



REPUBLIC OF KENYA



**Apondi v Apondi (Environment and Land Appeal E015 of 2023)  
[2024] KEELC 4850 (KLR) (20 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4850 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIIAYA  
ENVIRONMENT AND LAND APPEAL E015 OF 2023**

**AY KOROSS, J  
JUNE 20, 2024**

**BETWEEN**

**JOSEPH ODHIAMBO APONDI ..... APPELLANT**

**AND**

**JULIUS JUMA APONDI ..... RESPONDENT**

*(Being an appeal against the judgment of the Hon. CM M.O. Wambani  
delivered on 9/11/2023 in Siaya CM ELC Case No. 64 of 2018)*

**JUDGMENT**

**Background of the appeal**

1. Before the trial court, the appellant was the defendant and the respondent was the plaintiff. To put the appeal in context, the parties are brothers, and the disputed property which the respondent claimed he had a customary trust over was land parcel no. Siaya/Obambo/1828 (suit property) that is registered in the appellant's name and that of their brother Charles Konya Apondi (Charles).
2. Despite being a co-owner, Charles was not joined as a co-defendant but testified as the respondent's witness.
3. In a plaint dated 7/02/2014, the respondent averred that before adjudication, the parties' father acquired the suit property from Adenyo Kondiege (Adenyo). However, during adjudication, their father was deceased hence he registered the suit property in the names of the appellant and Charles.
4. He further contended that there was an express agreement the appellant and Charles were to hold the suit property in trust for family members which trust could be terminated and the suit property be subdivided amongst family members. According to him, the appellant had reneged on the agreement and carried himself out as a sole proprietor.



5. Thus, he sought for the court to find the appellant held the suit property in customary trust for him and other family members, an order for the appellant or deputy registrar of the court to execute documents to effect the subdivision of the suit property for purposes of conferring the respondent and other family members portions of the suit property and costs of the suit.
6. In defence, the appellant filed a statement of defence dated 26/02/2014 in which he admitted their father Patrick Apondi (father) was a beneficial owner of the suit property and that their father and mother Heneria Malowa (mother) had 5 sons who were the parties herein, Charles, Raphael Nyanunga Apondi (Raphael) and Aloyce Ochieng Apondi (Aloyce) who was deceased and that he was the last born and respondent 2<sup>nd</sup> last born.
7. He stated there was no agreement over the suit property and further contended their father owned several unregistered parcels of land and at adjudication, the sons distributed those parcels in the following manner: - Raphael- Siaya/Obambo/1897; Aloyce- Siaya/Obambo/1900; the respondent- Siaya/Obambo/1895, 1825 and 1835 and lastly, he and Charles- the suit property. He urged the court to dismiss the case with costs.
8. The matter was slated for hearing and both parties testified and produced documents in support of their respective cases. The respondent's case was led by two witnesses who were Charles and Silvanus Jaoko who testified as PW2. The appellant too called one witness John Oduor Odeny who testified as DW1.
9. Upon closing parties' cases and submissions being filed, the trial court reserved the suit for judgment. In the challenged judgment, the learned trial magistrate found that on a balance of probabilities, the respondent had proved his claim of customary trust and granted the prayers sought in the plaint.

### **Appeal to this court**

10. Being aggrieved by the impugned judgment, the appellant moved this court on 5 related grounds of appeal set out in the memorandum of appeal dated 21/11/2023 faulting the learned trial magistrate on grounds inter alia: -
  - a. The learned trial magistrate misapprehended and misapplied the doctrine of customary trust and thus arrived at a wrong conclusion.
  - b. The learned trial magistrate erred in law and fact in failing to appreciate the circumstances of the registration of the appellant and Charles as the suit property's owners.
  - c. The learned trial magistrate erred in law and fact by disregarding the appellant's evidence and giving credence to the respondent's evidence.
  - d. The learned trial magistrate erred in law and fact by failing to appreciate the appellant's evidence on the registration of various parcels of land.
  - e. The learned trial magistrate erred in law and fact by wholly relying on Charles's evidence.
11. In the memorandum of appeal, the appellant urged this court to set aside the trial court judgment and its consequential orders and substitute it with an order dismissing the respondent's case. He also sought for the appeal's costs to be provided for.

### **Parties' submissions**

12. On 14/02/2024, the court directed the appeal to be canvassed by written submissions, and in compliance, the law firm of Ms. Wakla & Co. Advocates filed written submissions dated 26/02/2024.



13. Despite service of the record of appeal and submissions upon the respondent's law firm on record M/s Oduol Achar & Co. Advocates, the respondent did not file his submissions.
14. The appellant's submissions collapsed all the grounds of appeal and they were argued as one ground. Upon identifying and considering the issues for determination, this court will in its analysis and determination consider the appellant's counsel's arguments on the particular issue. The precedents that were relied upon by the appellant's counsel's submissions in buttressing his argument will be considered.

### **Preliminary issue**

15. The nature and form of a memorandum of appeal are set out in Order 42 Rule 1 (2) of the Civil Procedure Rules in the following manner: -

“The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.”
16. The essence of this law is to assist the court and parties in framing the issues and to identify the core grounds the appellant is aggrieved against. With due respect to the appellant, the grounds of appeal as charted out in the memorandum of appeal fell short of this law as they were not concise, were argumentative, and narratively stated the evidence.
17. Given the unconcise grounds of appeal, this court has condensed the appellant's grounds of appeal into a singular ground; whether the learned trial magistrate erred in finding the respondent had proved his claim of customary trust over the suit property.

### **Issues for determination**

18. Being a 1<sup>st</sup> appeal, the power of this court is set out in Order 42 Rule 32 of the Civil Procedure Rules. Being an appellate court, this court will not interfere with the impugned judgment save this court satisfies itself the learned trial magistrate misdirected herself and thus arrived at an erroneous decision, undoubtedly exercised her discretion wrongly and occasioned injustice by such erroneous exercise.
19. The role of an appellate court was aptly stated in the decision of *Watt v Thomas* [1947] AC, 484 at p 485 which was cited with approval in the Court of Appeal decision of *Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others* [2018] eKLR thus: -

“Lord Simon's speech in *Watt v Thomas* [1947] AC, 484 at p 485 as follows:

“...an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide.

But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight...”



20. Recalling the role of an appellate court, I have carefully considered the records and appellant's submissions, and the two issues that will be handled together are the condensed grounds of appeal and the issue of costs. The highlighted issues are as follows;
- a. Whether the learned trial magistrate erred in finding the respondent had proved his claim of customary trust over the suit property.
  - b. What orders should this court issue including an order as to costs?

### **Analysis and determination**

21. Section 24 (a) of the [Land Registration Act](#) states the registration of a person as the proprietor of land shall vest in that person absolute ownership together with all such rights and privileges thereto.
22. By Section 25 of this Act, a registered proprietor holds title to land subject to leases, charges, encumbrances, conditions, restrictions, liabilities, rights, and interests including overriding interests which have been recognized by Section 28 (b) of the same Act which include customary trusts.
23. By Section 107 of the [Evidence Act](#), the persons claiming customary trust have the onus of proving it and the court can never imply trust but give effect the intention of the parties to create such a trust for the benefit of a group of other family members.
24. The Supreme Court of Kenya whose decision is binding upon this court settled the principles of customary trust in the case of *Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another* [2018] eKLR and on analysis of provisions of the Registered [Land Act](#) (Repealed), the current [Land Registration Act](#) and judicial precedents, the court held thus in paragraph 52 of its judgment: -

“...we now declare that a customary trust, as long as the same can be proved to subsist, upon a first registration, is one of the trusts to which a registered proprietor...The categories of a customary trust are therefore not closed. ..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.” Emphasis added.



25. The Court of Appeal in the case of Juletabi African Adventure Limited & another v Christopher Michael Lockley [2017] eKLR held: -
- “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.’
26. The decision of Peter Gitonga V Francis Maingi M’ikiara [2007] eKLR which this court concurs with weighed in on customary trust by stating as follows: -
- “A “trust” can be created under customary law and the circumstances surrounding registration must be looked at to determine the purpose of the registration. This was what led Muli J. to say this;
- “Registration of titles are a creation of law and one must look into the considerations surrounding the registration of titles to determine whether a trust was envisaged.” See HCCC 1400 of 1973 as quoted in Mwangi vs Mwangi [1986] KLR 328 at 332, by Shah J.A.”
27. These provisions of law and settled decisions affirm that customary trust is an encumbrance on land, it is not noted in the register of the subject land, possession and occupation are irrelevant, and each case has to be determined based on the quality of evidence adduced.
28. In the impugned judgment the learned trial magistrate while placing reliance on Charles’s evidence reasoned as follows before arriving at her conclusion and ultimate finding: -
- “...this court shall make its final finding that the plaintiff has established his case on a balance of probability against the defendant as per the prayers in the plaint on the sole ground that Charles (PW-3) was jointly registered with the defendant herein as joint owners of the suit land to hold the suit land in trust of land (sic) all other family members.”
29. The appellant’s counsel has taken issue with this reasoning and submits the respondent’s claim and evidence did not meet the threshold of customary trust and that the learned trial magistrate ignored the appellant’s unchallenged evidence that some of his siblings were at adjudication, registered as proprietors of other parcels of land that belonged to their father.
30. Therefore, according to counsel it was evident the appellant did not hold the suit property in trust for the respondent. In light of the counsel’s arguments, this court is called upon to revisit the evidence and arrive at its independent deductions.
31. In my honest view, I must agree with the appellant’s counsel that the reasoning of the learned trial magistrate was flawed since instead of considering the intention of the parties at the time of registration, she considered the tenure of the suit property’s registration as the basis of registration. Furthermore, the tenure of the registration would have led the learned trial magistrate to conclude that the respondent’s claim was incompetent and would have struck out the suit.
32. This is so because the suit property is a joint tenancy and the appellant and Charles did not hold distinct and separate shares yet despite the tenure of ownership, he only sued one tenant and not both yet in



joint tenancy, both of them form one person. See the extract of Megary & Wade, *The Law of Real Property and, Cheshire & Burn's, Modern Law of Real Property* that was cited in *Isabel Chelangat vs. Samuel Tiro Rotich & 5 others* (2012) eKLR.

33. Anyway, this issue was not raised on appeal and I will now revert to the issue for determination, and in doing so, I will bear in mind the learned trial magistrate's faulty reasoning and the non-exhaustive guidelines of *Isack M'inanga Kiebia* (Supra).
34. In his evidence the respondent testified that at adjudication, the appellant and Charles were absent and since he was present, he registered the suit property in their names to hold in trust for all the 5 brothers.
35. The appellant refuted this and testified each of the sons was registered as the owner of various parcels of land and to prove his position, particularly on parcels owned by the respondent, he produced green cards of land parcels no. Siaya/Obambo/1895, 1825, and 1835 which showed the respondent was registered as the owner of these parcels of land.
36. A scrutiny of these green cards and the suit property's official search results show all these parcels were 1<sup>st</sup> registrations and they were all registered on the same date of 3/11/2004.
37. From adduced evidence, the respondent's evidence on circumstances of the registration of land parcels no. Siaya/Obambo/1895, 1825, and 1835 to his name was unsatisfactory, contradictory, and full of falsehoods as shall be demonstrated shortly.
38. In addition, despite pleading there was an express agreement that the appellant held the suit property in trust for the 5 brothers, no evidence was led on this and I do not know how he could go about proving this claim in the absence of Charles being joined as a co-defendant.
39. Although he testified he purchased these parcels of land, PW2, contradicted him in his oral testimony and testified he gifted Siaya/Obambo 1825 to the respondent. Furthermore, PW2's oral testimony was a departure from his written testimony whereby he had testified he had sold Siaya/Obambo 1825 to the respondent!
40. The respondent also testified he bought a parcel from Jaoko Ojwang and land parcel no. Siaya/Obambo 1835 from Okoth Ogare yet this evidence was not substantiated by an agreement for sale or if it was oral, by the evidence of persons or witnesses who witnessed such purchase.
41. Furthermore, in proceedings over land parcel no. Siaya/Obambo 1835 that was before the land adjudication officer (LAO), the respondent's testimony was a total departure from his evidence in this case. In those proceedings, he testified as follows: -

“I was born in this disputed land. My father was given this land by Adenyo...During demarcation my piece of land P/NO.1835 was registered in my name and I still stay on that plot.”
42. These proceedings speak for themselves and hold the credence to the appellant's testimony that the respondent was registered as owner of other parcels of land that belonged to their father. His evidence that he and Charles were young during the adjudication process and thus remained in their homestead which is located in the suit property was unshaken.
43. Accordingly, I find that at adjudication, it was not the intention of the parties that the appellant would hold the suit property in trust for the respondent. I find the learned trial magistrate erred when she found the appellant held the suit property in trust for the respondent.



44. Ultimately and for the reasons and findings stated above, I find the appeal was successful and except for the trial court's order on costs, I hereby set aside in entirety the judgment and decree of the learned trial magistrate which allowed the respondent's claim and hereby substitute it with an order dismissing the respondent's claim. It is trite law costs follow the event and since both parties are siblings, each party shall bear their respective costs of the appeal.
45. Ultimately, I substitute the lower court judgment by issuing the following final disposal orders: -
- a. That the respondent's claim before the trial court is hereby dismissed.
  - b. Each party shall bear their respective costs of this appeal and the lower court's claim.
- Orders accordingly

**DELIVERED AND DATED AT SIAYA THIS 20<sup>TH</sup> DAY OF JUNE 2024.**

**HON. A. Y. KOROSS**

**JUDGE**

**20/6/2024**

Judgment delivered virtually through Microsoft Teams Video

Conferencing Platform in the Presence of:

Mr. Otieno for the appellant

Mr. Oduol for the respondent

Court assistant: Ishmael Orwa

