



REPUBLIC OF KENYA



**KENYA LAW**  
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**Omotto v Oduor (Civil Appeal 46 of 2017)  
[2022] KECA 371 (KLR) (18 February 2022) (Judgment)**

Neutral citation: [2022] KECA 371 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPEAL 46 OF 2017  
K M'INOTI, PO KIAGE & M NGUGI, JJA  
FEBRUARY 18, 2022**

**BETWEEN**

**MARGRET AUMA OMOTTO ..... APPELLANT**

**AND**

**MARIA WERE ODUOR ..... RESPONDENT**

*(Being an appeal from the judgment of the Environment and Land Court at Kisumu (Kibunja J) dated 27th November, 2013 in ELC Case No. 173 of 2014 (formerly HCCC No. 27 of 2012))*

**JUDGMENT**

1. This appeal relates to a dispute between sisters-in-law. The two had been married to brothers, both of whom were deceased at the time the appellant filed her suit by way of Originating Summons dated 25<sup>th</sup> April 2012. She brought the claim on her own behalf and on behalf of her deceased spouse, James Omoto Oulula, as his spouse and personal representative. The claim was filed against the respondent, Maria Were Oduor, on her own behalf and on behalf of Silvanus Oduor Oulula, her deceased husband.
2. The appellant alleged in the Originating Summons that the land comprised in Marachi/Kingandole/16 is held in trust by the respondent. She asked the court to find that the land is a share of her inheritance from the parties' deceased parents and is held by the respondent as the eldest child in trust for her. She further alleged that the respondent, in breach of the said trust, had converted the land to her own use and had refused to surrender it to the appellant. She further asked the court to issue orders that the respondent transfers the said land parcel number Marachi/Kingandole/16 to her; that the respondent do execute all the necessary documents to effect the transfer of the land to the appellant, failing which the Executive Officer of the court should do so; that the Land Registrar Busia be directed to effect the orders issued by the court; and that the costs of the suit be awarded to her.
3. In her affidavit sworn on 25<sup>th</sup> April 2012 in support of her claim, the appellant averred that her husband and the respondent's husband were brothers, sons of one Oulula Wanguba. The said Wanguba had



given her husband, who was the younger son, land parcel number Marachi/Kingandole/16 while he had given the elder son, the respondent's husband, land parcel number Marachi/Esikoma/736. The appellant averred that the respondent's husband had, however, converted the land that he held in trust to his own use and had refused to transfer it to her husband. The appellant's husband had taken the issue to the Butula Land Disputes Tribunal and the respondent's husband had been ordered to move out of the ancestral land and leave his younger brother there, but that he had ignored the order of the Tribunal. She stated that she later learnt that the Land Disputes Tribunal had no jurisdiction to deal with the matter, hence her suit before the court.

4. In her affidavit sworn on 19<sup>th</sup> September 2012 in response to the application, the respondent averred that Marachi/Kingandole/16 was registered in her late husband's name while Marachi/Esikoma/736 was registered in the names of the appellant's husband. She further averred that the appellant and her husband had stayed on Marachi/Kingandole/16 as extended family members and cannot claim that land either on the basis of adverse possession or customary trust. It was also her case that a claim based on a customary trust should be filed through a plaint and not by way of originating summons. Finally, that the case filed before the Land Disputes Tribunal had been filed before a forum without jurisdiction and the legal representative of her husband's estate had not been appointed then.
5. The Environment and Land Court heard the matter by way of oral evidence. The appellant testified as PW 1 and adopted her evidence as set out in her affidavit sworn on 12<sup>th</sup> March, 2013. She stated that she lives with the respondent on land parcel number Marachi/Kingandole/16 but that the respondent should vacate the said land and go and live in land parcel number Marachi/Esikoma/736 in accordance with the orders of their father-in-law. She asserted that her husband, James Omotto, had left a foundation of a permanent house which she had completed and was living in.
6. The appellant conceded in cross-examination that Marachi/Esikoma/736 was registered in her deceased husband's name while Marachi/Kingandole/16 is registered in the name of the respondent's deceased husband. She further stated that the purpose of her suit was to make the respondent move to Marachi/Esikoma/736 as ordered by their father-in-law and enable her to take over parcel Marachi/Kingandole/16. She conceded that the respondent's husband was the eldest son and that when she got married, she found the respondent on the suit land. Her husband had not sued the respondent's husband in respect of the land before he died in 1996. Her claim was over the whole parcel as she was currently using a quarter of the suit land while the respondent was using the remaining part.
7. The appellant's second witness was Pius Okoyo Ododa (PW2) who had sworn an affidavit in support of the Originating Summons on 24<sup>th</sup> August 2012. He stated that the appellant and respondent were wives of his nephews. That as elders, 'they' wanted the appellant's husband, being the younger son, to remain where the parties are settled and the respondent's husband, being the eldest son, to go to the land at Esikoma, the appellant's land. He stated in cross-examination that he did not know why the title to the suit land was issued in the respondent's husband's name and not in the appellant's husband's name.
8. Fredrick Omoto Olwenyi (PW3) adopted his evidence as set out in his affidavit sworn on 29<sup>th</sup> May, 2013. He avers in this affidavit that he was a brother of the spouses of the appellant and the respondent. Further, that he was conversant with Marachi customs and the customs require that the elder son moves out of his father's home while the younger son remains. He stated in cross-examination that the two land parcels at Eshikoma and Kingandole are eight acres each, and that the appellant and the respondent are using equal shares of the Eshikoma land.
9. The respondent testified as DW1. She stated that the suit land belonged to Silvanus Oduori, her deceased husband, while land parcel No. Marachi/Esikoma/736 belonged to James Omotto. Nobody



was living on the latter parcel of land although the appellant was cultivating it. The respondent testified that she lives on Marachi/ Kingandole/16 which land belongs to her deceased husband and that the appellant should move to Marachi/Esikoma/736. She stated in cross-examination that her husband had been given land parcel Marachi/ Kingandole/16 while the appellant's husband was given Marachi/ Esikoma/736 Her father-in-law's homestead was on parcel number Marachi/ Kingandole/16 where both she and the appellant reside. Her husband was older than the appellant's husband and she had looked after the latter when she got married as his parents were deceased.

10. In his evidence, DW 2, Mulamba Ngweno, stated that when the appellant got married to James, his elder brother Silvanus left the homestead for his younger brother and moved to a section where the respondent now lives. He stated in cross-examination that according to Marachi customary law, the younger son gets the land where his parents lived or died and that is why James got the Esikoma land to represent the home where his mother, Achieng, was buried. He denied that the said Achieng was buried on Marachi/Esikoma/740.
11. Upon considering the respective cases of the parties, the trial court found that the respondent's husband, Oduor Oulula, was first registered as the proprietor of the suit land on 8<sup>th</sup> November 1966; that his was a first registration, and he was the first and only registered owner. The father-in-law of the appellant and the respondent had died before land consolidation and he could therefore not have been the registered owner of the suit land. The court further found that when adjudication was done, Silvanus Oduor Oulula was registered as the owner of Marachi/Kingandole/16 while James Omoto Oulula was registered as the owner of Marachi/Esikoma/736. The finding of the trial court was that the fact that each of the brothers was registered as owner of one parcel of land each and did not take steps during their lifetimes to exchange the land meant that they were supposed to own the parcels registered in their names.
12. The court also found that the appellant had not given evidence to establish a claim for adverse possession, nor had she brought a claim to establish a customary trust, as she ought, by way of plaint. The appellant had therefore failed to prove her case to the standard required, her suit was without merit, and the trial court accordingly dismissed it with costs to the respondent.
13. Aggrieved with the decision of the trial court, the appellant filed a Memorandum of Appeal dated 10<sup>th</sup> May, 2017 raising twelve grounds of appeal. She argues in the first ground that the trial court erred in law and fact in failing to hold that the respondent received the suit land from the parties' deceased parents under Luhya/Marachi customary trust and was duty bound to distribute the land to his co-heirs in according with the terms and condition of the customary trust. Additionally, that the trial court was wrong in overlooking sections 25(2) and 28(b) of the *Land Registration Act* (2012) as read with section 3(2) of the *Judicature Act* Cap 8, and section 18(a) (ii) of the ELC Act Cap 12 laws of Kenya.
14. In her second ground of appeal, the appellant contends that the trial court failed to observe that the respondent, the leader of the Oulula Wanguba family, had misled surveyors to register the suit land in his name instead of the appellant's spouse contrary to the Luhya /Marachi customary trust condition under which he received the suit land. Thirdly, the appellant charges the trial court with erring in law and fact in failing to observe that time with respect to a claim of land received under a customary trust starts to run from the date the trustee refused to transfer trust property or to correct the mistake or error if any, but not from the date on which the land was registered.
15. The appellant alleges, further, that the trial court failed to observe that if the limitation of time is to be taken into account, it is in favour of the appellant who stayed on the suit land and built a permanent house thereon without any step being taken against her by the respondent. The appellant argues that the trial court was wrong in holding that the appellant lived in that home by the consent of



- the respondent after having correctly found that both parties lived in their father's home on LR No. Marachi/Kingandole/16.
16. The decision of the trial court, according to the appellant, was wrong as it had failed to realize that the issue before it was for transfer of the trust land by the trustee to a lawful owner of the land and not for rectification of the register. The appellant contended further that the trial court failed to hold that making a claim for land under a customary trust by way of Originating Summons is not fatal to the case; that the court misdirected itself by failing to realise that DW2 was dishonest in saying that the mother of the parties was buried on LR No Marachi/Esikoma/736 while she was buried on Marachi/Esikoma/740 allocated to him by family members.
  17. The appellant further challenged the decision of the trial court on the basis that it failed to realize that the respondent's claim to the suit land was based on the registration of the land that he had caused but not on how the land should be distributed under the customary trust under which he received the land. She contends that the trial court failed to realize that the manner and order in which the case was heard without an interlocutory judgment entered against the respondent having been set aside caused serious miscarriage of justice to the appellant; that the decision failed to determine some material issues of law of usage having the force of law; and that it was contrary to such usage.
  18. In submissions in support of her appeal dated 1<sup>st</sup> March 2019, the appellant elaborates at some length on the evidence that was before the trial court and asks this Court to find that the trial court was in error in failing to find in her favour in relation to her claim of a customary trust. She submits that the trial court failed to observe that in a claim for a property under a customary trust, it is not fatal to bring the suit by way of an originating summons as such originating summons can be converted to a plaint. Further, that Order 37 Rule 8 of the *Civil Procedure Rules* allows applications under the provisions of section 28 and 30 (g) of the *Registered Land Act (repealed)* which was then in force to be brought by way of originating summons.
  19. The appellant submits further that in a claim for land on the basis of a customary trust, the fact that the registration of the proprietor is a first registration does not relieve such proprietor from any duty or obligation to which the proprietor is subject as a trustee. It is her contention that the misconduct by the respondent's husband at the registration of the suit land as claimed in the originating summons related to the breach of a trust under customary law.
  20. In her submissions in response, the respondent noted that in her claim, the appellant repeatedly alleges a customary trust based on Marachi customs. She submits that any issue involving a plea in customs is a question of fact that requires to be exhaustively pleaded by giving express particulars through a plaint but not through an originating summons. She observes that the appellant was asking this Court to review the registration of the respondent's late husband as proprietor of Marachi/Kingandole/16 and that she was seeking cancellation of the first registration and insertion of her deceased husband as the proprietor.
  21. The respondent submits that it is uncontested that the registration of the suit land is a first registration that was effected under the Registered Lands Act; that as provided under Order 37 Rule 8 and sections 106 and 107 of the *Land Registration Act*, a suit seeking cancellation or rectification of title for reasons of existence of a customary trust or fraud and filed through an originating summons remains incompetent. It is her submission therefore that the trial court was justified in dismissing the appellant's case. The respondent relies in support of this submission on the case of *Theuri v Law Society of Kenya* (1988) KLR 334.



22. The respondent submits further that while the appellant alleges that her case was decided unfairly and only on the basis of defective pleadings, the trial court had fully considered the matter on its merits and on the basis of the evidence before it.
23. Regarding the appellant's complaint that the suit should not have proceeded while there was an interlocutory judgment in her favour, the respondent submits that her response to the suit was deemed properly filed and the substantive proceedings that came thereafter were validly conducted.
24. This is a first appeal and under the provisions of Rule 29(1) of the *Court of Appeal Rules*, we are under a duty to re-appraise the evidence and to draw inferences of fact, a duty that is also encapsulated in the case of *Selle & Another v Associated Motor Boat Co. Limited* [1986] EA 123.
25. From the appellant's grounds of appeal and her submissions in support, two issues arise for determination. The first is a technical point relating to the manner in which she ought to have filed her claim. The appellant submits that the trial court erred in holding that the claim based on a customary trust ought to have been brought by way of a plaint rather than an originating summons. We observe that the trial court did indeed make this finding. However, we note that this was not the basis on which it rendered its final decision on the appellant's claim. While the trial court did indeed find that a claim based on a customary trust should have been brought by way of a plaint, the court went on to consider the appellant's case on its merits. Accordingly, this ground of appeal has no merit.
26. A second technical ground raised by the appellant relates to the alleged failure by the trial court to address itself to an interlocutory judgment that had been entered in her favour. While the appellant alleges that she suffered prejudice as a result, she does not demonstrate in what manner such prejudice resulted. In any event, a perusal of the proceedings shows that an entry made by the registry on 29<sup>th</sup> June 2012 indicates that the matter was 'listed for interlocutory judgment on 27/9/2012. Notice to issue'. Three further entries show that the matter was listed for formal proof on 28<sup>th</sup> January 2013, 11<sup>th</sup> February 2013 and 21<sup>st</sup> February 2013. However, on 21<sup>st</sup> February 2013 when the matter came up before Kibunja J, an order was made admitting the respondent's replying affidavit to the record as properly filed and the respondent was directed to serve the appellant and the matter thereafter to be fixed for hearing. In the circumstances, the appellant's ground of appeal relating to the interlocutory judgment therefore has no foundation.
27. The crux of the appellant's case is based on the existence of a customary trust: whether the respondent's spouse was registered as the owner of Marachi/Kingandole/16 in trust for the appellant's spouse, and the respondent should therefore vacate the said land parcel and move to Marachi/Esikoma/736 which is registered in the appellant's deceased husband's name.
28. We have considered the evidence that was adduced before the trial court by the parties, which we have set out above. This evidence shows that the appellant's and respondent's spouses were brothers, sons of one Oulula Wanguba. Their mother was known as Achieng. The appellant's husband was the younger brother of the respondent's husband, and had been looked after by the respondent and her spouse. Their father died prior to the registration of the suit and, which was registered in the name of the respondent's spouse in 1967. The appellant's husband was registered as the proprietor of the second parcel of land, Marachi/Esikoma/736. The registration of the two properties was done in the lifetime of the two brothers, and from the evidence, there was no dispute about the ownership of the properties until after the demise of the respondent's husband. The two properties were registered in the names of the two brothers under the provisions of the Registered Land Act Cap 300 Laws of Kenya, now repealed. The appellant alleges that the respondent's husband was holding the suit land under a customary trust, the applicable customary law being Marachi customs.



29. The law is that a customary trust is one of the overriding interests that was recognised under the Registered Land Act. Sections 27 and 28 of the Act provided that the rights of a registered proprietor of registered land under the Act were absolute and indefeasible, and were only subject to the rights and encumbrances noted on the register or the overriding interests which were set out under section 30 of the Act. Section 30(g) of the Act provided for customary trusts. Such trusts are also recognised under section 28 (b) of the *Land Registration Act*, 2012 which provides for overriding interests as may subsist on the land and affect it without it being noted on the register.
30. In order for a customary trust to be recognised as an overriding interest in respect of registered land, the person alleging the existence of such a trust must satisfy the court of the existence of certain elements. These elements were enunciated by the Supreme Court in *Isack M'inanga Kiebia V Isaaya Theuri M'lintari & Another* [2018] eKLR as being whether:
- “ 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.”
31. The spouses of the parties before us were brothers. It appears from the evidence that the land belonged to their father, but he was deceased by the time the land in question was registered in the name of the respondent's spouse. Under the provisions of the Registered Land Act (now repealed) and now section 26 of the *Land Registration Act*, the certificate of title issued by the Registrar is to 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, inter alia, the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and such title 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.
32. We have considered the evidence that the appellant placed before the trial court, and we have not been able to find anything that shows that the respondent's spouse was registered as proprietor of the suit land through fraud. Nor is there anything placed before us that shows that he was registered in trust for the appellant's husband.
33. The trial court found, and we agree with this finding, that at the time the respondent's husband died, the two brothers each had an individual and specific parcel of land registered in their names. The appellant's husband was registered as the proprietor of Marachi/Esikoma/736, while the respondent's spouse was registered as the proprietor of the suit land, Marachi/Kingadole/16.
34. We observe that prior to the demise of the respondent's spouse, there had been no dispute regarding the registration of the land. A dispute appears to have arisen subsequent to the demise of the respondent's



husband when the appellant's spouse raised the issue before the Land Disputes Tribunal which, as conceded by the appellant, did not have jurisdiction to deal with the issue.

35. As observed by the Supreme Court in the case of *Isaac M'inanga Kiebia (supra)*, while a customary trust is one of the overriding interests to which a registered proprietor was subject under the proviso to section 28 of the repealed Registered Land Act, evidence must be led to prove the existence of such a trust; the court will make a determination on the basis of the evidence before it as to the existence or otherwise of such a trust as binds the registered proprietor; and each case has to be determined on its own merits and the quality of the evidence presented before the court.
36. We agree with the conclusion reached by the trial court that the appellant did not tender evidence that was sufficient to establish that the respondent's husband was registered as the proprietor of the suit land in trust for the appellant's spouse. The court was correct in finding that no objection was made to the adjudication process and the registration of the respondent's husband as the proprietor of the suit land. Nor can the court be faulted for its finding that the brothers did not take steps to exchange the lands during their lifetime, nor did the appellant's spouse lodge a claim during the lifetime of both brothers, an indication that the two brothers intended to retain the parcels that were registered in their names.
37. It is therefore apparent that the appellant did not prove her case against the respondent on her customary trust claim. The appellant's claim was hinged on the contention that her spouse was the younger son, and that as the younger son, he was entitled to remain on the land holding their parents' home. The evidence before us, however, shows that the parents of the parties' spouses predeceased the land adjudication process; however, the mother of the two brothers, Achieng, was buried on Marachi/Esikoma/736, which is the property registered in the name of the appellant's deceased spouse. According to Marachi custom as asserted by the appellant and supported by her witness, PW2, the younger son should retain the land on which his mother is buried. According to DW3, though disputed by the appellant, the mother of the two brothers was buried on Marachi/Esikoma/736 and not Marachi/Esikoma/740 as alleged by the appellant.
38. Taking all the above matters into account, we are satisfied that the present appeal is devoid of merit, and it is hereby dismissed.
39. As this is a family matter, we direct that each party bears its own costs of the appeal.

**DATED AND DELIVERED AT KISUMU THIS 18<sup>TH</sup> DAY OF FEBRUARY, 2022.**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**K. M'INOTI**

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**JUDGE OF APPEAL**

**MUMBI NGUGI**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*



**DEPUTY REGISTRAR**

