



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 518 'B' OF 2009

**IN THE MATTER OF THE ESTATE OF HARUN KONZOLO ALIAS HARUN KONZOLO
ENZANGA AND BENJAMIN ANJUGU MUZAMI (DECEASED)**

BETWEEN

KENNEDY ANAWEDI MUSAMIOBJECTOR/ PLAINTIFF

AND

LUFINA MAKHUNGU MUZAMIPETITIONER/DEFENDANT

JUDGMENT

1. This is a judgment in respect the confirmation of the Amended Grant of Letters of Administration issued by this Court on 14/03/2011 to KENNEDY INAWEDI MUZAMI and LUFINA MAKHUNGU MUZAMI in respect to the Estates of HARUN KONZOLO alias HARUN KONZORO ENZANGA and BENJAMIN ANJUGU MUZAMI.
2. HARUN KONZOLO alias HARUN KONZOLO ENZANGA (hereinafter referred to as “**HARUN**”) and BENJAMIN ANJUGU MUZAMI (hereinafter referred to as “**BENJAMIN**”) were brothers. Harun died on 30/05/1998 whereas Benjamin died on 04/08/2004. The two brothers were the registered proprietors of the parcel of land known as KAKAMEGA/BUMBO/494 as at the time of their respective demise. They, together with their respective families lived on the said land which families continue so living thereon to date.
3. The confirmation hearing proceeded by way of oral evidence where KENNEDY INAWEDI MUZAMI was deemed as the Plaintiff and LUFINA MAKHUNGU MUZAMI deemed as the Defendant. The Plaintiff’s testimony was buttressed by three more witnesses while the testimony of the Defendant was supported by one witness. The evidence centered on how Harun and Benjamin became the registered proprietors of the land and how they lived with their families thereon even long before both died.
4. The Plaintiff, **KENNEDY INAWEDI MUZAMI**, was Benjamin’s son. He testified on how his father bought the land when he used to work in Kampala, Uganda and thereafter asked his brother Harun to take care of it a result of which Harun found his way onto the land. When Benjamin returned home, he called the elders and gave Harun a portion of his land as a token of appreciation for being a good Caretaker. Benjamin’s wife, **EUNICE ANZALA** is still alive and lives on the land. She testified as **PW4**. She clearly corroborated the evidence of PW1, her son. According to her, both Benjamin and herself worked in Uganda in the 1960s. Benjamin worked with the Ministry of Veterinary Services whereas she worked with the Family Planning Association of Uganda. While in Uganda, they decided to buy land in Kenya and managed to so buy from one

- Nathan Gunyanje. It was the testimony of **MARIA MUTSAMI (PW3)** that Benjamin used to send money to her husband one **JAMIN KIHUNYA MUTSAMI** (deceased) towards the payment of the land.
5. Benjamin's wife further testified that when Benjamin and her relocated back to Kenya in 1972 as a result of the war in Uganda, Benjamin called the clan elders and sought their guidance on what to do to his brother, Harun, whom he had asked to stay on his land as a Caretaker. The clan elders directed and indeed Harun was given a portion of the land where the boundary was established and the two brothers lived harmoniously with their families on their respective portions of the land. To PW4, the dispute in this cause arose after the death of Benjamin and Harun and moreso when the family of Harun started interfering with the boundary features and eventually uprooted the trees marking it. The said boundary was however restored upon the intervention of their Area Chief and the village elder.
 6. **DANIEL SHANZIMA SHILESI** who testified as **PW2** also worked with Benjamin in Uganda and was well aware of the purchase of the land by Benjamin. To him, the purchase price was Kshs. 5,000/= which Benjamin paid by way of installments and on finishing the payment, Benjamin asked his brother Harun to stay on the land as his Caretaker. Harun moved in with his family and when Benjamin came back home later, clan elders met and agreed that a portion of the land be given to Harun as a token of appreciation for being a faithful Caretaker. The boundary was marked and trees planted on it in 1982. He was surprised to learn that the Defendant, Harun's wife, was seeking more land than that demarcated by way of the boundary.
 7. The Defendant's testimony centered on the fact that since Harun was registered as a proprietor with Benjamin on the land, then the land ought to be equally divided among the families of Benjamin and Harun. The Defendant denied the existence of any boundary on the land. **DW2** was one **ALFRED AZENGA MUZAMI** who was the Defendant's son. He also reiterated that since the land was in the names of Benjamin and Harun then it ought to be equally divided among their families. On cross-examination, DW2 admitted that there existed a boundary on the land which he was not agreeable to. He however admitted that the boundary was put in place long before he was born and indeed reconfirmed that there has all along been the boundary on the ground.
 8. This Court had earlier on directed the Kakamega County Survey to visit the land in the presence of the parties and file a report on it. That was so undertaken and the report dated 20/07/2012 was filed in Court accordingly. The Report confirmed that the land had a clear boundary and the families of Benjamin and Harun lived on their respective portions. The area occupied by the family of Benjamin was 4.24 Hactares and that occupied by the family of Harun was 0.98 Hectares. From the record, I find that none of the parties raised any objections to the contents of the Surveyor's report aforesaid.
 9. I have carefully perused the record with the hope of finding at least a copy of the Title Deed for the land but in vain. Had the Court found such evidence that would have been of much assistance as it would shed some light on the nature of proprietorship. However the record is only favoured with a Certificate of Official Search dated 01/10/2007 which only shows the two as the proprietors.
 10. From the way the parties' evidence unfolded, it is clear that the proprietorship was not joint but in common. Had it been proved that the proprietorship was joint then by virtue of this doctrine of survivorship in the Law of Succession Act, the last to die would have taken the entire parcel of land to the total exclusion of the family of the other. Going by the fact that Harun died first then the whole land would have been deemed as the sole property of Benjamin who survived Harun. Be that as it may, there is no evidence pointing to that proposition. It is on the foregoing basis that this Court has been of the firm view that the proprietorship was in common.
 11. If the record did not contain any evidence as to the acquisition of the land by the proprietors, this Court would have had no difficulty in finding that both Benjamin and Harun had equal shares. However, the record has some evidence which is worth looking at.

12. It is a fact that the Defendant did not adduce any evidence on the acquisition of the land but centered on its registration. On the other hand the Plaintiff went ahead and even availed witnesses in his attempt to prove that the registration as it were was not a case of equal shares. There is evidence on how the land was acquired by Benjamin and even how Harun found his way on it. That evidence was not controverted at all. Likewise the evidence of the clan elders demarcating the land to give Harun a token of appreciation for being a faithful Caretaker was not challenged. Further, the evidence that the boundary was marked by the planting of trees which the Defendant's family uprooted but was restored by the Chief remained unchallenged. It is equally important to note that the Defendant denied the existence of any boundary on the land but her son DW2, confirmed that there existed such a boundary which he was not in agreement with. The Defendant was hence not a truthful witness to this Court. She was dearly misleading the Court.

13. That aside, based on the evidence on record and on the foregone analysis, this Court is convinced on a balance of probability that the land in issue was acquired by Benjamin who invited his brother Harun to take care of the same as he and his wife were working in Uganda. This is the land which the clan elders apportioned part thereof to Harun and put in boundary marks which are still in place to date. I am therefore satisfied that the Plaintiff has proved his case as required in law and that the fairest order to make in the circumstances of this cause is to affirm the decision of the elders whose implementation was proved both by the witnesses and the Survey Report.

14. The Estates of Benjamin and Harun which comprise of the parcel of land known as KAKAMEGA/BUMBO/494 shall therefore be distributed as follows:-

- a. ***0.98 Hectares to be registered in the name of LUFINA MAKHUNGU MUZAMI who shall hold the same in trust for the children of HARUN KONZOLO alias HARUN KONZOLO ESHILINGA over which she shall have a life interest;***
- b. ***4.24 Hectares to be registered in the names of KENNEDY INAWEDI MUZAMI and EUNICE FRIDAH ANZALA MUTSAMI who shall hold in trust for the children of BENJAMIN ANJUGU MUZAMI whereas EUNICE FRIDA ANZALA MUTSAMI enjoys a life interest over it;***
- c. ***A Certificate of Confirmation to be issued forthwith;***
- d. ***The Kakamega County Surveyor and the Lands Registrar shall ensure that the parcel of land known as KAKAMEGA/BUMBO/494 is sub-divided and registered as in (a) and (b) above and separate Title Deeds issued accordingly.***
- e. ***As the parties are family members, each party shall bear its own costs as well as the costs of the sub-division and issuance of the Title Deeds.***

Orders accordingly.

DELIVERED, DATED and SIGNED at KAKAMEGA this 30th day of July, 2015

A. C. MRIMA

JUDGE