



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURTS)**  
**CIV APP 11 OF 93**

**MARY GATIMU GAIKU .....APPELLANT**

**VERSUS**

**MWANGI ELIJAH GATIMU .....RESPONDENT**

**JUDGMENT**

One Elijah Gatimu (deceased) had two wives. One of his two wives is Mary Wairimu Gatimu (the respondent herein).

Mwangi Elijah Gatimu – the appellant herein, is the son of the deceased by his first wife.

Apparently the appellant is the registered proprietor of a piece of Land known as L.R. No. Londiani/Kanuingi/111/107.

On 24th October 1990, the respondent filed a suit in the court of the Resident Magistrate at Kericho praying the sub-division of this land and transferring 3.5 acres thereof to her because in the meeting held before the Chief of Sorget Location on 28th February 1989 it had been agreed that the appellant do transfer to her that portion of the land.

The appellant had not acted on that agreement despite numerous requests and this is why she filed the suit subject to the present appeal.

The record shows this case was never heard on its merits in court but was on 6th March 1991 referred to the District Officer Londian for arbitration with the award being filed in court within 60 days.

No award was filed in court and various attempts were made to have the case heard but to no avail.

On 10th May 1991, however, the award of elders was filed in court but it would appear the Principal Magistrate was not satisfied it complied with the existing law then because the evidence of the parties in dispute was not received and recorded and by his order dated 6th November 1991 referred the same matter to the same panel for fresh hearing.

In that order the magistrate directed that the witnesses evidence be recorded as required by law and that the award to be filed within 60 days.

These orders were being made under Section 9(A) of the Magistrate (Jurisdiction) Amendment Act (No. 14 of 1981) – now repealed by Act No. 18 of 199.....

The award of the second reference was filed in court on 26th February 1991.

There is no application on the lower court file for entry of judgment in terms of the elders award but such judgment was entered by the Learned Senior Principal Magistrate, as Honourable Justice Tuiyot was, then, on 22nd April, 1992. There were no further proceedings or orders on the file as would be expected under Section 9D(3) of the above quoted Act – (but Section 9A 4 of the Act).

Nevertheless, this appeal was filed to this court on 18th January 1993 in a memorandum of appeal dated 15th January 1993 and which listed 4 grounds of appeal.

In the main these grounds question the jurisdiction of the panel of elders to deliberating and determining the dispute subject to this appeal and that the magistrate did not apply the proper law and principle in such matters.

In this court on 2nd October 2002 counsel for the parties appeared to submit either for or against the appeal. Counsel for the appellant submitted that it was a mistake for the learned magistrate to refer this matter to a panel of elders when it had no jurisdiction to deal with the matter.

According to counsel a panel of elders had no powers to determine involving title to land and that it had no jurisdiction to hear the suit subject to this appeal.

Counsel prayed that this appeal be allowed with costs.

Counsel for the respondent submitted in opposition to the appeal that since 1994 parties in this appeal had agreed to have the land subdivided and shared equally between them and that the case went to court when the appellant – step son to the respondent – refused to honour the agreement by transferring 3.5 acres to the respondent.

And that since the appellant consented to referring the matter to the elders he was estopped from denying the elder's jurisdiction and that this appeal was filed in court to frustrate the respondent. He prayed that this appeal be dismissed with costs.

The order of the second reference to the panel of elders was made on 6th November 1991. The award was to be filed in court within 60 days.

It is not indicated on the lower court record when the order of the court was served upon the District Officer Londiani but I do not think it could have taken more than 2 weeks for this to be done. If this be so then counting from 6th November 1991 to 26th February 1992 then this award was filed in court after 90 days, hence not within 60 days as ordered by the court.

Thus it was null and void and could not have formed the basis of a valid judgment recorded by the learned Senior Principal Magistrate on 22nd April 1992; see **Bagwasi Nyangau v Omose Nyakwasa [1982-88] 1 KSR 805.**

The Magistrate's jurisdiction (Amendment) Act 1981, Act No. 14 of 1981 allowed panel of elders to deliberate and determine Land disputes provided under Section 9A (1) thereof; namely

- (a) the beneficial ownership of land;
- (b) the decision of, or the determination of boundaries to land, including land held in common;
- (c) a claim to occupy or walk on land
- (d) trespass to land

This provision has nothing to do with panel of elders deliberating to do with panel of elders deliberating and determining the issue relating to title to land; and as in the case subject to this where the panel embarked on subdividing land L.R. No. Londiani/Kamwingi/111/107 registered in the name of the appellant to give half share of to the respondent, it was contravening various provisions of the Registered Land Act, namely Sections 4, 27, 143 and 159 which are still in existence.

In that regard therefore the panel of elders had no jurisdiction to deliberate over this dispute and to make orders subject to this appeal. That it had been agreed earlier by the parties – in 1984 – for land No. 64 Kamwingi to be subdivided into two equal shares and that one half thereof be given to the respondent is neither here nor there given that this agreement was not backed by law which the parties eventually resorted to in the case subject to this appeal.

No doubt this dispute is long standing and that the appellant in a bit hard-hearted knowing very well that the respondent is his step mother. I do hope he just does not want her to get title to the portion she occupies but that she will allow her to occupy and use this portion during her lifetime.

Otherwise I allow this appeal and set aside the lower court order.

Due to the close relationship of the parties to this appeal, each to bear his/her own costs of the appeal and the case below.

These shall be this court's order.

Delivered this 14th day of October, 2002.

D.K.S. AGANYANYA

JUDGE