



**Oganga v Were; Omondi (Interested Party) (Environment and Land Appeal E010 of 2023) [2024] KEELC 13311 (KLR) (21 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 13311 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENT AND LAND APPEAL E010 OF 2023  
AY KOROSS, J  
NOVEMBER 21, 2024**

**BETWEEN**

**JOHN OJWANG' OGANGA ..... APPELLANT**

**AND**

**JAMES ODIPO WERE ..... RESPONDENT**

**AND**

**BOAZ ODUOR OMONDI ..... INTERESTED PARTY**

*(Being an appeal from the judgment of PM Hon L.Simiyu delivered on 2/11/2022 in Siaya PM ELC Case No. 221 of 2018)*

**JUDGMENT**

**Background of the appeal**

1. In the lower court, the appellant was the plaintiff and the respondent the defendant. The parties are step-siblings and the parcel of land in dispute is land parcel no. Siaya/Kochieng "B"/744 (suit property) registered in the respondent's name.
2. In a plaint dated 21/12/2018, the appellant stated the parties were children of Rosebella Omwanda Were (Rosebella) and he also particularised his claim of trust over the suit property. Ultimately, he sought the following reliefs from the trial court: -
  - a. A declaration the respondent held the suit property in trust for him.
  - b. A transfer of the suit property to him by the respondent and in default, the court administrator executes the transfer instruments.
  - c. Costs of the suit and interests.



3. By a defence dated 11/02/2019, the respondent vehemently denied the averments contained in the plaint and put the appellant to strict proof. He averred the appellant had his own parcels of land that were registered in his name namely, Siaya Kochieng “B”/665, 653, and 684 (appellant’s parcels). He urged the trial court to dismiss the suit with costs.
4. The matter proceeded to a hearing, and the appellant testified as PW4 and called 3 other witnesses. Of significance is despite filing witness statements, lists, and a bundle of documents, neither the appellant nor his witnesses produced any documents.
5. The respondent also testified as DW1 and as his documentary evidence, he produced certificates of official searches of the suit property and those of the appellant’s parcels.
6. The interested party (IP) who was a brother of the parties testified and produced several documentary evidence which were produced and marked as IP Ex.1-12. These documents were all related to the resolution of boundary disputes over several parcels of land.
7. After hearing parties, their cases were closed, submissions were filed and impugned judgment was rendered on 2/11/2022. In dealing with the issue of customary trust, the learned trial magistrate concluded that it was never the intention of the parties for the respondent to hold the suit property in trust for the appellant.
8. In the impugned judgment, the learned trial magistrate was not persuaded the appellant and IP had proved their cases on a balance of probabilities. Their claims were dismissed, the respondent was found the absolute owner of the suit property and costs were awarded to him.

### **Appeal to this court**

9. This decision did not augur well with the appellant who acts in person and he preferred an appeal before this court. The appellant filed his memorandum of appeal dated 12/10/2023 in which he raised the following 9 grounds of appeal: -
  - a. The learned trial magistrate erred in law and fact in failing to appreciate the adjudication proceedings were initiated by the appellant’s father Philip Oganga Ojwang before being taken over by the respondent who was to act for the appellant who was a minor.
  - b. The learned trial magistrate arrived at the wrong decision by failing to appreciate the adjudication proceedings were between Philip Oganga Ojwang’s family and Asewe Oloo and not between Were Ojwang who was the respondent’s father and Asewe Aloo.
  - c. The learned trial magistrate arrived at the wrong decision by failing to appreciate the parties derived registration from their fathers’ respective parcels. Hence in the adjudication proceedings, the respondent represented the children of Philip Oganga Ojwang.
  - d. The learned trial magistrate erred in law and fact in failing to consider the respondent was not the biological son of Philip Oganga Ojwang and in finding that since the appellant and respondent had different parcels registered in their names, thus, customary trust did not suffice.
  - e. The learned trial magistrate arrived at the wrong decision by failing to appreciate he had been in occupation and possession of the suit property for over 30 years.
  - f. The learned trial magistrate erred in law and fact in failing to appreciate the respondent was in contempt of the court orders issued on 8/05/2019 and hence not entitled to an audience.



- g. The learned trial magistrate erred in law and fact in finding the suit property was registered in the respondent's name.
  - h. The learned trial magistrate erred in law and fact in misinterpreting the contents of the letter dated 17/10/2017.
  - i. The learned trial magistrate erred in law and fact by concluding that the appellant and IP's mother had control of Philip Oganga Ojwang and Were's land yet she only had control of Were's land.
10. Accordingly, the appellant implored this court to allow the appeal, set aside the impugned judgment in its entirety, and allow his claim in terms of prayers (a) and (b) of the plaint, costs of the lower court suit, and the appeal with interest.

### **Submissions.**

11. As directed by the court, the appeal was canvassed by written submissions. The appellant's submissions identified the following issues as arising for determination; whether the respondent represented the appellant's father in the adjudication process, whether the appellant is entitled to the suit property because it belonged to his father, whether there was a consent the appellant held the suit property in trust, whether there was implied trust for using the land for over 30 years and whether the trial court erred in granting the appellant audience when he was in contempt.
12. The respondent who also acted in person filed written submissions dated 18/06/2024 and apart from introducing matters of evidence, he addressed the issues that were canvassed by the appellant's submissions. The IP did not participate in these proceedings.
13. Upon identifying and considering the issues for determination, this court will in its analysis and determination consider the parties' rival submissions on the particular issue and also consider provisions of the law and judicial precedents they relied upon to advance their arguments.

### **Preliminary issues**

14. The memorandum of appeal introduced issues that were either new or overtaken by events. The lower court has rendered its final judgment yet, ground (f) of the memorandum of appeal on contempt of court orders issued on 8/05/2019 has long been overtaken by events. This ground will therefore be disregarded.
15. Pointedly, despite this court in a ruling rendered on 25/04/2024 declining the introduction of new evidence on appeal, the appellant intentionally introduced several shreds of new evidence and this court frowns at his glaring conduct.
16. The respondent too was not left behind and probably taking a cue from the appellant's submissions, also introduced new evidence in his submissions.
17. Both parties are reminded that submissions are arguments and not evidence. As a result, I will not consider these new pieces of evidence that have been introduced on appeal and will constrain myself to arguments raised by the parties in their submissions solely on matters that arose before the trial court.

### **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 steered by the principles enunciated in the well-cited case of *Selle v Associated Motor Boat*



Company Ltd [1968] EA 123, 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. Turning to the matter at hand, I have carefully considered the records, rival submissions, and judicial precedents cited. This court has condensed the grounds of appeal into the following: -
  - a. Whether the learned trial magistrate erred in not finding the appellant held the suit property in customary trust for the respondent.
  - b. What orders should be issued?

### **Analysis and Determination**

20. Since the outcome of issue (a) will determine the nature of the disposal orders that will be issued by issue (b), these 2 issues which had earlier been considered shall be dealt with together.
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 the absolute ownership together with all such rights and privileges thereto. Nonetheless, Section 28(b) thereof expressly recognizes customary trusts as one of the overriding interests over land.
22. These rights are also compounded by Section 25 thereof which provides that 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 that have been recognized by Section 28 (b) of the same Act.
23. As held by this court in the decision of Dominic Otieno Oguny & Peter Odhiambo Oguny v Helida Akoth Walori [2022] KEELC 1553 (KLR) which has been cited by the appellant as read together with Sections 107 to 109 of the [Evidence Act](#), the onus was on him to prove that it was the intention of the parties or family members that the suit property would be registered in the respondent's name to hold in trust for the appellant.
24. Once this onus is discharged, then the court will render its decision on the intent as the court never infers trust.
25. A party claiming customary trust must provide evidence to prove the existence of such a trust and once a positive determination is made, such a trust binds the registered proprietor. Because each case is unique, a case has to be determined on its own merits and the quality of the evidence presented before the court.
26. The Supreme Court of Kenya whose decision is binding upon this court settled the non-exhaustive principles of customary trust in the case of Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another [2018] eKLR and on analysis of the 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.

27. In considering the issue of the existence or non-existence of a customary trust over the suit property, the learned trial magistrate correctly appreciated the law on this and upon analyzing the evidence that was before her, had this to say: -

“...there is no evidence that the family of rosebella agreed from (sic) the defendant to be registered on the suit land to hold it for the rest of the sons...Each of brothers got several parcels of land registered in their names.”

28. The evidence shows that Rosebella was initially married to Were, and with him, she sired the respondent and IP. When he died, she married Philip Oganga Ojwang (Philip) and sired the appellant and other children.
29. The evidence displays that upon remarriage to Philip, she moved into his parcels of land, and he built a homestead for her there. From the record, Philip had another wife, but she did not have sons; however, it was never disclosed if she had daughters.
30. The appellant has challenged this reasoning of the learned trial magistrate and alludes that the respondent’s statement in the land adjudication committee (LAC) demonstrated that he represented the interests of Philip.
31. This court had combed through the hand-written and type-written proceedings and has confirmed they were never produced and admitted as evidence. It is noted that the impugned judgment erroneously stated the appellant produced documents as evidence.
32. From the record and as required by Order 2 Rule 10 (1) of the Civil Procedure Rules, the appellant particularized customary trust inter alia, the suit property was ancestral land, he was a minor during adjudication, apart from the suit property, the respondent owned land parcel nos. Siaya Kochieng “B”/91, 685 and 657 (respondent’s parcels).
33. The appellant did not particularise in his pleadings that the parties were sired by different fathers or that the suit property belonged to his father’s lineage. His case was anchored on the understanding that the parties were Rosebella’s children.
34. The appellant testified that he had been in occupation and possession of the suit property from 1985 to 2018 having been so given by Rosebella. This evidence was contradicted by several witnesses.
35. PW1 testified that after Asewe was ejected from the suit property, Rosebella tilled the land in 1985 but the respondent entered it in 2018.



36. PW2 testified that at registration, Philip's wife used the land, and upon Asewe's expulsion from it, the respondent utilized the suit property and had even planted cassava therein.
37. PW3 testified that as of 1986, she found Rosebella tilling the suit property and that later, the respondent cultivated it. The IP testified that Rosebella had used the suit property during registration to the time of her demise in 2020.
38. These witnesses were consistent that the appellant had never made use of the suit property and I am persuaded by this line of evidence. Even if the learned trial magistrate did not deal with the issue of customary trust based on possession and occupation, I find the appellant did not prove his claim.
39. As was held in the case of Peter Gitonga V Francis Maingi M'ikiara [2007] eKLR, in claims of customary trust, courts are concerned with the circumstances surrounding registration to establish the purpose of the registration.
40. In the circumstances of this case, there was consistent evidence that the appellant was born in 1956 and was 21 years old at the time of the adjudication process which commenced in 1977. In other words, he was an adult. His claim that he was a minor at adjudication and hence the suit property was held in trust for him because of age is untruthful.
41. By his evidence, he was conversant with the adjudication process, and he stated the reason he did not register the suit property in his name was because it had already been registered in Asewe's name.
42. Once it was registered in Asewe's name, he did not pursue it further. Meaning, he had no interest in the suit property whether customary, proprietary, or otherwise. Put another way, he never intended for the suit property to be registered in his name.
43. It was probable that this was occasioned by the fact that he had 3 other parcels that were registered in his name which was done at the same as the suit property. In my honest view, it is callous of him to claim customary interest several decades thereafter yet at the time of registration, he turned a blind eye to Asewe's registration and had no interest in it.
44. I must agree with the learned trial magistrate that in the context of this case, after the demise of their husbands, the wives had some form of control over parcels of lands belonging to their deceased husbands- Rosebella tilled the suit property and Philip's other wife registered some of her parcels of land in the appellant's name.
45. Additionally, I also concur with the learned trial magistrate that it was never the intention of the parties to hold parcels of land in trust for each other as each one of them had their respective parcels of land registered in their respective names.
46. For the reasons stated above, I find the learned trial magistrate did not err in her findings. I arrive at the same conclusion as her that the appellant's suit was ripe for dismissal.
47. Therefore, I will not disturb the learned trial magistrate's judgment delivered on 2/11/2022. I uphold the judgment that dismissed the appellant's case. It is trite law costs follow the event, since the parties have close relations and to foster reconciliation, each party shall bear their respective costs.

Orders accordingly.

**DELIVERED AND DATED AT SIAYA THIS 21<sup>ST</sup> DAY OF NOVEMBER 2024.**

**HON. A. Y. KOROSS**

**JUDGE**



**21/11/2024**

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

In the Presence of:

Appellant

Respondent – deceased.

Court assistant: Ishmael Orwa

14 days right of appeal.

