



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELCA NO. 21 OF 2016**

**FREDERICK SIKUKU OBWAR.....APPELLANT**

**VERSUS**

**VITALIS OBWAR OTEKLA .....1<sup>ST</sup> RESPONDENT**

**CELINE OPONDO .....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

The Appellant filed a Memorandum of Appeal, appealing from the judgment of the Learned Trial Magistrate Hon Owanda (PM) in UKWALA PMCC NO. 17 of 2013 on the ground that the Learned Trial Magistrate erred in law and if fact in dismissing the Appellant's claim:

- 1. When there was sufficient evidence to support the claim for customary rights to the suit property and a customary trustee's duty on the part of the 1<sup>ST</sup> Respondent.**
- 2. When the facts and the law was in support of the Appellant, and failed to find that the 1<sup>ST</sup> Respondent had a lifetime interest over the suit property whereas the Appellant has beneficiary interest in view of the fact that it is family land.**
- 3. When the facts and evidence was against the Respondents, and that consent was not given by the Appellant for sale of the suit property on which the Appellant has beneficiary interest.**

The appeal proceeded by way of written submissions.

**Appellant's Submissions**

Counsel submitted that the Appellant was the son to the 1<sup>ST</sup> Respondent who had sold and transferred family land to the 2<sup>ND</sup> Respondent without notice to any of the family members, including his wife. Counsel submitted that the 1<sup>ST</sup> Respondent had failed to obtain spousal consent, rendering the transaction invalid. Counsel cited Section 93 (2) of the Land Registration Act and the case of ***Fred Gumo and Marcel Ngira Ogondi (\*counsel did not attach authority)*** in which the court held that such a sale without spousal consent was void. Counsel submitted that the rationale for spousal consent even where the land is registered as a sole proprietorship is that the registered owner is holding the property in trust for the family members.

Counsel submitted that the 1<sup>ST</sup> Respondent admitted that spousal consent was not obtained, and the 2<sup>ND</sup> Respondent also conceded, failing to tender any evidence that the 1<sup>ST</sup> Respondent's wife had given her consent to the transaction; therefore the transaction was a nullity.

**Respondents' Submissions**

Counsel submitted that it was not in dispute that the 1<sup>ST</sup> Respondent was the sole proprietor of the suit property. That the 1<sup>ST</sup> Respondent had the right to sell the land to the 2<sup>ND</sup> Respondent by virtue of being the proprietor, as per **Section 25 (1) of the Land Registration Act**.

Counsel submitted that the Appellant had failed to prove the existence of a customary trust. That the Appellant was neither in actual possession or occupation of the portion of land sold to the 2<sup>ND</sup> Respondent (0.2 Ha out of 1.2 Ha). Counsel cited the cases of ***Mbui Mukangu v Gerald Mutwiri Mbui CA No. 281 of 2000*** and ***Kiarie v Kinuthia***.

Counsel submitted that the 1<sup>ST</sup> Respondent had informed the Appellant of his intention to sell the suit property to get funds to buy a motorcycle to generate income. That the Appellant has promised to buy the 1<sup>ST</sup> Respondent a motorcycle in return for not selling the suit

property. That the 1<sup>st</sup> Respondent waited in vain but the Appellant failed to keep his promise, prompting the 1<sup>st</sup> Respondent to sell the suit property. That this transaction was necessary in order for the 1<sup>st</sup> Respondent to cater for himself and his family members.

### **Issues for Determination**

1. *Whether the Trial Magistrate erred in holding that the 1<sup>st</sup> Respondent was an absolute proprietor who did not hold the property in trust for the Appellant*

The Supreme Court has held in *Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another* [2018] eKLR that the existence of a customary trust over land should be determined on a case by case basis, considering the nature of the land and the intention of the parties:

**“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.”

In *Juletabi African Adventure Limited & another v Christopher Michael Lockley* [2017] eKLR, it was held that:

**“It is settled that the onus lies on a party relying on the existence of a trust to prove it through evidence. That is because:-**

**“The law never implies, the Court never presumes, a trust, but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.”**

See *Gichuki vs. Gichuki* [1982] KLR 285 and *Mbothu & 8 Others vs. Waitimu & 11 Others* [1986] KLR 171.”

In *Alice Wairimu Macharia v Kirigo Philip Macharia* [2019] eKLR, it was held that:

**“...it follows that evidence must be led that points to the root of the land. Pertinent question that must concern this Court are such as; how was the land first registered" Was it clan, communal or family land before registration" Was the land inherited or passed down from the family lineage of [the first registered owner]" How did [the first registered owner] acquire this land" Did he inherit or he acquired by way of purchase or a gift”**

### **Analysis**

The Trial Magistrate found that, on the evidence on record, the 1<sup>st</sup> Respondent could only be considered the registered owner of the property who “enjoys all the rights and privilege arising therefrom. This includes the right to dispose off the land to a willing buyer.”

Regarding the nature of the land, the 1<sup>st</sup> Respondent testified that he inherited the land from his mother and that he got the land in 1970. The Appellant also filed a copy of a certificate of search which only revealed that the 1<sup>st</sup> Respondent was the registered owner. The green card of the property was not presented to give more details relating to the nature of the first registration of the property. No further evidence was led by the Appellant to show that the land was ancestral or family land before registration.

In conclusion, the evidence and witness testimony in this case is not sufficient to establish the existence of a customary trust over the suit property. The Trial Magistrate correctly found that the 1<sup>st</sup> Respondent was an absolute proprietor who could dispose the land to a third party.

### **2. Appropriate Reliefs**

The Trial Magistrate’s judgment is upheld and the appeal dismissed.

**DATED AND DELIVERED THIS 20TH DAY OF DECEMBER, 2019.**

**In the presence of:**

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**A. O. OMBWAYO**

**ENVIRONMENT & LAND**

**JUDGE**