



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: MUSINGA, GATEMBU & MURGOR, JJA.)**

**CIVIL APPEAL NO. 21 OF 2015**

**BETWEEN**

**LUCIA NGAIRA ..... FIRST APPELLANT**

**ROSELINE ADISI ..... SECOND APPELLANT**

**LUCY ODIAMA ..... THIRD APPELLANT**

**AND**

**JACKSON EKIM OMAIDO ..... RESPONDENT**

***(An Appeal from the Judgment of the Environment & Land Court at Kitale (Obaga, J.) dated 16<sup>th</sup> December, 2014***

**in**

**KITALE HCCC NO. 9 OF 2014)**

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**JUDGMENT OF THE COURT**

1. The suit that gave rise to this appeal was instituted by the respondent against the appellants on 8<sup>th</sup> August, 2014. The respondent is the registered owner of a parcel of land known as **L.R. No. 8699/7**, hereinafter referred to as “*the suit land*”.
2. The appellants are widows of the late **Collins Otwane Omunga**, hereinafter referred to as “*the deceased*”, who died on 14<sup>th</sup> August, 2014.
3. The suit land was part of a larger parcel of land that was originally owned by a colonial settler known as **Alfred Arthur Durani Martineau**, hereinafter referred to as “*Durani*”.
4. The respondent’s father, **Jonam Omaid Mishael (Jonam)** as well as the deceased were employees of Durani. In 1972 Durani gave Jonam half undivided joint interest in the suit land. Following the death of Jonam on 16<sup>th</sup> October, 1992, his half undivided share in the suit land reverted to Durani. Durani died in 1994. In his will he had bequeathed the entire suit land to the respondent. Consequently in 2008 the respondent transferred the suit land to himself.

5. After the demise of the deceased, his widows started making preparations to inter his remains on the suit land. This is what prompted the respondent to file the suit in the High Court, as he was apprehensive that if he allowed the appellants to bury the deceased's body on the suit land, the deceased's family members may later on raise unwarranted claims for part of the suit land.

6. In his suit, the respondent stated that, he had offered to purchase 3 acres of land at a neighbouring farm where the deceased's would be interred but the appellants rejected his offer. Alternatively, the deceased's could be buried at another parcel of land where one of the deceased's widows, Lucy Odiama, was living. The respondent sought a permanent injunction to restrain the appellants from burying the deceased's remains in the suit land.

7. The appellants filed a defence and counterclaim and contested the respondent's absolute ownership of the entire suit land. They contended that sometime in 1984, Durani had orally promised to give to the deceased 359.5 acres of the suit land. Durani had also promised to give 40 other employees 5 acres each.

8. The appellants further stated that all former deceased workers of Durani were buried on the suit land. They saw no good reason as to why the deceased could not be buried on the suit land as well. The appellants admitted that the 3<sup>rd</sup> appellant has land elsewhere where she is living with her children. However, that is land that she personally purchased out of her earnings as a teacher, they averred.

9. In their counterclaim, the appellants sought, *inter alia*, a declaration that the respondent holds the suit land in trust in unequal share for himself and the appellants as well as all the other dependants of the deceased. The appellants also sought a declaration that together with their children, were entitled to 359.5 acres of the suit land or its fair value at the price of Kshs.1,000,000/= per acre.

10. Following a full trial, the High Court found in favour of the respondent and dismissed the appellants' counterclaim. The court held that there was no documentary evidence that the deceased was entitled to 359.5 acres of the suit land, and if indeed that was so, the deceased would have brought up the claim before Durani died or shortly thereafter. The court further held that the deceased was an employee of Durani and when Durani died, he continued to live on the suit land as an employee of the respondent. The deceased was staying in a house that belonged to Jonam and had sought permission from the respondent to put up a mud house on the suit land.

11. The court also rejected the appellants contention that the respondent was holding the suit land in trust for the family members of the deceased. The court held:

**“Since the suit land was not family land, there is no basis upon which the deceased's family can lay claim to any part of the suit land. The existence of a trust is a matter of evidence. One has to prove existence of right to the land. There has to be either contractual, filial or other relationship from which a trust could be implied. In the present case there is no basis upon which a trust could be implied.”**

12. The court granted a permanent injunction restraining the appellants, their servants and/or agents from burying the remains of their deceased on the suit land.

13. Being dissatisfied with that decision, the appellants preferred an appeal to this Court. Although the memorandum of appeal contains 18 grounds of appeal, **Mr. Kraido**, the appellants' learned counsel, rightly stated that the appeal raises just two main issues, namely, whether the deceased should be buried on the suit land, and whether the appellants have a right to sue for the land which they believe the deceased was entitled to.

14. **Mr. Kraido** submitted that the deceased was an occupier of the suit land as of right since 1984 when Durani showed him the portion of the land that he promised to give him, as a result of which the deceased settled there with his family members. Since then two of the deceased's children had died and the deceased buried them on the suit land.

15. Counsel further submitted that there was an established practice of routine burials on the suit land of Durani's deceased workers or those of the Respondent.

16. **Mr. Teti**, the respondent's learned counsel, opposed the appeal. He submitted that the respondent, being a registered proprietor of the suit land, had absolute ownership of the same as provided for under **section 24** of the **Land Registration Act, 2012**.

17. Counsel further submitted that the appellants had not led any evidence to establish existence of any form of trust over the suit land between themselves and the respondent. He added that trust is a question of fact that has to be proved by credible evidence. In that regard, he cited this Court's decision in **Gichuki V Gichuki [1982] eKLR**.

18. Mr. Teti further Submitted that the fact that the deceased was authorized to stay on the suit land and keep animals thereon did not entitle him to any share of the land, that the alleged promise of 359.5 acres to the deceased by Durani did not create any right over the suit land, and the fact that bodies of other deceased workers of Durani or the respondent had been buried on the suit land did not imply that the appellants had a right to inter the deceased's remains on the suit land.

19. We have considered the record of appeal as well as the submissions by counsel. It is not in dispute that the respondent is the registered proprietor of the suit land since 23<sup>rd</sup> May, 2008. It is also not in dispute that the deceased was a long serving employee of Durani. Lucia Ngaira, the first appellant, told the court that the deceased, her late husband, was employed by Durani in 1970. After the death of Durani in 1994, the deceased remained in occupation of the suit land, as an employee of the respondent.

20. Although the appellants alleged that in 1984, Durani promised to give the deceased 359.5 acres of the suit land, there was no documentary evidence to that effect. That promise *per se* is not sufficient to entitle the appellants to the alleged share of the suit land. **Section 3 (3)** of the **Law of Contract Act** stipulates that:

**“(3) No suit shall be brought upon a contract for the disposition of an interest in land unless –**

**a. the contract upon which the suit is founded –**

**1. is in writing;**

**2. is signed by all the parties thereto; and**

**(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party”.**

21. As rightly submitted by the respondent's counsel, if indeed Durani had made a firm promise to the deceased regarding the claimed parcel of land, there was no reason why the deceased could not have pursued realization of the promise by Durani between 1984 when the promise was allegedly made and 1994 before Durani died. Similarly, the deceased took no action at all after 1994 until his demise.

22. The appellants as well as the deceased were well aware that since 23<sup>rd</sup> May, 2008 the respondent had become the absolute registered proprietor of the suit land. Under **sections 24 and 25 of the Land Registration Act, 2012**, the registration of a person as the proprietor of land vests in that person, the absolute ownership of the land together with all rights and privileges belonging to or appurtenant thereto. Such rights cannot be defeated except as provided under the Act.

23. The fact that the deceased was allowed to bury 2 of his deceased children on the suit land, or the fact that several former workers of the late Durani were buried on the suit land, cannot *per se*, give the appellants the right to bury the deceased on the suit land or entitle them to the 359.5 acres claimed.

24. Did the appellants establish that the respondent was holding the 359.5 acres or any portion at all of the

suit land on their behalf and that of the deceased's children? We do not think so. We agree with the learned trial judge that trust is a question of fact that has to be proved by evidence. In **Mwangi Mbothu & 9 Others V Gachira Waitimu & 9 Others [1986] eKLR** this Court delivered itself as follows:

**“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 parties to create a trust must be clearly determined before a trust will be implied”.**

See also this Court's recent decision in **Salesio M'itonga V M'arithi M'athara & 3 Others [2015] eKLR**.

25. No sufficient evidence was led by the appellants to prove the existence of the alleged trust.

26. We find no merit in this appeal and dismiss it with costs to the respondent.

**DATED and delivered at Kisumu this 4<sup>th</sup> day of March, 2016.**

**D.K MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCI Arb**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**