



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

SUCCESSION CAUSE NO. 106 OF 2014

**IN THE MATTER OF THE ESTATE OF KATANA KARISA MADAGO alias KATANA KARISA
VENGO (DECEASED)**

CHARO KATANA KENGA PETITIONER/RESPONDENT

VERSUS

KADZO KENGA MADAGO 1ST APPLICANT/OBJECTOR

NYEVU KENGA 2ND APPLICANT/OBJECTOR

MOSES MUNGUA MWANGI 1ST INTERESTED PARTY

KILIFI MUUNGANO HOUSING

CO-OPERATIVE SOCIETY LTD 2ND INTERESTED PARTY

JUDGEMENT

The late Katana Karisa Madago died on 24.11.2008 at the age of 88 years. His step son, Charo Katana Kenga petitioned this court for letters of administration intestate. A grant was issued on 8.1.2015 to the petitioner. On 24.2.2015, the objectors filed an application seeking to be enjoined as co-petitioners as well as seeking an order of injunction to restrain the petitioner and his agent from intermeddling with Plot Number Kilifi/Mtondia/192. The applicants are Kadzo Kenga Madago and Nyevu Kenga, both female adults. The petitioner responded to that application by filing a replying affidavit sworn on 13.5.2015.

On 14.7.2015, this court gave directions whereby the petitioner was directed to file an application for confirmation of the grant. An application dated 6.8.2015 was filed. The applicants became the objectors/plaintiffs while the petitioner became the defendant. An application to enjoin purchasers as interested parties was filed on 30.10.2015.

The objection proceeded by way of oral evidence. PW1 KAHASO KENGA MADAGO, testified that she was the second wife of Kenya Madago (deceased). The first wife was Bibi Nguma who is also deceased. Bibi Nguma had two children namely Katana Kenga Madago and Nyevu Kenya, the second objector. Katana Kenya Madago was married to MWENDA HAZIZ. They had four children, the petitioner and the other three beneficiaries named in the petition.

It is PW1's evidence that Katana Kenga Madago passed on. His wife, Mwenda Haziz was first inherited by Karisa Kadenge. According to PW1, it is her husband who organized for the inheritance. Mwenda and her second husband later separated. Once again Kenga Madago, PW1's husband brought in another husband to inherit his daughter in law, Mwenda Haziz. This time around, the inheritor was elder brother's son, Katana Karisa Bengo also known as Katana Karisa Madago; the deceased in this case. The new husband for Mwenda Haziz had seven children with her. The petitioner did not initially include them as beneficiaries.

The objection as per PW1 is grounded on the contention that the suit land was initially owned by her husband, KENGA MADAGO. She does not know how the land was registered in the names of Katana Karisa Bengo alias Katana Karisa Madago. According to her, Katana Karisa Madago was brought in only to inherit Mwenda Haziz under Giriama Customs. He registered himself as the proprietor of the land fraudulently. Her husband was sick during land adjudication and Katana Karisa registered himself. Her husband even asked Katana Karisa Madago why he had registered himself as the owner. Katana Karisa Bengo only used the name Madago so that it could appear that he was from the homestead of Kenga Madago.

PW1's further evidence is that when Katana Karisa Madago inherited Mwenda Haziz, he found the land had already been developed. He had no employment and used to harvest the crops and take care of PW1 and her co-wife who was residing on the land. There was no dispute during the life of Katana Karisa Madago. Her husband, Kenga Madago died three weeks after registration of land had started in the area. She has been living on the land all along until recently when she was chased away from the land. Her co-objector was the first to be chased away. The petitioner divided the land into four and she was placed in the middle. Her house was also demolished. The petitioner is her step grandson. Her husband was buried on the land. The land is located at Mtondia in Kilifi County. She would like the land to be divided into two between herself and her co-wife. Her coconut trees were destroyed and part of the land has now been sold.

PW2, NYEVU KENGA MADAGO is the daughter of KENGA MADAGO. Her young brother was the late Katana Kenga Madago, 1st husband to Mwenda Haziz. Her brother is the petitioner's father. She testified that her brother died first before her father. Her father and herself made arrangements for Katana Karisa Bengo to inherit her sister in law, Mwenda Haziz. They were living cordially on her father's land at Mkoroshoni, Mtondia. Katana Karisa Bengo was given the land by her father as her brother Katana Kenga Madago had died. Her children were young at that time.

Its PW2's evidence that her father had two wives. Her mother, Bibi Nguma and PW1; Kahaso. The petitioner has now chased them away from the land. When Katana Karisa Madago was alive, he did not chase them away. He was providing for them while using the land. According to her, Katana Karisa Madago was to take care of her brother's children and upon growing up distribute the land to the two wives of Kenga Madago. She is claiming her part of inheritance as the land belongs to her father. Her father brought in Katana Karisa Madago to inherit his daughter in law as Katana Karisa Madago was his elder brother's son. The land by then already had mature crops.

PW3 KADZO MASHA WANJE is a village elder at Mkoroshoni. She is also a neighbor to the land in dispute. Her evidence is that she knew the late Katana Karisa Madago. She attended his burial. He found him living on the suit land with his wife, children and step mother. He had inherited his wife Mwenda Haziz. she did not see Mwenda Haziz's first husband, Katana Kenya Madago. After the death of Katana Karisa Madago, the objectors used to go to her and complain. A letter was written to PW2 asking her not to step on the suit land. She got the letter. After the objectors were chased away, selling of part of the land started. When Katana Karisa Madago was alive, there was no dispute with the objectors. They were living in harmony. According to her, the land belongs to the objectors. The petitioner's father respected those he found on the land.

DW1, CHARO KATANA KENGA is the petitioner. His biological father is Katana Kenga Madago. The deceased herein Katana Karisa Madago inherited his mother, Mwenda Katana Karisa. DW2 was born in 1958. PW1's husband Kenga Madago, is his grandfather. It is his evidence that his

grandfather never lived on the land. His biological father also never lived on the land. His father died at Mkoroshoni and was buried on another plot. His grandfather was living at Mkwajuni. His auntie, PW2 used to live in Mombasa. She is his biological father's sister. She disagreed with her brother and left. She only came back after the death of Katana Karisa Madago. She did not build on the plot. PW1 is his grandmother, second wife to his late grandfather, Kenga Madago. PW2 used to live in Tezo with Kenga Madago. She was not chased away from the land. He has not sold the land. He filed the petition and indicated the suit land as Kilifi/Mtondia/192 but the correct position is Kilifi/Mtondia/160.

DW1 further testified that his grandfather had two wives. He has an elder sister, Kadzo Katana. The land belonged to his biological father. His father did not buy the land. At that time Katana Karisa Madago who inherited DW1's mother was not there. The land was divided into four before the death of Katana Karisa Madago. He has a permanent house on the land. It is his grandmother, Bibi Nguma who brought Katana Karisa Madago to inherit his mother. He himself went with his grandmother to Katana Karisa and brought him to the land. When registration came, it was Katana Karisa Madago who was on the land and he was registered as the owner. PW1 and PW2 were not chased away from the land. They left on their own. His mother is alive. When Katana Karisa Madago went to the land, he lived in Mwenda Haziz's house. Katana Karisa Madago had no dispute with the objectors or anybody.

Counsel for both parties filed written submissions. I have read both submissions. Mr. Michira, counsel for the objectors maintain that Mwenda Haziz was inherited under Giriama Customary Law. Katana Karisa Madago became in charge of all family members and was a trustee of the estate of Kenga Madago. He was registered during land registration in that capacity as the head of the family. Mr. Michira submit that the land should be distributed to the two families of Kenga Madago. The alledged purchasers should be chased away as they are strangers to the estate.

Mr. Kenga, counsel for the petitioner maintains that the land belonged to Katana Karisa Madago whose succession is the subject of this dispute. The objectors are not the deceased's children or beneficiaries under the law of Succession, Chapter 160 Laws of Kenya. According to Mr. Kenga, the objectors' argument does not hold water. If they have any claim, it should then be handled by the Environment and Land Court.

The issues for determination are whether the objectors are entitled to inherit the suit land and whether the deceased, Katana Karisa Madago was registered on the land fraudulently or in trust for the benefit of the estate of Kenga Madago. There are some complications on the sequence of events which needs to be set out clearly from the outset. The deceased herein was called Katana Karisa Madago. According to the objectors, his real name was Katana Karisa Bengo. His biological father was Karisa Bengo, brother to Kenga Madago. Therefore, the deceased herein was not the son of Kenga Madago. He used the name of Madago. He used his father's name as the middle name "*Karisa*" but used Madago as his surname.

There is also Mwenda Haziz. The evidence shows that she was married to Katana Kenga Madago who is the petitioner's father. Katana Kenga Madago died before his father. Thereafter, according to the objectors, Kenga Madago brought in Karisa Kadenge Ngala to inherit Mwenda Haziz. That arrangement did not last and it appears there is no child born out of that marriage. Subsequently, Kenga Madago went for his elder brother's son, Katana Karisa Bengo who was brought in to inherit Mwenda Haziz. That arrangement worked and seven children were born. According to PW2, it was herself and her father who brought in Katana Karisa Bengo. According to the petitioner, he went with his grandmother, Bibi Nguma, to bring in his step father to inherit his mother. All in all, it is clear that Katana Karisa Bengo alias Katana Karisa Madago was not living on the land. It is the petitioner's evidence that when Katana Karisa Madago was brought, he lived in his mother's house, that is Mwenda Haziz's house.

It is the petitioner's contention that the land in dispute belongs to his biological father, Katana Kenga Madago and not Katana Karisa Madago. That line of evidence means that although Katana Karisa Madago is the registered owner of Plot Number, Kilifi/Mtondia/160, the land was owned by Katana Kenga Madago. That line of evidence is clearly supported by the petition itself. The petition only named four sons and the widow, Mwenda Katana Karisa alias Mwenda Haziz. I believe the other beneficiaries

namely Charo Katana (petitioner), Moses Jeshi Katana, Karisa Pancras Katana and Naftali Katana are the children of Kenga Katana Madago. The petitioner left out the other seven step brothers and sisters.

The above line of evidence is somewhat similar to the objector's evidence. The only major variation is that according to the objectors, the land belonged to Kenga Madago, the father of Katana Kenga Madago. To the objectors, Katana Karisa Madago was only brought in to inherit Mwenda Haziz and found the land already developed. This was a settlement scheme and being the male figurehead in the family, he had himself registered as the proprietor. It is therefore established that all the parties are in agreement that Katana Karisa Madago was not the initial owner of the land. He was a wife inheritor. It is the objector's evidence that he could have taken his wife and go back to his home. However, he decided to live on the land and respected those he found there.

The next question which follows is who between Kenga Madago and Katana Karisa Madago owned the land before Katana Karisa Bengo came in? The evidence shows that Katana Kenga Madago died before his father. PW1 testified that her husband was the owner of the land. He died and was buried on the land. His co-wife, Bibi Nguma also lived on the land. She left after the death of Katana Karisa Bengo. She died and was buried elsewhere. It is evident that the petitioner was still young by the time Katana Karisa Bengo was brought in. He concedes that his grandmother went for Katana Karisa Bengo. That proves that Bibi Nguma, petitioner's grandmother was living on the land and by extension, had been left on the land by her husband, Kenga Madago.

The evidence also establishes that PW1, Kahaso Kenga was living on the land too before she was chased away. Initially, the petitioner indicated that PW1 and PW2 never lived on the land. On cross-examination, he testified that they left on their own. There is the evidence of the petitioner that Katana Kenga Madago had no dispute with the objectors. The objectors maintain that when Katana Karisa Madago was alive, they lived in harmony. He was not employed. He used the crops to cater for his uncle's two wives.

Mr. Kenga submit that the land belongs to the deceased, Katana Karisa Madago and that the objectors are not his beneficiaries. It is also submitted that this court cannot deal with the objection as it is a land matter. The evidence of both parties is quite clear. It is not in dispute that Katana Karisa Madago never owned the land. Even his own children were left out in the petition. The effect of that would mean that this was not Katana Karisa Madago's land. Other than the fact that he was registered as the owner, he found the land developed with mature crops and people living on the land. I believe he lived on the land for quite some time from the late 1960s or early 1970s until when he died in 2008. He had seven children with Mwenda Haziz. Such a number of children cannot be born within a short period of time. He respected his uncle's wives as he found them on the land. The Giriama Customs was applied ad he inherited a wife. We cannot therefore insist that Katana Karisa Madago became the absolute proprietor of the land and no other person other than his widow and children should inherit. The title deed was processed in 2015 and nobody bothered to include the green card to enable the court know when the land was registered. The title deed was issued in 2015 in the name of Katana Karisa Madago.

When the petition was filed, reference was made to Plot Number 192. A title deed for Plot Number 192 was issued in the deceased's name. The petitioner concedes that the problem was caused by the land office. The proper title is No. 160. The plot was erroneously indicated to be No. 192. Plot 160 is 15 acres according to the title and the official search. The parties mentioned 12 acres. It is not clear to the court whether the land is 12 or 15 acres.

From the evidence, herein, it is established that Katana Karisa Kenga was not the owner of the land. I do hold that he was a trustee who held the land in trust for the benefit of the family of his uncle, Kenga Madago. I am not convinced that Katana Kenga Madago owned the land. The land belonged to his father, Kenga Madago. The concept of absolute ownership under section 27 of the now repealed Registered Land Act (RLA) does to apply. In any case, the objectors' rights are recognized under section 30 of the RLA as they had overriding interest as persons in possession and actual occupation. The registration of Katana Karisa Madago was therefore subject to the overriding interests of the objectors and was in trust for the objectors' benefit. There was no fraud involved only that Katana Karisa presented

himself as a “*Madago*” yet he was not Madago’s son.

In the end, I do find that the objectors are entitled to benefit from the suit land. The petitioner and his brothers and sisters are also entitled to benefit from the land as his father, Katana Kenga Madago was entitled to benefit.

Having found that the objectors are entitled to inherit the suit land, the next issue is how the estate should be distributed. According to the objectors, the land should be distributed amongst the two homes of the late Kenga Madago. That would mean the petitioner and his siblings will get their share as the children of Katana Kenga Madago. Equally, PW2 will get her share being a sister to Katana Kenga Madago. On his part, the petitioner is not willing to part with the land. Together with his brothers, they have started selling part of the land.

From the evidence on record, I do find that the objectors and the petitioner are entitled to inherit the land. The petitioner and Nyevu Kenga are the children of the first wife, Bibi Nguma while PW1, Kahaso Kenga Madago was the first wife. In distributing the estate, I have to take into account the fact that Katana Karisa Madago secured the land and did not sell a portion of it.

The first wife had two children. The petitioner’s father and PW2. PW1 had four children. I take note of the four children of Katana Kenga Madago. I hold that the land is only twelve (12) acres and not fifteen acres. Should the land be more than 12 acres, parties shall be at liberty to apply.

I do proceed and distribute Plot Number Kilifi/Mtondia/160 as follows: -

- (i) KAHASO KENGA MADAGO - 5.5 Acres
- (ii) NYEVU KENGA MADAGO - 1.5 Acres
- (iii) CHARO KATANA KENGA - 5 Acres

Kahaso shall thereafter distribute her share to her children. Similarly, Charo will distribute the share amongst himself and his brothers and sisters. Each party shall meet their own costs.

Dated and delivered in Malindi this 31st day of October, 2016.

S.J. CHITEMBWE

JUDGE