



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MERU**

**Succession Cause 87 of 1996**

**IN THE MATTER OF THE ESTATE OF BAKARI JUMA .....DECEASED.**

**SAID BAKARI.....PETITIONER**

**V E R S U S**

**SAID WAZIR.....OBJECTOR**

**Law of Succession Act**

**J U D G E M E N T**

*Introduction - The Delay*

For those engaged in fault finding and alleged incompetence of the Judiciary this is one case among many in which, blame for the delay cannot be laid at the feet of the Judiciary for either incompetence, corruption, or purely laziness. It all began in 1990 in the High Court as Succession Cause No. 84 of 1984 by ALIMA BAKARI MUTHONI who was granted letters of administration as a widow. That grant was revoked as it was contrary to Section 58 of the Law of Succession Act. The said section prohibits the grant of letters of administration to one person unless it is a continuing trust or is the Public Trustee or Trust Corporation.

Following the revocation of that grant, the deceased's widow started the matter afresh in the High Court as High Court Succession Cause No. 87 of 1990. Since then nineteen (19) years have elapsed. The matter has been handled by Justices (1) Oguk, (2) Porter, (3) Etyang, (4) Osiemo, (5) Tuiyot, (6) Kasanga Mulwa, (7) Onyancha, (8) Sitati (9) Ouko. I am the 10<sup>th</sup> Judge. Hon. Mr. Justice Tuiyot took the evidence of the objector Saidi Wazir on 15.09.2001. The next evidence was that of Sulalman Juena Kariuki, the wife of the Objector. That evidence was taken on 12<sup>th</sup> March 2007, and the objector's case was closed.

Hon Mr. Justice Ouko also took the evidence of Said Bakari, the Petitioner, and the son of the Bakari Kamau (Deceased) who was the son of Kamau Mbwiria who died in 1978.

I have perused the entire record as well as submissions of counsel for the Petitioner (Mwenda Mwarania), and the Objector (Mr. Kioga). The sole issue is whether the Objector should obtain one acre from land parcel Title No. NTIMA/IGOKI/1231 (the suit land) under an agreement for sale and purchase of land entered with Gituma Kamau Mbwiria (the grandfather of the Petitioner (and hereinafter referred to as "Mbwiria"). The Petitioner denies the validity of such an agreement, and therefore enforceability

thereof under the Law of Succession Act. The Objector thinks and submits that that agreement is enforceable in accordance with its terms.

Before answering that basic issue it is necessary to set out in some detail, the facts in this matter.

## THE FACTS

### (a) The agreement for sale.

The original owner and the first Registered Proprietor of the suit land as stated above was Kamau Mbwiria (the deceased). He became first registered proprietor on 8<sup>th</sup> January 1970 and was issued with a Certificate of Title on 14<sup>th</sup> March 1970. The suit land Ntima/Igoki/1231 comprised one decimal four one six (1.416 Ha.) or three decimal five acres (3.5 acres), or thereabouts.

By an Agreement made the 26<sup>th</sup> day June 1978 between Kamau Mbwiria (called the Vendor) and said purchaser Wazir (the purchaser) (the Objector/Protestor herein), the vendor agreed to sell and purchaser agreed to buy one acre (1.0 acres) of the suit land for the price or sum of Ksh. 25,000/- which the purchaser paid in full in terms of the agreement. The said agreement was produced in evidence and clause 4 thereof provided-

“4 That after the execution hereof the Vendor shall give vacant possession to the purchaser without any interference either from the Vendor, his agents executors and/or servants whatsoever and shall further guarantee him quiet and peaceful enjoyment of this land.”

Mr. Kioga learned counsel for the Objector submitted inter alia that at the time, the suit land was not subject to any land control law except that the sub division was to be approved by the Municipal Council Planning Committee under the Town Planning Regulations at the time. This was clause 8 of the Agreement and there was therefore no contest by counsel for the Petitioner. The Objector's evidence is also, that in terms of clause 4 of the agreement, he took immediate vacant possession of the portion he had purchased which was demarcated to him and he built his house on the land.

### (b) The death of Kamau Mbwiria and the rise of Bakari Kamau

According to the evidence of the Objector, Mbwiria died in or about 1978 before the formalities of the transfer of the portion of one acre of the suit land to the Objector was completed. After his death, the suit land was taken over by his widow, Alimah Muthoni Bakari and his son Kamau Bakari. They without informing the Objector, filed Succession Cause No. 72 of 1984 in which they obtained a temporary grant over the estate of Mbwiria, and had the suit land transferred to themselves, and a simultaneous transfer by the widow, to her son Bakari Kamau so that he became sole proprietor of the suit land. That Grant was revoked on 13<sup>th</sup> March 1987 by E. M. GITHINJI Esq Senior Resident Magistrate Meru. The revocation was made pursuant to an application by the objector, after Bakari Kamau started harassing him to get out of the land.

Instead of prosecuting the Petition under Succession Cause No. 72 of 1984, both Bakari Kamau and Alimah Muthoni Bakari filed this cause in the High Court. Alimah Muthoni Bakari died in 1994, and it took the application dated 5<sup>th</sup> November 1996 by the Objector for a Grant of Letters of Representation to wake the Petitioner up. It was by that application that the said Bakari was enjoined as a Legal representative of his deceased mother.

In summary the facts are that the objector bought from Kamau Mbwiria, one acre of the suit land in the year 1978. As fate would have it, Kamau Mbwiria died that same year, leaving his widow, Alimah Muthoni Bakari and a son called Bakari Kamau. Six years later, the said Bakari Kamau and Alimah Muthoni Bakari filed Succession Cause No. 72 of 1984. In that cause they succeeded in transferring the suit land to themselves in several portions, and simultaneously Alimah Muthon Bakari transferred her portion to Bakari Kamau who proceed to harass the objector so as to get him out of the land. On

resistance and application by the Objector, the said grant was revoked and the land reverted to Kamau Mbwiria, the deceased.

However by some unrecorded gymnastics, Kamau Bakari got himself registered under the provisions of Sections 120 and 121 of the Registered Land Act, (at least according to the submissions of Counsel for the Petitioner). The Objector's claim however remained outstanding and unresolved. The Petitioner insists that he had no agreement with the objector, and the agreement therefore is not enforceable against him.

### 3. OF WHETHER THE LAND PURCHASE AGREEMENT OF 26.06.1978 IS ENFORCEABLE

The Agreement of 26.06.1978 is in my view enforceable in accordance with its terms. It was in writing. It was for valuable consideration. It was coupled with immediate grant of possession of the vendor, and the purchaser took possession in or about June 1978, that is to say, exactly thirty one years ago this month of June 2009. The question is, is it justice to either subject the Objector to the provisions of the Law of Succession Act or the Land Control Act, statutes which Mr. Kioga learned counsel for the Objector, submits were not applicable at the time? Indeed the Law of Succession Act only came into force on 1<sup>st</sup> July 1987 by virtue of Legal Notice November 94 of 1981 and did not apply to the deceased Kamau Mbwiria who died in 1978, some three years before that Act came into force, and that the Control Act was not applicable to the suit land. In my view, even if the said statutes were applicable, Sections 82 and 83 of the Law of Succession Act impose certain statutory obligations upon the personal representatives of a deceased person. Section 82 obligates (subject to the limitations imposed by the grant) the personal representative-

(e) "to assent, at any time after the confirmation of the grant to the vesting of a specific legacy in the legatee thereof."

And Section 83 imposes upon the personal representatives the duty-

(d) to ascertain and pay out of the estate of the deceased, all his debts."

Although the one acre sold by the deceased Kamau Mbwiria cannot be described as a specific legacy within the definition of that term in Section 3 of the Law of Succession Act (in the absence of having been a testamentary disposition), the fact that he entered into agreement for the sale and transfer thereof to the purchaser, and had to put that intention into effect, allowed the purchaser into possession is clear evidence that the estate of Mbwiria was bound by that agreement. It was a covenant which touched and therefore run with the land. The Petitioner is bound to give effect to it.

The lack or absence of consent to sub-divide and transfer the one acre portion is no bar to that transaction. Firstly, that law, the Law of Succession Act was inapplicable at the time of the sale Agreement. Secondly, even if it were, that cannot be employed to defeat that which equity deems to be done as done. Thirdly, the Objector having been in possession for over 31 years, the Land Control Act cannot and indeed no statute should be cited to aid the fraudulent. It becomes an instrument of fraud, and offends the Statute of Frauds of England 1684, which is applicable to this country by virtue of Section 3 of the Judicature Act (Cap 8, Laws of Kenya) as a statute of General Application as of 1978.

Even if I was wrong in the above propositions, precedent suggests that once a Plaintiff such as the Objector in these proceedings has established exclusive occupation of property, a tenancy at will is presumed in his favour unless there are circumstances to negative such presumption. In the case of MAINA VS MURAI & OTHERS [1976] K.L.R. 227 a "Muhoi" that is, a person, usually a poor person, with no land of his own who under Kikuyu custom is permitted to occupy and cultivate land temporarily and who could never acquire ownership established title by adverse possession.

In Karanja Mathera vs Kanji [1976] K.L.R. 140 Harris J. held:-

"Although Section 6(1) (a) of the Land Control Act renders certain transactions relating to agricultural

land void unless the consent of the local land control board is first obtained, and section 6(1) (b) similarly renders void the division of such land, a person is entitled to be registered as the proprietor of such land in accordance with sections 7 and 17 of the Limitations of the Actions Act even if he has not previously obtained the requisite consent.”

The position of the Objector herein is neither that of a “Muhoi” nor a tenant at will (Wainaina vs Murai & others (supra). He is a purchaser for value in possession for over 31 years. If he were to move under the provisions of Sections 7 and 17 of the Limitation of Actions Act (Cap 22 Laws of Kenya) he would without an iota of doubt get orders entitling him to be registered as proprietor of that one (1) acre portion of the suit land. Any interest by any one entitled to the estate would have been extinguished under Section 7 of the said Act upon the expiration of twelve years.

As the objector obtained that possession for value, and not adverse possession I have a discretion to direct the Petitioner to consent to the Objector getting his one acre in the confirmation of the grant or make orders for the ends of justice under rule 73 of the Probate and Administration rules.

I elect not to exercise the first option as that would lend itself to manipulation by the Petitioner. That is therefore not a viable option. Taking into account that this matter has been in this court for the last 31 years without any fault of the court, but rather furtiveness and intransigence by the administrators of the deceased Kamau Mbwiria’s estate including the Petitioner, I elect to exercise the second option, and hopefully bring this matter to a close.

I direct that the Petitioner shall be appointed Administrator, of the estate of Kamau Mbwiria. I also direct that the grant shall be confirmed on terms that the Objector shall get one acre of the suit land NTIMA/IGOKI/123 and 2.5 acres the balance to Said Bakari.

The Petitioner and the Objector shall each bear their respective costs of this Cause and obtaining title for their respective portions.

There shall be orders accordingly.

Dated, Delivered and Signed at Meru this 10<sup>th</sup> Day Of July 2009

**M. J. ANYARA EMUKULE**

**JUDGE.**