chief and produced the document in her bundle of documents as exhibits in this case. She prayed that the orders sought in her Plaint be granted together with costs.
7. On cross examination she stated that she got married to the late Michael Ole Tanchu over 30 years ago and while they had disagreements, they never divorced. She stated that the land she was claiming was located in Maparasha where she was residing until about three years ago when she moved to Isinya. She further stated that she had five children with Michael Ole Tanchu while living at Maparasha

and that none of the children was born out of wedlock. She confirmed that she knew with Mama Grace, who was also Michael's wife. She stated that her children as well as Grace's children were the ones listed in her witness statement. When referred to the High Court Succession Cause No. 4 of 2022, she confirmed that the Defendant's children and the children of the late Grace had been listed as beneficiaries and that she was the only one who had been left out. She also stated that the land was transferred to the Defendant while Michael Ole Tanchu was sickly and during the distribution, he did not state that she (the Plaintiff) should not be given the land.

8. On re-examination she reiterated she was never divorced from the late Michael and that she together with the late Grace and their children lived on the land. She stated that the late Grace, Michael and her son were all buried on the said land. She admitted that while her children were adults, she filed this suit because she was Michael Ole Tanchu widow.
9. PW2 Kiplagat Oinepu, adopted his witness statement as his evidence in chief. He stated that he was familiar with the family of the late Michael and that the plaintiff was his cousin. He stated that he knew the location of the suit land and that the Plaintiff was married to the late Michael ole Tanchu according to Maasai customary Laws and was never divorced. He also stated that he was aware the Defendant together with her children reside on the land.

10. On cross examination he stated that dowry was paid for the Plaintiff by Michael ole Tanchu, although the elders who received the same have since passed away. He stated that he was also aware that the Plaintiff no longer resides on the suit land. He further stated that Michael ole Tanchu demanded his dowry back but the elders refused to dissolve the marriage on account that his children were born on the land and one of them had passed away and was buried on that land. He also stated that he was aware that Michael Ole Tanchu distributed his property but he was not present during the said distribution. He however stated that he was aware that Michael Ole Tanchu Ole Tanchu had disinherited the Plaintiff unfairly.
11. On re-examination he reiterated that the Plaintiff was never divorced and all children were sired by the late Michael Ole Tanchu.

EVIDENCE OF THE DEFENDANT

12. DW1 Joyce Sintoyia, the Defendant adopted her witness statement as her evidence in chief and produced the document her bundle of documents which were marked as Exhibits in this case.
13. On cross examination she confirmed that she was the third wife of the late Michael Ole Tanchu that the Plaintiff was the second wife and the late Grace was the first wife. She stated that she got married to the late Michael Ole Tanchu in the year 1998, started residing on the suit land and sired three children in the years 1998, 2001 and 2006

respectively. It was her testimony that when she got married, Grace had already passed on although her seven children were still on the land. She brought some of them up. She went on to state that the Plaintiff only had one child with Michael Ole Tanchu and she was not aware that any of her children had passed on and was buried on the suit land.

14. She further stated that the Plaintiff separated with the late Michael Ole Tanchu before she went to that home. She could not confirm whether the Plaintiff remarried. She insisted that the Plaintiff only had one child with Michael Ole Tanchu. It was her testimony that on 28th October 2019 and 28th November 2019, Michael Ole Tanchu distributed his land and wealth in the presence of the members of community. She confirmed that the title deed was registered in her name on 15th May 2019 before the meeting to distribute the property and that by 2019, the late Michael Ole Tanchu was 75 years old while she was 35 years old. It was her testimony that Francis Letima (the Plaintiff's son) was not given any land. However, she, and the late Timothy ole Tanchu who were the administrators of the estate., gave him some land and livestock although he is not listed as one of the beneficiaries in the Succession cause.

15. On re-examination she stated that since 1998 the plaintiff has not been on the suit land and that Grace's children left the suit land upon being allocated their own parcels by the late Michael Ole Tanchu. She further stated that once she

became an Administrator of the Estate of Michael, she allocated Francis some land and livestock.

16. DW2 Aldapash Ole Kila Kirasha adopted his witness statement as his evidence in chief. On cross examination, he stated that he was 60 years old and knew the late Michael Ole Tanchu who was a member of Osilalei Group Ranch. He confirmed that he knew the late Grace as well as the Plaintiff (Tipira) because he used to work at the homestead. He stated that the Plaintiff stayed on the land for only two years and he was aware she had a son with Michael ole Tanchu by the name Francis. It was his testimony that he was not aware of a child by the name Saitoti who died and was buried on the land. He stated the late Michael Ole Tanchu informed him that the Plaintiff left the homestead because she sired a child with another man. He also stated that he was informed that Michael ole Tanchu had distributed his property.
17. On re-examination he stated that he was aware that the Plaintiff and Michael disagreed because of the pregnancy and she left the homestead.
18. DW3 Elijah Paloshe Koitalei, adopted his witness statement as his evidence in chief. On cross examination, he stated that he attended the meeting held by Michael ole Tanchu in 2019 where he distributed his property. It was his testimony that while Michael Ole Tanchu was ailing, he was mentally sound. He stated that he had never met the Plaintiff, but was aware that she was Michael's wife and had one son by the name Francis, who was not allocated any

land by the late Michael. He also stated that he was not aware that one of the Plaintiff's children had been buried on the land.

19. On re-examination he indicated that he knew Michael Ole Tanchu for about forty (40) years and knew he had three wives although he had never met one of them- the Plaintiff. He further stated that the Plaintiff's son was brought back to the homestead where he lived and went to school. He stated that while he was not present when the title to the suit land was transferred to the Defendant, he was aware that Michael Ole Tanchu had given it to her and that Francis was Michael's only son with the Plaintiff.
20. At the close of the oral testimonies, parties were directed to file their final written submissions. However, at the time of writing this judgment only the Plaintiff had filed her submissions.

SUBMISSIONS OF THE PLAINTIFF

21. Counsel for the Plaintiff outlined the following as the issues for determination: whether the Plaintiff was wife to Michael Ole Tanchu (Deceased); Whether L.R. 195/Osilalei/Kajiado was held by Michael Ole Tanchu under Customary Trust; Whether the Defendant should hold the land under Customary Trust for the Plaintiff and children of Michael Ole Tanchu.
22. It was submitted that evidence showed that the Plaintiff was married to Michael and no evidence had been placed before court to show that the marriage had been dissolved.

23. Counsel went on to submit that the suit property which was initially registered in Michael's name and later to Joyce's name belonged to the family as all the wives and children resided thereon and some family members had been buried on the said land. Therefore, she had established the elements set out by the Supreme Court in ***Kiebia v M'lintari & another [2018] KESC 22 (KLR)*** to prove that there was customary trust. As such registered in favour of the Defendant should be registered as held in trust for the Plaintiff together with all Michael's children.

ANALYSIS AND DETERMINATION

24. I have considered the pleadings, the evidence on record, submissions, and the legal authorities. I find that the issues for determination are:

- i. Whether this Court has jurisdiction to determine the suit**
- ii. Whether the Defendant holds the Suit Property Kajiado/Osilalei/195 in trust for the Plaintiff and the children of the Deceased.**
- iii. Whether the Defendant has proved her case and is entitled to the prayers sought in the Counterclaim.**
- iv. Who should bear costs of the suit?**

25. The dispute before this Court concerns the ownership and registration of the property LR No. Kajiado/Osilalei/195 (hereinafter after referred to as the “Suit Property”) measuring approximately 92.073 hectares. The Plaintiff, claiming to be the second wife of the late Michael ole Tanchu asserts that the property is ancestral land held in trust for the Deceased’s three houses. The Defendant who is the third wife, maintains she is the absolute owner having received the land during the Deceased’s lifetime.
26. The Plaintiff’s case rests on the doctrine of Customary Trust. She argues that as a wife of the Deceased, the suit property was ancestral land and cannot be alienated to one wife to the exclusion of the others and their children. However, the Defendant claims that the Plaintiff was divorced and only had one child with the late Michael Ole Tanchu
27. It is the plaintiff’s case is that the Defendant holds the suit property in trust for herself and the other beneficiaries of the estate of the Deceased. While it is not in dispute that the Plaintiff, was married to the late Michael Sironka Ole Tanchu and that the marriage was not dissolved, it was incumbent upon the plaintiff to prove that the title deed in the name Defendant was obtained through fraud.
28. It came out during the trial that the Deceased transferred the suit property to the Defendant, before his demise. He actually transferred the same before he distributed his other properties on the 28th October 2019.

This was done in the absence of the Plaintiff as she had left the home several years earlier.

29. This evidence was not shaken by the Plaintiff. It is not in dispute that the suit property was transferred to the Defendant in the lifetime of the Deceased. It is only the Deceased who could explain his actions. The plaintiff has failed to demonstrated that the Defendant obtained title to the suit property through fraud.
30. **Section 26(1) of the Land Registration Act, 2012**
Provides as follows: -

26. Certificate of title to be held as conclusive evidence of proprietorship

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b)where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

In the case of ***Teleposta Pension Scheme Trustees Vs Inter Countries Importers and Exports Ltd & 4 Others (2016) eKLR*** the court held as follows:

“It is trite Law that whoever alleges fraud must prove. It was therefore incumbent upon the Plaintiff to prove the fraud allegations against the Defendants to the required standard. This standard of proof in fraud cases is higher than that in ordinary Civil cases, it is higher than on a balance of probability”

31. I am also of the view that the Plaintiff, ought to have demonstrated that the deceased intended that the Defendant do hold the suit property in trust for the other beneficiaries. The issue of customary trust is one of fact that has to be proved.
32. It has been held severally that a customary trust cannot be implied. It must be strictly proven by the claimant on a balance of probabilities. In the case of ***Roche Vs Roche (2025) KECA 1637 (KLR)*** the Court of Appeal observed thus;

“ A customary trust in the context of the Kenyan Land Law is a legal concept where land is held by one person or entity, for the benefit of a group or family members after often across generations. It is

essentially an inter-generational equity concept where the current holder of the land is entrusted to hold or manage it for the benefit of another or others”

33. **Black’s Law Dictionary, 6th Edition Pg.1817** defines the concept of customary trust as follows;

“ 1. The right enforceable solely in equity to the beneficial enjoyment of property to the beneficial enjoyment of 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”

2. A fiduciary relationship regarding the property

and

Charging the person with title to the property

with

Equitable duties to deal with it for another’s benefit;

The confidence placed in a trustee, together, with the trustee’s obligation toward the property and the beneficiary. A trust arises as a result of a manifestation of an intention to create it”

34. It is my view that the Plaintiff was not able to demonstrate to the court that the Defendant held the title in trust for herself and other beneficiaries of the Deceased. It appears to the Court that for whatever reason, the Deceased intended the Defendant to be registered as the absolute proprietor of the suit property. It was also an evidence that the Deceased had other parcels which he distributed to other beneficiaries.
35. It should be noted that there are succession proceedings in respect of the Estate of the late Michael Sironka Ole Tanchu pending before the Kajiado High Court. Having stated that the Plaintiff is a widow, hence a beneficiary, she ought to approach that Court and state her case.
36. In Conclusion, I find that the Plaintiff has failed to establish her case as against the Defendant on a balance of probabilities. The suit is hereby dismissed.
37. In essence, I find that the Defendant succeeds in her counterclaim and I grant the reliefs sought.
38. The final disposal orders are: -
- (a) The Plaintiff's suit is dismissed.**
 - (b) That a declaration be and is hereby issued that the Defendant as the owner of the parcel known as Kajiado/Osilalei /195 is not encumbered by customary trust in favour of the Plaintiff and other beneficiaries.**

- (c) That a permanent injunction is hereby issued restraining the Plaintiff, her employees, servants and/or agents from interfering, interrupting, or in any way disturbing the Defendant's possession and occupation of the parcel known as; Kajiado /Osilalei/195.**
- (d) That the Land Registrar is hereby directed to remove the caution entered as entry No.8 on 4th August 2020 and registered on Kajiado /Osilale/195 within sixty (60) days from the date of this judgment**
- (e) That each party do bear own costs.**

Ruling dated, signed and delivered virtually at Nak

uru this 30th day of April 2026.

L KOMINGOI

JUDGE

In presence of :-

Ms. P Makori for the Plaintiff

Mr. Aunga for Ms. Mageto for the Defendant

Court Assistant: Derick