



REPUBLIC OF KENYA



**Mokaya & another v Nyangau & another (Environment & Land Case
99 of 2021) [2022] KEELC 675 (KLR) (15 March 2022) (Judgment)**

Gideon Nyangau Mokaya & another v Mary Nyamisa Nyangau & another [2022] eKLR

Neutral citation: [2022] KEELC 675 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA

ENVIRONMENT & LAND CASE 99 OF 2021

JM KAMAU, J

MARCH 15, 2022

BETWEEN

GIDEON NYANGAU MOKAYA 1ST PLAINTIFF

BILLAH NYAMOITA OKANGI 2ND PLAINTIFF

AND

MARY NYAMISA NYANGAU 1ST DEFENDANT

SIBIA KEMUNTO NYANGAU 2ND DEFENDANT

(Formerly in the Environment & Land Court at Kisii Case No. 705 of 2016)

JUDGMENT

1. This suit is between 2 co-wives as Defendants. On the part of the Plaintiffs the 2 claim to be brother and sister-in-law respectively. The first Plaintiff avers that the 2nd Plaintiff is his brother's wife which the 2nd Defendant supports but according to the Defendants, the 2nd Plaintiff is their co-wife since, as the latter argue the person alleged to have been the 1st Plaintiff's brother and who is said to have married the second Plaintiff died long before the 2nd Plaintiff was born. The claim is for: -
 1. A declaration that the closure and subdivision of Land Parcel No East Kitutu/Kebirichi/2530 and 2531 is null and void and contrary to the distribution order given and stated in the certificate of confirmation of grant of the estate of Mokaya Onsoti issued on the April 25, 2005.
 2. A declaration that the decision of the Rigoma Land Disputes Tribunal Case No 4 of 2005 is invalid, null and void.
 3. An order directing the cancellation of the title No East Kitutu/Kebirichi/2530 and 2531 and the register be rectified accordingly and that land parcel No East Kitutu/Kebirichi/945 be



subdivided and registered in accordance with the distribution order stated in the certificate of confirmation of grant issued on April 25, 2005 in Succession Cause No 195 of 2004.

4. Damages.
 5. Costs and interest.
2. From both their statements and oral evidence in court it is the Plaintiffs' case that on April 25, 2005 the High Court in Kisii Succession Cause No 195 of 1994 issued a certificate of confirmation of Grant of representation of the Estate of the 1st Plaintiff's late father, Mokaya Onsoti which certificate gave the 1st and 2nd Plaintiffs 7¼ Acres each out of land parcel No East Kitutu/Kebirichi/945 and that the register was duly rectified and/or amended accordingly. The Defendants on their part testified that the 2nd Plaintiff was the wife of the 1st Plaintiff and not the wife of the late Samwel Onkangi Mokaya who, according to the Plaintiffs, was married to the said Onkangi Mokaya post-humously under the Gusii customs and traditions. As a result, they obtained East Kitutu/Kebirichi/2530 and 2531 irregularly and illegally which should now be cancelled and rectified so that East Kitutu/Kebirichi/945 be restored and the land sub-divided in accordance with the certificate of confirmation of grant issued on April 25, 2005 in Succession Cause No 195 of 1994 Kisii High Court. The 1st Plaintiff testified that the Decision of Rigoma Land Disputes Tribunal was adopted as the Decree of Keroka SRM Court in Miscellaneous Application No 7 of 2005 and that the same was reviewed and set aside by the same court. It is also the 1st Plaintiff's case that the Defendants attempted to have the certificate of confirmation of grant dated 25/4/2005 in Kisii High Court Succession Cause No. 195 of 1994 reviewed but the Objection was dismissed on March 13, 2002. An order to that effect was produced as Exhibit No P2. The certificate of confirmation of Grant was also produced as Exhibit 3 showing that LR. No East Kitutu/Kebirichi/945 was shared equally between the 1st Plaintiff and the 2nd Plaintiff each getting 7 ¼ Acres. The said certificate is dated April 25, 2005. There is also an order of the Senior Resident Magistrate, Keroka in Miscellaneous Civil Suit No. 7 of 2005 dated May 8, 2007 marked Exhibit PMFI -7 which reads as follows: -

“(a) That the award of Rigoma Land Disputes Tribunal filed in court on March 21, 2005 and adopted on the same day be and is hereby reviewed.”

3. Although it is not indicated what the review meant I take the words to mean anything else but not the conservancy of the Award. It must have therefore been set aside. What was the Decision of the Rigoma Land Disputes Case No 4 of 2005.
1. Plot No East Kitutu/Kebirichi/945 be registered in the name of Gideon Nyang'au Mokaya to be divided among his 3 wives (Mary Nyamira Nyang'au, Sibia Kemunto Nyang'au and Bilia Nyang'au) equally.
 2. The Land Registrar and District Surveyor do assist in the sub-division.
 3. Any aggrieved party to appeal to the Appeal Committee within 30 days from the date of the Decision.
4. The 1st Plaintiff proceeded to testify that the Defendants lied to the Land Registrar that the 2nd Plaintiff was his 3rd wife and presented the Decree of Keroka SRM Miscellaneous Civil Suit No 7 of 2005 to have registered the parcels of land LR Nos East Kitutu/Kebirichi/2530 and 2531 respectively in their own names. He and the 2nd Plaintiff were hence disadvantaged since the third parcel of land viz. East Kitutu/Kebirichi/2532 was later registered in the joint names of the Plaintiffs under unclear circumstances. He prays that the said sub-division and registration be cancelled.



5. On cross-examination by Counsel for the Defendants, Mr Oguttu (now a Judge of the ELC Court stationed in Nairobi), the 1st Plaintiff categorically insisted that he had only 2 wives (the Defendants) and that the 2nd Plaintiff was his sister-in-law (his late brother's wife). He further said that his late brother died in 1979 and one year after the death of Samwel Onkangi Mokaya in 1980, the 2nd Plaintiff married the deceased. He admitted that the 2nd Plaintiff and her late husband (Samwel Onkangi) did not live on this earth together as husband and wife. Both lived at different times but were nevertheless husband and wife for all intents and purposes. The 2nd Plaintiff has 4 children. She came to the family with 2 children and got 2 others both of whom were sired by the 1st Plaintiff. Mr Gideon Nyang'au went on to explain that according to the Abagusii customs, when a man dies his brother is allowed to take his wife and have children on behalf of the deceased. The 1st Plaintiff concluded by saying that his wish was that his late brother's parcel of land should be left to his (the deceased's) wife. On re-examination the 1st Plaintiff said that the children the second Plaintiff got prior to her marriage and those that she got after getting married post-humously all belonged to his late brother and not to himself.
6. On her part, the 2nd Plaintiff adopted the 1st Plaintiff's evidence and on cross-examination she denied that she was the 1st Plaintiff's wife and that she was entitled to half share of Plot No East Kitutu/Kebirichi/945.
7. On the part of the defence, the 1st defendant adopted the Defendants' joint written statement dated February 24, 2013 as her evidence in chief. She testified that both defendants are the 1st Plaintiff's wives and the 2nd Plaintiff is their co-wife. She further testified that they had the land LR No East Kitutu/Kebirichi/945 sub-divided and registered as LR No East Kitutu/Kebirichi/2030, 2031 and 2032 between the 1st Defendant, 2nd Defendant and 1st Plaintiff respectively in execution of the Decree of Keroka Miscellaneous Application No 7 of 2005. She also said that the Decision of the Tribunal still stands and that there was no Appeal preferred nor were its orders quashed.
8. The suit land measures 14.5 Acres and after sub-division, the Defendants got over 2.0 Hectares each and LR No East Kitutu/Kebirichi/2032 was registered in the joint names of the Plaintiffs and that since 2005 each of them has been occupying their respective portions. She denied that the transfer was effected fraudulently since, as she said, she is advanced in age and cannot engage herself in acts of fraud. In support of her case, the 1st Defendant produced the following documents: -
 1. Copies of Title Deeds in respect of LR No East Kitutu/Kebirichi/2530, 2531 measuring 2.6 Hectares, 2.3 Hectares respectively.
 2. The Decree of Resident Magistrate Keroka in Miscellaneous Civil Application No 7 of 2005.
 3. The Order issued on June 6, 2007 reviewing the said Award.
 4. A Ruling dated May 20, 2008 expunging the order of "March 6, 2007" from the court records.
9. I must admit that I never came across any order dated March 6, 2007 which is said to be expunged nor was I furnished with copies of the Application dated March 7, 2008 that yielded the alleged Court Order.
10. On cross-examination by the 1st Plaintiff, the 2nd Defendant said it is not true that their objection in Kisii High Court Succession Cause No 195 of 1994 was unsuccessful. And on cross-examination by the 2nd Plaintiff she said that she knew the Plaintiffs as husband and wife respectively and that the 2nd Plaintiff was not the 1st Plaintiff's brother's wife. She also said that it could not be true that the 2nd Plaintiff was the wife of the late Samwel Onkangi Mokaya the latter having died in the early 1950's even before the 2nd Plaintiff was even born.



11. The second Defendant adopted the statement dated February 26, 2013 co-authored with the 1st Defendant. She also agreed with the evidence adduced in court by the 1st Defendant. On cross-examination, partly by the 1st Plaintiff and partly by Mr Sagwe for the Plaintiffs who arrived in court when the matter was going on, the 2nd Defendant said that it is not true that she has been inciting her children against their father, the 1st Plaintiff. She also denied any knowledge of the existence of Succession Cause No 195 of 1994 in Kisii High Court and in a twist of events she said that she was not aware her objection to the confirmation of the Grant was ever dismissed. She also said that it is not true that the award of the Rigoma Land Disputes Tribunal No 4 of 2005 was overturned. But she later admits that it is the 1st Plaintiff who filed the Succession Cause at Kisii.
12. After the close of the case, parties were invited to file their written submissions and both complied. The court has considered rival submissions.
13. Before deciding whether to allow the prayers sought in the Plaintiffs or not, it is important to first establish the relationship between the Defendants and the 2nd Plaintiff vis a vis the 1st Plaintiff. Whereas the Defendants claim that the 2nd Plaintiff is the 1st Plaintiff's wife, the Defendants vehemently insist that she is a wife of the 1st Plaintiff and consequently a co-wife to them. Although no expert in Gusii customary law was called to testify in the case, the Plaintiffs explained that this kind of marriage exists among the members of the community. They introduced in their evidence a rather unique form of marriage where they explicated that if a man dies before he is married, his mother can get a wife for him and bring her to the family. She is made to sire children with the brother to the deceased. The children born out of this "union" do not belong to the biological father but to the deceased. They are even known by the name of the deceased and the progeny know their biological father as their paternal uncle. Accordingly, during Succession the woman has equal rights to inheritance with the man he sires children with. This is the scenario explained here by both Plaintiffs. But the Defendants were quick to counter this and claimed in court that the 2nd Plaintiff is wife to the 1st Plaintiff. The 1st Defendant even suggested to the Plaintiffs that since the two live together after the 1st Plaintiff deserted the Defendants, then the two are husband and wife respectively. But the 2nd Plaintiff, in cross-examination protested and disowned the 1st Plaintiff as her husband. She even retorted to the Defendants, "come for your husband." The Defendants would want to use this argument to deny the 2nd Plaintiff half of the suit property so that all the 3 ladies get a third each. However, both of them (the Defendants) admitted that the Plaintiffs live under the same roof and have got 2 children together. On the other hand, the Plaintiffs would want to advance the argument of the two being brother and sister-in-law respectively in order for the 2nd Plaintiff to have an advantage over the Defendants in the heirloom.
14. From the evaluation of the evidence adduced in court, I find that the Plaintiffs are telling the truth. Although they live together and have had children out of the union, the 2nd Plaintiff is a wife to the 1st Plaintiff's late brother under the Gusii customs. But that notwithstanding this matter has been litigated upon by 2 different courts, the High Court Kisii and the Resident Magistrate's Court, Keroka. The Award of Rigoma Land Disputes Tribunal gave a verdict that dealt with Title to the suit property. Under Section 3 of the now repealed *Land Disputes Tribunals Act* (CAP 303A Laws of Kenya) the jurisdiction of the Tribunal was limited to: -

".....all cases of a Civil nature involving a dispute as to; -

- (a) The division of, or the determination of boundaries to land, including land held in common;
- (b) a claim to occupy or work land; or



(c) trespass to land.”

15. Although the documents produced in Court do not give clarity at all as to whether the Tribunal’s Decision was set aside, or reviewed, the Tribunal had no jurisdiction to hear any dispute relating to the ownership and/or Title to land. The Decree of Keroka Senior Resident Magistrate’s Court in Miscellaneous Civil Suit No 7 of 2005 adopting the Award of Rigoma Land Disputes Tribunal Case No 4 of 2005 filed in court on March 21, 2005 dated February 22, 2005 was therefore a nullity for want of jurisdiction. The Court acted *ultra vires* the Act that created it. Secondly, the Deceased died on October 2, 1973 and the letters of administration in respect to his Estate had not been granted until April 25, 2005 yet the Decision of Rigoma Land Disputes Tribunal was made on February 22, 2005 more than 2 months before the certificate of confirmation of Grant was issued. Accordingly, it would be right to conclude that the action taken by Rigoma Land Disputes Tribunal amounted to intermeddling with the Estate of the late Mokaya Onsoti contrary to Section 45 (1) of the Law of Succession Act, CAP 160 Laws of Kenya which provides that:

“Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person”.

16. Consequently, any act taken pursuant to that Award is null and void *ab initio*. It was an exercise in futility. Since the certificate of confirmation of Grant issued in Kisii High Court Succession Cause No 195 of 1994 still stands, I would not interfere with the same. I therefore grant Judgment to the Plaintiffs in terms of Prayer Nos. (a) (b) and (c) of the Plaint dated December 17, 2012. No Damages have been proved and prayer No (d) is consequently disallowed. This being a family dispute I make no orders as to costs.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 15TH DAY OF MARCH, 2022.

MUGO KAMAU

JUDGE

IN THE PRESENCE OF: -

COURT ASSISTANT: SIBOTA

PLAINTIFFS: MR. SOIRE HOLDING BRIEF FOR MR. SAGWE

DEFENDANTS: MR. OMOTTO HOLDING BRIEF FOR MS. OCHWAL

