

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CIVIL CASE 5 OF 1990

MARIA KANORIO M'TWAMWARIPLAINTIFF

VERSUS

IGOKI MUTETHIA FARMERS & TWO OTHERSDEFENDANT

RULING

The suit before me brought on 12th January 1990 is between Maria Kanario M'Itwamwari (the deceased) as the plaintiff and Igoki Mutethia Farmers Co-operative Society Ltd (1st defendant), Japhet Karuma (2nd defendant) and Zipporah Muchioki (3rd defendant) as defendants. The dispute related to parcel of land plot No. 128 at Mutethia Farm, Timau measuring 5 acres belonging to the deceased which was allegedly sold by the 2nd defendant in collusion with the 1st defendant to the 3rd defendant without the knowledge or consent of the deceased during her lifetime. The deceased, on the other hand is said to have sold the very property to three others, namely Paul Kirimi Mindewa, (Paul) Desdelio Njeru Benson (Benson) and Telesio Marete Saberio (Marete).

The matter was referred to an arbitration by the court (Ongundi, J) before the D.O. Timau and elders. It was never heard by the arbitrators and was recalled on 13th May 1997.

Prior to this on 7th August 1991 there was an application to restrain Paul, Benson and Marete from cultivating or developing the suit land. There was also a prayer for mandatory order to demolish any structures on the suit land. That application was brought by the 3rd defendant. As I have stated, it was brought against the three (Paul, Benson and Marete) even though they were not parties to this suit. Paul, Benson and Marete in their reply to the application alluded to this fact and pleaded that they are plaintiffs in HCCC No. 336"A" of 1991.

There is also evidence on record that the deceased died in April 1996. Why have I brought out the foregoing background? It would appear that there are two files that have caused the confusion in this matter, namely this file, HCCC No. 5 of 1990 and HCCC No. 336"A" of 1991.

The present application is indicated at the top to relate to both suits. The suits are not consolidated. Infact efforts to trace HCCC No. 336"A"/1991 in the registry has been fruitless. Its position cannot be confirmed. Without its consolidation with this file no application can be brought in this file to determine issues in HCCC No. 336"A" of 1991. Secondly, in the present suit, HCCC No. 5 of 1990, Alex Romano M'Itwamwari was, on 19th November 1996 appointed the legal representative of the deceased.

There is also HC Probate and Administration Cause No. 237"B" of 2003 in which M'Mugwika M'Itwamwari was also appointed the legal representative of the deceased – on 22nd September 2003. It is unclear under what circumstances the second appointment was done, seven years after the appointment of Alex Romano M'Itwamwari. M'Mugwika M'Itwamwari has denied ever applying to be appointed the deceased's legal representative and was categorical that it was Alex Romano M'Itwamwari who was so appointed.

I have seen application dated 15th August 1996 in which it was sought that Alex Romano M'Itwamwari

be appointed the deceased legal representative. It was brought by the 3rd defendant who asserted that she had counter-claimed against the deceased in the suit and since she had passed away, she applied that her son, Alex Romano M'Itwamwari be appointed her legal representative. That application was brought pursuant to Order 23 rules (1) and 12 of the Civil Procedure Rules.

Etyang, J granted the application and the same have not been set aside. So, as far as this suit is concerned, the legal representative of the deceased is Alex Romano M'Itwamwari.

For these reasons, this application fails and is dismissed with costs to M'Mugwika M'Itwamwari.

Dated and delivered at Meru this 28th day of April 2008.

W. OUKO

JUDGE