



REPUBLIC OF KENYA



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Baya (Suing as administrator of the Estate of Abdalla Kalume aka Abdalla Kalume Jefwa) v Jackson (administrator of the Estate of Kitsao Jefwa aka Kitsao Jefwa Kithunga) (Environmental and Land Originating Summons E008 of 2024) [2024] KEELC 13783 (KLR) (10 December 2024) (Judgment)

Neutral citation: [2024] KEELC 13783 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E008 OF 2024
FM NJOROGE, J
DECEMBER 10, 2024

BETWEEN

JUMA ABDALLA BAYA (SUING AS ADMINISTRATOR OF THE ESTATE OF ABDALLA KALUME AKA ABDALLA KALUME JEFWA) APPLICANT

AND

NYEVU KITSAO JACKSON (ADMINISTRATOR OF THE ESTATE OF KITSAO JEFWA AKA KITSAO JEFWA KITHUNGA) RESPONDENT

JUDGMENT

Introduction.

1. In this case the applicant claims that his uncle was registered to hold the suit property in trust for the entire family that included the applicant's father and he claims half of the suit property on behalf of the estate of his late father as part of part of the inheritance from the grandparents.

Pleadings.

2. In the Originating Summons dated 1/3/2022, the applicant seeks a declaration that the registration of Kitsao Jefwa aka Kitsao Jefwa Kithunga in respect of parcel no Gede Mijomboni /19 (hereinafter "the suit land") was done in trust for himself and the applicant's family, a declaration that the applicant is entitled by way of adverse possession having occupied half of the suit property for a period exceeding 12 years and hence Kitsao Jefwa aka Kitsao Jefwa Kithunga's title to a half portion of the suit property be extinguished by operation of the law and transferred to the applicant; an order that the Land Registrar Kilifi be do cancel the title held by Kitsao Jefwa and the same be subdivided into two equal parts and the Deputy Registrar of this court do execute the transfer of the land to the applicant.



3. The Originating Summons is supported by the sworn affidavit of the applicant of even date and also the supplementary affidavit sworn on 13th July 2022.
4. The suit is opposed by the respondent who filed her sworn replying affidavit sworn on 6/6/2022.
5. On 12/10/2023 it was ordered that the matter be tried as though commenced by way of plaint and viva voce be adduced. The documents filed by the parties were deemed as pleadings.

Evidence

Evidence for the applicant.

6. PW1 Juma Abdalla Baya testified on 24/1/2024 and adopted his witness statement dated 31/10/2022, affidavits and annexures thereto attached as his evidence-in-chief. His evidence is that the respondent is his aunt, sued on behalf of his late uncle Kitsao Jefwa (herein after “Kitsao”). His father Abdalla Kalume (herein after “Abdalla”) worked at the port in Mombasa; Kitsao and his grandparents stayed at Gede on the suit land; the applicant’s family home was in Gede. The grandparents are buried on the suit land. However, the respondent claims the ownership of the whole property. Kitsao and Abdalla were the only sons of his grandfather Mzee Kithunga; on 29/6/1990 two years after the demise of Kitsao, title issued in Kitsao’s favour. The applicant stated that his family is entitled to half of the suit land on account of customary trust and adverse possession; that the registration in the name of Kitsao was in trust for his only brother and the two families; that the applicant always knew the land to be Mzee Kithunga’s and later on his family and Kitsao’s family built homes on the land, and the applicant and others grew up on that land, and continued living thereon even after Abdalla’s demise, in the very house his father built long ago. The land is shared into two portions and each family’s occupation has been uninterrupted and open, nec vi, nec clam, nec precario, for a period in excess of 12 years. Both Kitsao and Abdalla were buried on the suit land. The applicant’s wife was also buried thereon. The applicant is 64 years old and his family still resides on the land. That the suit land was registered in Kitsao’s name at demarcation time while Kitsao was working in Mombasa. He used to send both families funds for upkeep.
7. In the supplementary affidavit he stated that Abdalla had never abandoned his home. He stated that Abdalla was born on the suit property; that no land was registered in the names of more than one person at demarcation and Kitsao was registered as he was the only one who was married at the time. He alleged that the respondent divorced from Kitsao and left the suit land; that the respondent never purchased the suit land.
8. Upon cross-examination by Mr Komora he stated that he has no evidence of the divorce between Kitsao and the respondent; that however theirs had been a customary marriage; that the applicant was born in Mombasa; that Mzee Kithunga was not born in Gede but came from Madunguni and was alive and staying on the land when registration was being done while the Abdalla was away at Mombasa.
9. Upon re-examination he stated that in their community traditions the elder child guards the deceased father’s property, and in this case Kitsao was the older son.
10. PW2, Hinzano Ngonyo testified orally and adopted his witness statement filed in the case. His evidence is that he is a village elder of Mwambao area where the suit land is located; that he has lived in Gede all his life and his land neighbours that of the parties herein; that Abdalla Kalume used to come to the land often and when he retired he settled on the suit land more than 30 years ago; that all the parties used to live on the same land and in the same boma; that at one time the son to Kitsao had sought advice from



him as to the proper boundary between the two families' entitlements in the land and sought that the land be divided into two portions.

11. Upon cross-examination he stated that he lives at Mukenge village; that he inherited his land from his father who had been allocated the land before the witness was born; that the owner of the land between the respondent's plot and PW2's land was also deceased and his children had inherited the land. He was born in 1976.
12. PW3 Jimmy Liwali Katana testified and adopted his witness statement filed in the suit. His evidence is that his plot is no 21 just in the neighbourhood; that he was born in the Gede settlement scheme in 1941; according to his father's narrative the area was given to the locals by the colonist in 1935, and Mzee Kithunga, the applicant's grandfather, was one of the locals who benefited. The eldest son to Mzee Kithunga was given land elsewhere as he was married at the time. Abdalla and Kitsao were unmarried and remained on the suit land. During the time of demarcation and adjudication, land adjudication officers would only record land under one name and the uncle was registered on behalf of the family. According to him there was no dispute between Abdalla and Kitsao while they were alive. He spoke generally about the situation in the area and alleged the trend by persons who were registered in trust for their families is to claim that the land is exclusively theirs.
13. Upon cross-examination by Mr Komora he stated that Abdalla had a house on the suit land. He maintained that that suit land had been allocated to Mzee Kithunga.
14. PW4 Mwenda Baya Yaa testified and adopted her witness statement filed in the suit. She stated that the applicant is her nephew.
15. Upon cross examination by Mr Komora she stated that Kitsao and Abdallah were born in Gede but their father came from elsewhere. At that point the applicant's case was marked as closed.

Evidence for The Defence.

16. DW 1 Nyevu Kitsao Jefwa testified and adopted her witness statement filed in the case. Her evidence is that she got married to Kitsao at Jimba and then they later moved to Gede; that there she gave birth to Kazungu and 9 other children; by then the Abdalla's family was living in Mombasa. The land was later on demarcated in the absence of Abdalla's family; she used to live with her mother-in-law and father-in-law; Abdalla came for burials of his parents and the respondent's husband, and each time he returned to Mombasa where he was living with his family. A month after Kitsao's burial however, Abdalla came back to the land and not only started living thereon but also claiming ownership thereof and a dispute erupted between them which the chief determined in her favour. Abdalla then took a portion of the suit property and began living thereon even as their relations soured. Later on he brought his children from Mombasa to live on the suit property. Abdalla eventually chased her away from the suit land, but she left her first child on the suit land. Her children eventually followed up and the suit property's title was registered in Kitsao's name.
17. On cross-examination by Ms Mwangi, she stated that she went to Gede months after being married; that Abdalla was younger than Kitsao; that she witnessed Kitsao being allocated the land; that Abdalla had a house on the land, built when Kitsao was still alive; Abdalla never challenged the registration of title in his brother's name.
18. Upon re-examination by Mr Komora she stated as follows: that she cleared the land when it was given to them. While clearing the land Abdalla father came and build a small house which he later on expanded. He used to visit the Gede land to see his parents.



19. DW2 Johnson Mutana Kalama testified and adopted his witness statement filed in the case. His evidence is that the land in Gede was not communally owned but government land; in 1936 a European wanted the land distributed to local people and they applied. The criteria for allocation was that one must be married; Kitsao came and was allocated the land and he cleared it. A sixty-day notice was given for objections by the District Adjudication Office and as there were no objections, ownership was confirmed. Kitsao went and collected his title before he passed on. Abdalla was however working at Mombasa and came back to Kitsao's property and constructed a house. At the time of allocation of the land Kitsao was not yet married. Kitsao however lived with his parents since their home in Madunguni had been affected by floods. According to him Kitsao planted trees on the land.
20. Upon cross-examination by Ms Mwangi DW2 stated that he is 81; that his land is about 4 km away from the suit land; that the Gede area was declared an adjudication section in 1973; that he has nothing to show that Kitsao applied for land; he reiterated that only the marrieds could be allocated land; that Abdalla retired in the 1980s and came and begged to be allowed to build on Kitsao's land.
21. Upon re-examination by Mr Komora DW2 stated that since people were not learned they used to just enter the land offices and give their names.
22. DW3 Kenneth Mkare Jefwa testified and adopted his witness statement filed in the case. His evidence is that he was among the first to move from Magangani area to Gede in 1948 when heavy rains pounded Madunguni area. Kitsao brought his parents who had been affected by floods at Madunguni. Later on Abdalla left for Mombasa, lived there and married a wife and got children there as Kitsao lived on the suit property. DW3 witnessed Kitsao being given a notification that the land was his. He also worked as an agricultural officer in the area and thus knew the land was Kitsao's.
23. Upon cross-examination by Ms Mwangi, DW3 stated that he lived about 1.5 miles from the suit land; that he was an agricultural officer between 1950-1956; that he knows the applicant who lives on the suit land with his children.
24. Upon re-examination by Mr Komora he stated that Kitsao came to the suit land with his parents only.
25. At that juncture the respondent's case was marked as closed.

Submissions.

26. The parties filed submissions of which I have taken consideration while writing this judgment.

Determination.

27. The issues arising for determination are as follows:
 - a. Can the claim for adverse possession and customary trust be entertained side by side in the same pleading and if not which of the two claims should be entertained by the court?
 - b. Has the applicant established a case in customary trust?
 - c. Who ought to bear the costs of the suit?
28. Regarding the first issue this court has arrived at the finding that the two claims of adverse possession and customary trust cannot lie side by side for the reason that the propriety of the title in the name of the respondent herein is challenged. It is a crucial passive ingredient of an adverse possession claim that the paper title of the owner is not under any challenge from the claimant in an adverse possession suit. the moment a challenge to such title is mounted the claim becomes an ordinary suit for determination



of ownership. I therefore strike out the claim for adverse possession and the claim for trust remains for determination.

29. Has the claimant established a customary trust?
30. Trust can not be inferred. It must be established by way of evidence. I have considered the evidence in this case and in this court's view the following are the major highlights:
31. The entire family of Mzee Kithunga moved from Madunguni to Gede. It is alleged that Kitsao looked after his parents. However, there is no evidence that Kitsao was the sole person looking after his parents. It is instructive that Mzee Kithunga and his children lived on the suit land; the forays of the two brothers named herein into the outside world to seek employment utilized that land as their base. They both worked in Mombasa and used to return to that land. It is normal to have one's family stay close to his place of employment even today, the main reason being to avoid wearisome perambulation and expenses concomitant thereto. That fact per se that the Abdalla later on went to stay in Mombasa with his family can not be used against him to deny him inheritance. Even though Abdalla married and stayed in Mombasa with his family the respondent acknowledges that there is a house which he built on the suit land long ago and that he regularly used to visit the suit land. In the respondent's view, he was only visiting his parents but owing to the fact that he built his house on the suit land and later expanded it unhindered by the respondent's husband, that is a clear sign that the respondent's husband did not in his lifetime claim it as exclusively his own.
32. Evidence led also shows that the land is informally shared between the two families and each occupied its side, at least until the respondent's son started seeking ways of stopping the applicant's family from further utilizing it for agriculture. It is noteworthy that long after his uncle died, the applicant remained on the suit land. There is no dispute between the applicant's uncle and the applicant's father that was alluded to. One of the witnesses testified directly to that state of affairs.
33. It is also noteworthy that the evidence adduced shows that the family moved from Madunguni to Gede. There is no evidence of any land left in Madunguni which the applicant's grandfather's heirs could claim as ancestral land. The land that the applicant's grandfather found at Gede is the only land that can be attributed to him. that land was not immediately registered in his name, but he lived thereon with members of his family.
34. No migration by the grandfather to a place other than Gede has been demonstrated by evidence of both parties. It is also common ground that land was allocated to persons who were married. When the respondent testifies that she got married elsewhere and then she and her late husband went to Gede later on, that can only imply that she and her husband went to Gede to stay with her father-in-law and mother in law who had already settled there. Those in-laws were married and they must have been settled on some land and this court believes it to be the suit land.
35. The fact that the land was admittedly bushy at the time of settlement meant that the respondent and her husband had to clear it in order to make a livelihood out of some agrarian economic activity, and thus their clearing of bush was not symbolic of their ownership of the suit land. Ownership remained with the family.
36. There is clear evidence, including of actual occupation, that the applicant has always known the land to belong to his grandfather's family and that he has believed that his family was entitled to the inheritance of a portion thereof. This led him to oppose the efforts exerted by the respondent's children, with the help of the public trustee, to have title issued in her late husband's name.
37. No documentation was produced by any of the parties regarding the adjudication process. The recent issuance of title was therefore a mere formality because the search produced by the applicant shows



that his uncle was registered in 1975 as the proprietor of the land. The implication of that is that title was issued long after the applicant's grandfather's family had started living on the suit land.

38. Also, respondent and her witnesses do not recollect when the applicant began living on the suit land. The applicant asserts that after his father passed on he continued living in the house. That house was build decades earlier. No attempts were made to evict him. No suit was filed against him for trespass. I am of the view that this passivity on the respondent's part was not borne of mere acquiescence but rather awareness that the land belonged to the applicant's grandfather's family and the applicant's father had a share of the inheritance.
39. The applicant produced his identity card. It shows he was born in 1957. His father, according to the certificate of death produced, died on 12/3/2000, meaning that he was born in 1945 or thereabouts. His elder brother is therefore presumed to have been at least two years older, thus implying that by 1935-1936 when the land was being given out, the two brothers were aged between 11 and 15 years. From the evidence of DW2, Johnson Mutana Kalama, there appears to have been no great time lapse between the year Daniel Nightingale decided that the land be distributed to locals and the time such land was actually given out. In his evidence, there also seems to be no great time lapse between that European's decision and the time that the applicant's grandfather's family moved to Gede. Notably DW2 does not give any firm timelines for Kitsao's arrival. He merely states that Kitsao came to the area and wanted land and he was given land by the government. I find that during the time the family settled in the area Kitsao was not married and I find it implausible that he qualified to get land immediately if married status was the criteria. I find it probable that this is why DW1's evidence is that she and Kitsao married away from the area and returned to the area. DW3 Kenneth Mkare Jefwa's evidence contradicted itself when he stated in examination-in-chief that Mzee Kithunga and Kitsao and Abdalla came together to Gede only to recant that later in re-examination and state that Kitsao came alone to Gede. The evidence of PW3 Jimmy Liwali Katana is quite strong. He stated that he was born in Gede in 1941 and that the eldest son to Mzee Kithunga was given land elsewhere as he was married at the time, and that Abdalla and Kitsao were unmarried and remained on the suit land. There is no other conclusion other than that during the time Kitsao was unmarried, and his grandfather held the suit land for the family. Kitsao came to be registered as owner in 1975 according to the certificate of official search produced. DW2 Johnson Mutana Kalama evidence that Kitsao collected the title when alive is false. I therefore doubt that Kitsao owned the land exclusively from the time of the settlement of his grandfather on it. If at demarcation and adjudication the same land was registered in the name of Kitsao, there is no doubt that he held the same in trust for the applicant's grandparents and their descendants and the latter category of persons could raise their claims regarding the land later on. In the case of *Julius Kailikia Laaru v Peter Kaigera Laaru* [2020] eKLR the court held as follows:

“It is crystal clear that the interests of the appellant were bundled together with those of his mother's household (read respondent), where they remained in a state of inertia.

...Thus, through the objection proceedings, the interests of the appellant were actually ascertained, but were not severed from those of the respondent as there was no need to do so at that time as there was no dispute to that effect. This situation did not however preclude the appellant from raising the matter in future. Even if the respondent had gone ahead to acquire a title deed as it so happens when the process of adjudication is over, that still would not have eclipsed the appellant's claim of customary trust.”



40. In *Njenga Kimani & 2 others v Kimani Nganga K. Wainaina* [2017] eKLR the court observed as follows:

“There are instances where a person is registered as trustee but usually you would be given a reason why this is so. Sometimes it is because the person registered is the first born, or more educated than the rest, as happened in the case of *Gatimu Kinguru vs Muya Gathangi* (1976-80) KLR 317.”

41. It is not clear when Mzee Kithunga met his demise. However, Kitsao was on the land after that event but the history of the suit land as analyzed herein above defies any conclusion that Kitsao exclusively owned the land. It is this court’s finding that adjudication came long after settlement and since Kitsao was on the land he was registered. However, there is no doubt in the present case that Kitsao’s registration was in trust for the larger Mzee Kithunga’s family.

42. Further, in *Isack Kieba M’Inanga v Isaaya Theuri M’Lintari & another* [2018] eKLR, it held as follows:

“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.”

43. As held in *Patrick Gitonga M’ikiara vs Ruthson Mangati M’ikiara Meru ELC NO. 16 of 2018* [2020] eKLR a customary trust has the flavour of intergenerational equity. The prayers in the present suit which envisage only an arbitrary subdivision of the suit land into two portions are incorrect in this court’s view if the principles governing a customary trust as set out in the *Isack Kieba M’Inanga* case (supra) are to be observed. If the land was Mzee Kithunga’s then all his heirs need be made beneficiaries unless they renounce such right.

44. The upshot of the foregoing is that the applicant’s claim of trust succeeds and I allow his claim and enter judgment in his favour against the respondent and I issue the following final orders:

- a. A declaration is hereby issued declaring that the registration of Kitsao Jefwa in respect of land parcel Gede/Mijomboni /19 was done in trust for himself and the family of his late father Mzee Kithunga;
- b. An order that the Land Registrar Kilifi shall cancel the title held in the name of Kitsao Jefwa and register the same in the names of both the applicant and respondent herein to hold in trust for all beneficiaries of the estate of the estate of Mzee Kithunga (Deceased);
- c. Each party shall bear their own costs of the suit.



It is so ordered.

**RULING DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON
THIS 10TH DAY OF DECEMBER, 2024.**

MWANGI NJOROGE

JUDGE, ELC, MALINDI

