**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**
**AT NAKURU**
**CIVIL SUIT NO. 240 OF 1990**

**EVANSON KIMEMIA…….PLAINTIFF**

**VERSUS**

**SAMUEL GICHINA MUIRURI……..DEFENDANT**

**RULING**

The application has been brought through Notice of Motion under Sec. 3(A) and 80 of the Civil Procedure Act, Order XLIV R.1 of the Civil Procedure Rules and all mother provisions of the law. The application seeks the following orders:

- That the judgment delivered on the 2nd March, 1994 be reviewed in the following terms:

(a) A declaration be and is hereby issued and directed that the plaintiff be entitled to one half share of the 51 acres portion of L.R. No. 422/14 and 1045 now known as Bahati/Wendo Block 3 (Rimuko) situated in Bahati held by the defendant and that the defendant is trustee thereof to the plaintiff.

(b) That an order be and is hereby issued that the defendant do sub-divide all that piece of land known as Bahati/Wendo Block 3/15 Rimuko and transfer 25.5 acres to the plaintiff.

(c) That the defendant be and is hereby directed to execute the necessary transfer forms to effect the transfer of the said 25.5 acres to the plaintiff.

(d) That should the defendant fail to sign the transfer forms, the Deputy Registrar of this Court be and is hereby authorized and directed to execute the same on his behalf.

(e) That there be liberty to apply to either party.

(f) That in the alternative, the plaintiff be allowed to excise 25.5 acres from all that piece of land known as Bahati/Wendo 3/15 Rimuko and after survey, the Nakuru Land Registrar be ordered to issue a Title Deed in respect of those 25.5 acres to the plaintiff at the defendant's costs.

In his Replying Affidavit, the respondent has opposed the application on the following grounds:

(i) That the application is bad in law, lacking in merits and should be dismissed with costs.

(ii) That the respondent does not have any Title documents for any of the parcels of land.

(iii) That the respondent never sold 25.5 acres of land to Jacob Mwaura.

(iv) That the attempts by Jacob Mwaura to dispossess him of the land led to Nakuru HCCC No. 243 of 1988.

(v) That the case is still pending – and that the respondent has filed an application to set aside an award by el ders who were arbitrating over the dispute.

(vi) That the application could not be prosecuted since the file went missing from 1997.

(vii) That the matter was further complicated by the death of Jacob Mwaura a while ago. The respondent further added that a determination cannot be made about the demarcation of the land unless it is known whether the land claimed by him from Jacob Mwaura shall ever be recovered.

(viii) The respondent has also argued that the applicant has never shown any interest in the dispute between the respondent and Jacob Mwaura.

This Court has carefully perused the above submissions. Besides the above, the Court has also carefully perused the well reasoned judgment of Hon. Justice Lady Nambuye dated 2nd March, 1994. Apparently, her judgment was upheld by the Court of Appeal on 8th November, 2002. The decision was made by a three-Judge Bench of the said Court. The reasons for the same have been laid out succinctly. Both judgments have clearly set out the rights of the applicant to the land.

Having gone through the grounds clearly laid out by the applicant, I am persuaded that I should grant the application. From the evidence available, it is clear that the description of the disputed land had been changed.

The upshot is that I hereby concede to the application on the following terms:

(a) A declaration be and is hereby issued and directed that the plaintiff be entitled to one half-share of the 51 acres of L.R. No. 422/14 and 1045 now known as Bahati/Wendo/Block 3 (Rimuko) situated in Bahati held by the defendant and that the defendant is trustee thereof to the plaintiff.

(b) That an order be and is hereby issued that the defendant do sub-divide all that piece of land known as Bahati/Wendo Block 3/15 Rimuko and transfer 25.5 acres to the plaintiff.

(c) That the defendant be and is hereby directed to execute the necessary transfer forms to effect transfer of the said 25.5 acres to the plaintiff.

(d) That should the defendant fail to sign the transfer forms, the Deputy Registrar of this Court be and is hereby authorized and directed to execute the same on his behalf.

MUGA APONDI

JUDGE

Ruling read, signed and delivered in open Court in the presence of Mr. Kahiga.

MUGA APONDI

JUDGE

19TH FEBRUARY, 2004