



**Otieno (Suing as the Administrator Ad Litem of the Estate of Dison Otieno Odongo (Deceased))
v Ochillo & another; Land Registrar, Siaya County (Interested Party) (Environment and
Land Appeal E007 of 2023) [2024] KEELC 6319 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6319 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND APPEAL E007 OF 2023
AY KOROSS, J
SEPTEMBER 26, 2024**

BETWEEN

**HENRY ODENDE OTIENO APPELLANT
SUING AS THE ADMINISTRATOR AD LITEM OF THE ESTATE OF DISON
OTIENO ODONGO (DECEASED)**

AND

**GEORGE OCHILLO 1ST RESPONDENT
THOMAS SAWANDA ODONGO 2ND RESPONDENT**

AND

LAND REGISTRAR, SIAYA COUNTY INTERESTED PARTY

*(Being an appeal from the judgment of SPM Hon. L.Simiyu
given on 6/09/2023 in Siaya SPM ELC Case Number 52 of 2019)*

JUDGMENT

Background of the appeal

1. From the record, the appellant and respondent have close family relations. The appellant and 1st respondent are stepbrothers and sons of Odongo. The administrator of the appellant's estate Henry Odende Otieno (Henry) is the appellant's son while the 2nd respondent is the 1st respondent's son.
2. The parcel of land that was at the center of the dispute was land parcel no. North Gem/Maliera/876 ['suit property'] which was registered as a 1st registration in the 1st respondent's name on 7/7/1975.
3. In a plaint dated 24/06/2019, the appellant claimed the suit property was ancestral land which was held in trust for him. He contended they had breached the trust by encroaching on portions of the



- suit property that he possessed. He also asserted that during adjudication, other ancestral lands were divided amongst Odongo's two wives- the appellant's mother- Sisia, and the 1st respondent's mother- Misewe.
4. According to the averments, they were respectively allocated parcel nos. 851 and 852 with the suit property being a common farming property with the right side thereof being tilled by Sisia and left by Misewe.
 5. The appellant sought orders of permanent injunction, a declaration that one-half of the suit property was held in customary trust by the 1st defendant for the appellant's family, issuance of a title deed of this portion to him, and costs of the suit.
 6. The claim was strenuously opposed by the respondents who filed a joint defence and a counterclaim dated 15/07/2019. They denounced the existence of customary trust and asserted the family had customary land which was registered at adjudication with the appellant and 1st respondent getting their respective portions.
 7. According to them, during the adjudication process the appellant was registered as the owner of land parcel nos. North Gem Maliera 851, 884, and 887 (appellant's parcels of land) whilst the 1st respondent was registered as the owner of the suit property, North Gem Maliera 852 and 853 (jointly, they will be referred to as "1st respondent's parcels of land").
 8. Thus, the respondents asserted the appellant was a trespasser who had unlawfully encroached on the suit property and sought an order of eviction.
 9. The appellant's claim against a 3rd defendant Jackline Anyanga was withdrawn on 29/1/2020 and thereafter, the matter proceeded for hearing with the appellant's case having 3 witnesses and the respondents' 4. The parties' cases were subsequently closed and the case was reserved for judgment.
 10. In the impugned judgment that was rendered by the learned trial magistrate, she identified 3 issues as arising for resolution; whether a trust was created/can be inferred, whether there was an agreement, and mesne profits.
 11. In her conclusions on these issues, the learned trial magistrate found customary trust had not been proved and there was no proof that an agreement existed between the appellant and 1st respondent. The learned trial magistrate granted some of the prayers sought in the respondents' counterclaim and granted orders of eviction, denied the prayer of mesne profits, ordered each party to bear their respective costs, and granted a 60-day stay of execution.

Appeal to this court

12. Aggrieved by the lower court judgment, the appellant preferred an appeal to this court and raised 9 grounds of appeal in his memorandum of appeal. An examination of these grounds demonstrates they fall far short of the requirements of Order 42 Rule 1 (2) of the Civil Procedure Rules as they are unconcise and argumentative.
13. The appellant appreciated the shortcomings of his memorandum of appeal and in his submissions dated 11/03/2024, he consolidated his grounds of appeal into a singular ground; whether the learned trial magistrate erred in finding the appellant had failed to prove his claim of customary trust. In my view, this is a suitable ground for appeal.



14. In the memorandum of appeal, the appellant urged this court to set aside the impugned judgment and other incidental orders and substitute it with an order allowing the appellant's claim of customary trust and costs of the appeal.

Appellant's submissions

15. This court on 28/02/2024 directed all parties to dispose of the appeal by filing a 7-pager submission, in breach of the direction, the appellant, by the firm on record for him, Ms. Arika & Company Advocates, filed a 12-pager submission and this court urges parties to comply with strict directions failure of which, a court may disregard their submissions.
16. The appellant identified 2 issues for determination; whether customary trust had been proved and whether the appellant is entitled to the reliefs sought. A reading of the submissions shows the issue of customary trust was addressed in both of them.
17. On the 1st issue, counsel relied on the decision of this court of Dominic Otieno Ogonyo & 2 others v Helida Akoth Walori [2022] eKLR which ostensibly had a situation that obtains to the circumstances of this appeal. In this decision, this court stated that each claim of customary trust is unique and a case-by-case analysis has to be conducted.
18. On the 2nd issue, the appellant prayed for the orders sought to be granted. However, in reverting to the 1st issue, counsel submitted this court should not scrutinize the appellant's parcels of land and North Gem Maliera 852 and 853 and urged this court to turn a blind eye to them as sufficient information had not been adduced on them. In addition, counsel faulted the learned trial magistrate for treating the case that was before her as a succession matter.
19. However, counsel introduced a new issue in the submissions which attacked the respondent's pleadings for not being specifically pleaded or proved and relied on the Court of Appeal decision of Caltex Oil (Kenya) Limited v Rono Limited [2016] eKLR.

Respondents' submissions

20. The law firm of Ms. Korongo & Co. Advocates which represented them filed written submissions dated 22/03/2024 and in dealing with the issue of customary trust, counsel submitted that trust is a concept of intergeneration equity and courts usually give effect to parties' intention. According to counsel, the appellant did not prove customary trust.
21. It is noted despite relying on several authorities, the respondents' counsel did not tender them to court and for this reason, they shall be disregarded. A portion of the submissions were incomprehensible and it appears there was an oversight by counsel. For this reason, this portion will not be considered.

Interested party's submissions

22. In the submissions filed by Ms. Lorna Orege, counsel from the Office of the Attorney General, counsel identified a singular issue for determination; whether the appellant was rightfully joined as a 3rd respondent.
23. Counsel submitted the 3rd respondent was an interested party (IP) in the lower court and it was erroneous for the appellant to now describe it as a respondent. Counsel submitted this misdescription had serious repercussions including compelling the IP to pay costs.



24. Counsel submitted that Rule 2 of *the Constitution* Of Kenya (Protection Of Rights and Fundamental Freedoms) Practice And Procedure Rules, 2013 had distinguished an IP from any other party to a proceeding.

Preliminary issue

25. Before I delve into the issues for determination, I must address an issue that arose in the appellant's submissions whereby counsel introduced new evidence on appeal challenging the respondents' pleadings yet this issue was never succinctly raised as an issue for determination before the learned trial magistrate to enable her to determine it. It was also not raised as a ground of appeal.
26. If the appellant wanted to introduce new evidence on appeal, then he should have moved this court under the provisions of Section 78 (1) (d) of the *Civil Procedure Act* and Order 42 Rules 27, 28, and 29 of the Civil Procedure Rules.
27. This court's position is anchored in the Court of Appeal decision of Otieno, Ragot & Company Advocates v National Bank of Kenya Limited [2020] eKLR where Asike-Makhandia JA stated that the only evidence that can be entertained by an appellate court was only that which formed part of the record. The appellant's line of arguments on this issue will be ignored.

Issues for determination

28. As a first appeal, I am enjoined to revisit the evidence that was before the lower court afresh, analyze and evaluate it, and arrive at my independent conclusion, but always bearing in mind that the learned trial magistrate had the benefit of seeing the witnesses, hearing them and observing their demeanour and giving allowance for that – see the case of *Selle vs. Associated Motor Boat Company Ltd*, [1968] EA 123.
29. I have carefully considered the record, submissions filed by counsels, and the law. The issues that become apparent for this court to exercise its mind upon are:-
- a. Whether as an IP in the lower court, the appellant could be joined as a respondent at an appellate level.
 - b. Whether the learned trial magistrate erred in finding the appellant had failed to prove his claim of customary trust.
 - c. What orders should this court issue including an order as to the costs?

Analysis and determination

30. The issues that were earlier identified for determination shall be handled sequentially.
- a. Whether as an IP in the lower court, the appellant could be joined as a respondent at an appellate level.**
31. Apart from the IP's counsel, none of the other counsels addressed the court on this issue. As rightfully submitted by the IP's counsel, an IP's role in court proceedings is very limited and the meaning of



such a party is found in Rule 2 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 which defined an IP as:-

“interested party” means a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation;”

32. From the record and as submitted by the IP’s counsel, the IP was merely an IP at the lower court level, and at no point in time was it ever transformed into either a plaintiff or defendant. It is only at the appellate level that it has been described as a 3rd respondent.
33. A scrutiny of the lower court proceedings demonstrates that the only reason the IP was joined to the suit was for it to effect an order of registering a portion of the suit property in the appellant’s name as sought by the appellant and no more.
34. The logical conclusion is that it was a typographical error by the appellant. I find the IP is not a respondent in this appeal and the proper designation of the IP has been attributed in the header of this judgment.

b. Whether the learned trial magistrate erred in finding the appellant had failed to prove his claim of customary trust

35. Section 24 (a) of the Land Registration Act states the registration of a person as the proprietor of land shall vest in that person the absolute ownership together with all such rights and privileges thereto.
36. 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 such as customary trusts which have been recognized by Section 28 (b) of the same Act.
37. By Section 107 to 109 of the Evidence Act, the persons claiming trust have the onus of proving it, and the court can never imply trust but give effect to the intention of the parties to create such a trust for the benefit of a group of other family members.
38. 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 Repealed Land Act, 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.
39. The appellant’s claim before the trial court was customary trust which is an encumbrance on the land and an overriding interest albeit not registered. These are non-registrable intergeneration rights that usually run with the land.
40. Upon analysis of the evidence, the learned trial magistrate deduced the appellant did not prove his case. In customary trust claims, a case-by-case analysis has to be carried out as the principles in *Isack M’inanga Kiebia (Supra)* are not exhaustive.
41. This court as 1st appellate court will reconsider the case that was before the trial court but being mindful that it cannot infer customary trust but identify and give effect to the intention of the parties at the time of registration.
42. As inferred from the evidence, the suit property was a creation of the *Land Adjudication Act* whose mandate was to ascertain and record rights and interests in customary land including land held communally under Luo customary law to which the parties ascribed themselves.
43. The process of adjudication is usually comprehensive, in the public domain and, parties are given opportunities to ventilate their grievances at various stages. This process usually starts with the land adjudication committee and if dissatisfied, to the arbitration board and if still aggrieved, they can approach the land adjudication officer (LAO) before a final appeal to the minister. See Sections 20, 21, 22, 26, and 29 (1) and (2) of the *Land Adjudication Act*.
45. As discerned from the evidence, the suit property was family land, and the parties have family relations which is not tenuous and made against the registered proprietor. However, it was incumbent upon the appellant to satisfy the court that certain intervening circumstances led to his non-registration as the owner of the suit property.
46. The appellant pleaded that Sisia had died before 1942 which was long before adjudication which crystallized on 7/7/1975. It emerged during evidence that during adjudication, the appellant and 1st respondent were adults.
47. Henry testified that at adjudication, the appellant and the 1st respondent were not present hence their cousins conducted the exercise on their behalf.
48. These alleged cousins were not called as witnesses. However, the respondents rebutted this and asserted that during adjudication, the family land was divided amongst the homes of Sisia and Misewe and by extension their sons who are respectively the appellant and 1st respondent. It was the 1st respondent’s testimony that the appellant was registered as owner of various parcels of land.
49. The 1st respondent testified that Misewe and Dison were present at adjudication. However, DW3 testified that as a village elder, he was privy to how the family lands were distributed to the appellant and 1st respondent. He asserted that these parties’ wives were present during adjudication processes and that no disputes were ever lodged.



50. Although the appellant's counsel submitted that this court should overlook the circumstances of registration of these other parcels of land, this is not tenable and I agree with the learned trial magistrate that they were critical in the determination of the case as they illuminated on the circumstances in which the appellant was not registered as the owner of the suit property.
51. Henry and DW3's evidence was consistent that the appellant and 1st respondent were absent during adjudication. The 1st respondent testified he suffered memory lapse while DW3 testified that he was present during the adjudication process and was categorical that the wives of the appellant and 1st respondent were present. His evidence was unshaken.
52. Considering the provisions of Sections 107 to 109 of the *Evidence Act*, The appellant's evidence having been disputed, the legal and evidential burden shifted to the appellant to prove that certain intervening circumstances led to his non-registration over the suit property and having failed to so do, I agree with the learned trial magistrate that he failed to prove his claim. This shifting burden of proof was elucidated in the Court of Appeal decision of Mbuthia Macharia v Annah Mutua Ndwiga & another [2017] eKLR where the court stated: -
- “The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence?”
53. It emerged from documentary evidence that each appellant and respondent got 3 parcels of land and none of them ever raised any objection or appeal during the land adjudication process and as construed by the learned trial magistrate which this court concurs with, the two step-siblings intended to have their separate and distinct parcels of land and not otherwise.
54. The circumstances of Otieno's entry into the suit property and the respondents' prayer for eviction have not been challenged on appeal. Therefore I must conclude that the appeal fails.
55. Ultimately and for reasons stated hereinabove, I find and hold that this appeal is devoid of merit. I hereby dismiss it and uphold the judgment of the learned trial magistrate delivered on 6/09/2023. Since it is trite law costs follow the event and considering the close relations between the parties, each party shall bear their respective costs of the appeal.

It is so ordered.

JUDGMENT DELIVERED VIRTUALLY.

DATED, SIGNED AND DELIVERED THIS 26TH DAY OF SEPTEMBER 2024.

HON. A. Y. KOROSS

JUDGE

26/9/2024

In the Presence of:

Mr. Arika for the appellant

N/A for respondents

Court assistant: Ishmael Orwa



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