



Okongo (Suing as the Legal Administrator of the Estate of Oudu Agigo - Deceased) v Oketch & 9 others (Environment and Land Appeal 17 of 2022) [2024] KEELC 14214 (KLR) (20 November 2024) (Judgment)

Neutral citation: [2024] KEELC 14214 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT AND LAND APPEAL 17 OF 2022
GMA ONGONDO, J
NOVEMBER 20, 2024**

BETWEEN

MICHAEL OTIENO OKONGO (SUING AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF OUDU AGIGO - DECEASED) APPELLANT

AND

- MARY OKETCH 1ST RESPONDENT**
- BENSON ASSA OCHIENG OBOLLA 2ND RESPONDENT**
- TOBIAS OLUOCH OBOLLA 3RD RESPONDENT**
- BEVON ONYANGO OBOLLA 4TH RESPONDENT**
- MARTIN LUTHER OBOLLA 5TH RESPONDENT**
- TOM AMADA OKAL OBOLLA 6TH RESPONDENT**
- BARRACK LEAKY OMONDI OBOLLA 7TH RESPONDENT**
- ROBERT LEAKY OMONDI OBOLLA 8TH RESPONDENT**
- ROBERT JAPHETH OKAL 9TH RESPONDENT**
- LAMECH ODOYO OBOLLA 10TH RESPONDENT**

(Being an appeal against the entire judgment and decree of Hon. R.K Langat P.M on 24th May, 2022 in Rongo Environment and Land Court case No. 33 of 2019 at Rongo Principal Magistrate’s court)



JUDGMENT

1. On 24th May 2019, the trial court (Hon. R.K Langat, PM) delivered judgment in the original suit, RONGO SPM's Court Environment and Land case number 33 of 2019 that the appellant who was the plaintiff, had failed to prove his case against the nine respondents who were the defendants in the suit on a balance of probability. He then dismissed the suit with costs to the defendants.
2. Being dissatisfied at the said judgment, the appellant who is represented by Onyango Owaka and Company Advocates and originally, appeared in person, lodged this appeal by way of memorandum of appeal dated 24th June 2022 captured in the record of appeal dated 8th February 2023, the supplementary record of appeal dated 25th March 2023 and another supplementary record of appeal dated 4th July 2023 based on the eight grounds infra;
 - a. That the Learned Magistrate erred in law and fact by failing to appreciate the equitable doctrine of constructive trust in favour of the plaintiff.
 - b. That the Learned Magistrate erred in law and fact by failing to consider the evidence adduced on behalf of the plaintiff.
 - c. That the Learned Magistrate failed to appreciate the submissions of the learned counsel for the plaintiff by proceeding to dismiss the suit.
 - d. That the Learned Magistrate failed to appreciate the facts as deposited and the evidence adduced by the plaintiff were not controverted and that the suit ought to have succeeded on that basis.
 - e. That The Learned Magistrate erred in law and fact in not finding that the respondents obtained the suit parcels (The suit parcels of land-infra) through fraud.
 - f. That the Learned Magistrate erred in law and fact by failing to appreciate that the appellant had acquired overriding interest over and in respect to the suit property.
 - g. That the Learned Magistrate erred in law and fact by failing to consider the evidence adduced by the appellant in support of the fact that the suit parcels of land were acquired through fraud.
 - h. That the Learned Magistrate erred in law and fact when he believed the evidence of the respondent and dismissed the evidence of the appellant without assigning any tangible reasons.
3. So, the appellant has sought the following orders;
 - a. Appeal be allowed.
 - b. The Judgment and Decree delivered on 24th May, 2022 in Rongo Environment and Land Court Case No. 33 of 2019 at Rongo Principal Magistrate's Court by Hon. R.K Langat P.M be set aside.
 - c. The Appeal be awarded the costs of this Appeal and in the Subordinate Court.
4. On 20th November 2023, the court directed that the appeal be heard by written submissions.
5. Accordingly, G M Nyambati and Company Advocates, learned counsel for the respondents did file submissions dated 20th December 2023 and implored the court to dismiss the appeal with costs. Reference is made to the impugned judgment and the memorandum of appeal seeking that the appeal



be allowed, among other orders. Briefly, counsel set out the background of the matter including that sometime on 1st January 1971, Oduo Gigo (Deceased-1) became the registered proprietor of the original suit land reference number Kamagambo/Kongudi/537 following land adjudication in the area. That on 20th September 1991, Deceased-1 sold the suit land to Peter Davidson Otieno (Deceased-2) who became the registered proprietor thereof. That deceased-2 died and the 1st and 2nd defendants obtained grant of letters of administration in respect of the estate of Deceased-2 and distributed the original suit land among the beneficiaries of the estate. That however, in the year 2013, the appellant claimed that he had been in possession of the suit land since 1989 when deceased-1 died thus, raised fraud and customary trust over the same against the respondents herein.

6. In the evaluation of evidence, counsel relied on Isack Kiebia M’Inanga-vs-Isaaya Theuri M’Lintari & another (2018) eKLR on customary trust and Raila Amolo Odinga & another-vs-IEBC & 2 others (2017) eKLR that parties are bound by their pleadings alongside the evidence of witnesses herein. Also, counsel cited sections 107 and 109 of the *Evidence Act* Chapter 80 Laws of Kenya, sections 24 and 26 of the *Land Registration Act* 2016 (2012), section 93 of the *Law of Succession Act* Chapter 160 Laws of Kenya and that this is a pseudo appeal in succession causes regarding the estates of Deceased-1 and Deceased-2. That trust was not pleaded in the original suit hence, the issue must fail herein.
7. Notably, the appellant commenced the original suit against the respondents by an amended plaint dated 31st August 2019 seeking the following orders;
 - a. Declaration that the defendants herein hold the entire LR No’s Kamagambo/Kongudi/2903, 2904, 2905, 2906,2907 and 2908 (The suit parcels of land) on trust for and on behalf of the plaintiff and the rest of the beneficiaries of the Estate of deceased-1.
 - b. An order for cancellation and/or nullification of the names of the 1st -6th Defendants as the registered proprietors of the suit parcels together with all the Title Instruments, inter-alia the Green Cards (sic) bearing the names of the 1st to 6th Defendants and restoring the Register and or Tile of the original suit land in the name of Deceased-1 as the Bona-fide and legitimate owner thereof.
 - c. An order of eviction against the defendants, their Agents and/or Servants from the suit parcels.
 - d. Permanent injunction restraining the defendants either by themselves, agents, servants and/or anyone claiming under the defendants, from trespassing onto, encroaching upon, Cultivating, building, fencing, selling, charging, leasing, sub-dividing, alienating, interfering with and/or in any other manner dealing with the titles in respect of the suit parcels of land and/or any portion thereof.
 - e. General damages for trespass.
 - f. Costs of this suit be borne by the defendants.
 - g. Such further and/or other relief as the Honourable Court may deem fit and expedient so to grant.
8. In their statement of defence dated 13th November 2019, the defendants denied the plaintiff’s claim, sought proof of the plaintiff’s allegations and that the suit be dismissed with costs to them. They stated that the estate of Deceased-2 was properly administered and the appellant has not been on the suit land. That deceased-2 was not registered posthumously in 1991 and the documents reflecting his demise, were obtained by fraud. That the original suit land was subdivided into various sub divisions and the respondents are the rightful owners of it as the appellant is a stranger to the family of Deceased-1.



9. In his testimony, the appellant, Michael Otieno Okongo (PW1) relied on his statement dated 21st June 2019 and stated, inter alia, that the original suit land was subdivided into several parcels in the year 2019 and currently registered in the name of Deceased-2 illegally since the said year. That initially, it was registered in the name of Deceased-1 in 1971 and that Deceased-1 died in 1989. Further, he stated that he lived on the original suit land held by the defendant in trust for him and others until 2013. That his father Okongo Owaka (Deceased-3) was not registered as proprietor of the original suit land. That he planted maize thereon.
10. PW2, John Ochwala relied on his statement as part of his testimony and stated that PW1 was a son of Deceased-3 and a grandson of Deceased-1 who was the owner of the original suit land. That he occupied the land with PW1 being members of family of Deceased-1 and succession proceedings regarding his estate, were not challenged. He was in agreement with the prayers sought in the plaint.
11. DW1, Beron Onyango Okal relied on his statement as part of his evidence and stated that Deceased-2 was his elder brother who got registered as the proprietor of the original suit land on 20th September 1991 and died in the year 1994. This witness stated that PW1 was not a beneficiary of the estate of Deceased-2. He told the court that he has been using the original suit land.
12. DW2, Benson Assa Ochieng Obolla told the court that he was sued as the 2nd defendant together with co-defendants who are his brothers. He stated that Deceased-2 was his elder brother who obtained title deed to the original suit land in 1991 and died in 1994. That he obtained grant of Letters of Administration thereof-PExhibit 2. That Deceased-2 was not married and distribution of his estate with subsequent sub divisions of the original suit land, were lawful.
13. DW3, Maureen Ayumba, Civil Registrar at Rongo stated that she issued death certificate in respect of Deceased-1. She produced relevant documents thereof as DExhibit 7 in the suit.
14. DW4 was Jeremiah Orongo Nyamboke, Chief East Kamagambo Location. He testified that Deceased-1 went to him for an introduction letter (DExhibit 5) to assist him swear an affidavit and he served him accordingly.
15. DW5, John Silas Machila Obare was Registrar of Persons, Rongo Sub County. In his evidence, he referred to Identity Card No. 11557988 of Deceased-1 and produced it as DExhibit 4.
16. It is trite law that an appellate court has the jurisdiction to review the evidence in order to determine whether the conclusion reached upon such evidence should stand but this is a jurisdiction which should be exercised with caution; see Peters-vs-Sunday Post (1958) EA 424 at 429 and Williamson Diamonds Ltd-vs-Brown (1970) EA 1.
17. Thus, the issues for determination in this appeal crystallize to whether; (a) trust and fraud are disclosed in respect of the original suit land and (b) the orders to issue to meet the ends of justice in this appeal.
18. On trust, the appellant stated in examination in chief that;

‘.....I pray that all the title deed be held in trust.....’
19. It is noted that trusts including customary trusts are overriding interests over registered land in Kenya under section 28 (b) of the [Land Registration Act](#) 2016 (2012). They are part of the principles of equity enshrined in Article 10 (2) (b) of [the Constitution](#) of Kenya 2010.
20. A trust is a right solely enforceable in equity, to the beneficial enjoyment of property to which another holds legal title; see Black’s Law Dictionary 10th Edition and Twalib Hayatan Twalib Hayatan & another-vs- Said Saggar Ahmed Ali-Heidy & others (2015) eKLR.



21. Further, trust is a question of fact and has to be proved by way of evidence; see *Mumo-vs-Makau* (2002) 1 EA 170.
22. It is established law that some of the elements that constitute a customary trust are; that the land in question was before registration family, clan or group land and the claimant belonged to such family, clan or group; see *Isack Kiebia* case (supra).
23. In cross examination, PW1 stated that succession was heard and determined in Nairobi High Court and that.....

‘I was not listed as a beneficiary....By the time, I filed the suit , I had information that succession cause had been filed in Nairobi. My Migori succession cause was struck out. I did not challenge the Nairobi Succession cause. This court can set aside High Court succession grant....there is a document showing the land is held by defendant on trust.....I am not occupying the land....’
24. In the foregone, the trial court correctly observed that the appellant was not related to Deceased-2 who had legally obtained title of the suit land and transmitted the same to his brothers. That the appellant;

‘...can only challenge the same through a probate court and not this forum.’
25. The appellant alleged fraud against the respondents concerning the original suit land. In *Kinyanjui Kamau-vs-George Kamau* (2015) eKLR, the Court of Appeal held that;

It is trite law that any allegation of fraud must be pleaded and strictly provednot enough to infer from the facts....’
26. Also, in the case of *Gladys Wanjiru Ngacha-vs-Treresa Chepsaat & 4 others* (2015) eKLR, the Court of Appeal observed that allegations of fraud be strictly proved in a suit. That something more than a mere balance of probability is required.
27. It is notable that sections 24, 25 and 26 *Land Registration Act* 2016 (2012) capture the rights and interest of proprietors of land. The testimonies of DW1, DW2, DW3, DW4 and DW5 showed that the respondents have valid registrations as regards the suit parcels of land.
28. The appellant failed to prove the acquisition of the suit parcels of land by the respondents was not lawful, formal and free from any encumbrances; see *Munyu Maina-vs-Hiram Gathiha Maina* (2013) eKLR.
29. PW1 testified regarding fraud by the respondents thus;

‘.....They did not obtain the title legally.....’
30. Plainly, the appellant made mere allegations of trust and fraud. He did not present evidence in support thereof in consonant with *Kiebia*, *Kamau* and *Ngacha* cases (supra)
31. It is evident that the respondents own the suit parcels of land through transmission over the estates of deceased-1 and deceased-2. Therefore, they are entitled to acquire and own the said parcels as stipulated under Article 40 of *the Constitution* of Kenya 2010. There is nothing presented by the appellant to limit them from the proprietorship thereof as envisioned under the same Article.
32. In that regard, the appellant has not established that the respondents hold the suit parcels of land in trust for and on behalf of the appellant and the rest of the Beneficiaries of the Estate of deceased-1. Moreover, this is a pseudo appeal in succession causes as observed in paragraphs 8 and 23 hereinabove



but this court can not entertain the issue of grants in the causes being guided by the case of Republic-vs-Karisa Chengo & 2 others (2017) eKLR.

33. In Kiruga-vs-Kiruga & another (1988) KLR 348, the Court of Appeal emphasized and held that;

‘An appeal court can not properly substitute it’s own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge an be said to be plainly wrong.....’

34. It is thus, the finding of this court that the impugned judgment is in accordance with the evidence on record and the application of the correct principles of law. There is no reason to disturb it. Therefore, I affirm the same without any reservation.

35. A fortiori, this appeal lacks merit and hereby dismiss it with costs to the respondents.

36. It is so ordered.

DATED AND DELIVERED AT MIGORI THIS 20TH DAY OF NOVEMBER 2024

G M A ONGONDO

JUDGE

Present;

Kirianki instructed by Mr Nyambati learned counsel for the respondents

Tom Maurice, court assistant

