



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

SUCCESSION CAUSE NO. 260 OF 2006

IN THE MATTER OF THE ESTATE OF EVANS KAMAU MWAURA – DECEASED

ESTHER GATHONI KAMAU.....1ST PETITIONER

SAMUEL KARANJA MWAURA.....2ND PETITIONER

EVANS KAMAU MWAURA3RD PETITIONER

VERSUS

EVANS KAMAU MWAURA.....CAVEATOR

J U D G M E N T

1. This matter has been long, winded and protracted. The late **Moses Mwaura Kamau** was a polygamous man. He had 3 wives. Out of the said wives all their first borns were sons and per the Kikuyu customs which he subscribed, he named each one of them **Evans Kamau Mwaura**. He passed on in the year 1993.

2. The deceased herein was the son from his first wife. He predeceased him as he died in the year 1986. The petitioners in this proceedings are his widow and his step brothers respectively.

3. The objector is the step brother to the deceased and the son of the 2nd wife of Moses Mwaura Kamau.

4. The petitioner did commenced the succession proceedings in Nakuru and after a while Musinga J (as he then was) referred the matter to this court for determination. My brother Karanja J heard the parties based on the filed pleadings and found that the deceased herein held the land in trust on behalf of his late father Moses Mwaura Kamau and thus the same was a family land and therefore it ought to be shared equally between the three houses. He none the less referred the question of division to the Environment and Land Court.

5. Justice Obaga sitting at Kitale in the ELC division found hat the matter was res judicata and thus dismissed the same.

6. The objector then moved to the Court of Appeal where in a unanimous decision the learned Judges inter alia stated that;

“ As we have pointed out, Karanja J, held that being a Judge of the High court, he had no jurisdiction to determine the dispute between the appellant and the Respondent over the ownership of the suit land. In the circumstances he did not consider the merits of the parties respective claims. With respect the learned Judge erred. All disputes , including land ownership disputes, arising in succession causes should be determined by the succession courts. We cannot have a situation where issues are n going to be shoved from one court to another. Cases should be instituted in courts with Jurisdiction over predominant causes of action and such courts should determine all issues that arise in them.”

7. The court went ahead to set aside the ELC decision and ordered that the same be consolidated with this matter for full determination.

8. When this matter came up for directions, I ordered that the same be heard by way of viva voce evidence. The objector was deemed the plaintiff and the Petitioners the Defendants. The parties then proceeded to call various witnesses whose evidence at this juncture is worthwhile summarising.

The Plaintiff's case:

9. **PW1 Evans Kamau Mwaura** the Objector testified that he was the son of the late Moses Nwaura from the 2nd house. That he was the owner of the suit land, namely parcel No. 174 Suwerwa Settlement Scheme.. He said that he was a forest ranger between 1961 – 1964 and

he worked in various forests including Elgeyo, Kiptogot, Mt Elgon and others. He was born in the year 1939.

10. He was born at Elgeyo forest where his father resided and did business after the government build houses for them after the emergency.
11. He testified that the government gave out land in the year 1964 – 1967 and he went to Chepyemit where one Senior Chief Chemweno whose son he was schooling with gave him a letter to bring to Suwerwa Settlement Scheme where he got land . He said he paid Kshs 602 and was given an allotment letter. He signed and accepted the terms. He produced the same as exhibits.
12. He further paid Kshs 45 and joined the Cooperative Society of the said farm. They were also given fencing materials as well as a cow. He produced the receipts to that effect. The purchase of the land was through a loan by SFT and they were then required to pay through milk proceeds delivered to KCC. He equally produced bundle of receipts. He continued paying the loan till KCC went under as well as the Suwerwa Cooperative Society.
13. He produced the demand notice from SFT demanding the balance of the purchase consideration which he paid in the year 2003, a sum of Kshs 7000.
14. He said that he occupied the land and despite being incarcerated for 20 days in 1966 in Eldoren prison his wife was staying in the land. He had build a grass thatched house. All along the family members including his father stayed at Elgeyo forest.
15. His father died in the year 1993 and was burried at Nyandarua. At no time did he stay in the suit land.
16. The deceased herein died in the year 1986 and was burried at Elgeyo forest cemetery. He said that his father would come visiting him and would go back.
17. He denied that he was holding the land on behalf of the family and that he was not involved in the Succession proceedings, filed by his siblings. Out of the Succession proceedings the Petitioners subdivided the land into various portions and transferred to other 3rd parties including one Moses Suter Tanui.
18. He argued that the deceased name was “Evan” and not “Evans”. He produced the deceased copy of the National identity card as well as his to show the apparent distinction.
19. On cross-examination he said that by the time he was arrested and detained in the year 1966 he was already in the land. He further stated that none of the family members ever ploughed or stayed in the suit land. That none of the family members including the deceased herein was burried at the suit land.
20. **PW2 Andrew Ochieng** a settlement officer from Trans Nzoia County produced the documents relating to the suit land. The same showed the objector as the allottee of the land. All the documents including the purchase receipts shows the objector as the owner. He said that the discharge of charge was done based on the confirmed grant from the court which was in the names of the Administrator's herein.
21. **PW3 Simon Cheruiyot Ruto** is the Chief Suwerwa location. He said that he settled in the land in the year 1967 and has been there since then. He found the objector already settled on that land. That he even schooled with his children. He said that he wrote a letter in the year 2005 which was given to Ngugi Karanja for purposes of Succession proceedings. He later denounced the letter as he learned from the objector that he was not involved in the family meeting which had deliberated over the suit land. He denied meeting the deceased herein.
22. **PW5 Peter Njuguna Gicheru** stated that he worked as a clerk at the said farm between 1966- 1998. He knew the objector herein whom he found already on the land. He confirmed on cross-examination that the objector took the wives and cows from the office as per the then requirements in the year 1966.
23. **PW6 Silas Kabue** is a former Administration police officer who said that he was posted at Suwerwa scheme in the year 1965 and was involved in the inspection of those who purchased the land. The interviews were done at Iten then they would come to Suwerwa and take the land. He said that the Objector came with one Ngigi and he saw the letter of authority. Since then the objector has been staying in the land and he has been staying in his land No 310 as well within the same scheme.
24. **PW7 John Kosgey Cheserek** is a neighbour to the objector. He stated that he had all along seen the objector on the land and that the objector's father would visit and spend at their home as he was a friend to his father. The two would take alcohol together. He said that the objector has all along stayed on the land. On cross—examination he said that he did not know much about the extended family of the objector other than his father.
25. **PW8 Monica Njuguna**, the objector's wife testified that the suit land belonged to them as a family and not the deceased. She said that she married the objector in 1962, by then working as a forest ranger at Elgeyo forest a place called Musekekwa. They lived in a government house. Her father in law was selling posts and charcoal.
26. She said that the objector got the purchase consideration through his work and she kept it totaling kshs 900/-. After buying the land he build a house and had someone stay there. He was later jailed for 20 days. She went to the suit land while he was in custody. She was taken to the land by one John Cherop who showed her the land as well as the house. After his release he joined her. This was in the year 1966. From then she has been on the land.
27. She said that neither the deceased not her father in law stayed on that land. Her father in law would come but spend the night at his friend , who was a neighbour. He died and was buried at Nyahuruu and the deceased herein buried at Musekekwa at Keiyo forest.

28. On cross-examination she said that John Cherop had also purchased land at Suwerwa. There was also a caretaker at the land called Maina. She did not see Geoffrey Ndungu who was a brother to his father in law.

Defence case

29. **DW1 Esther Gathoni Kamau** is the widow of the deceased herein. He said that the deceased died in the year 1986 and that he was the administrator of the estate of his father Moses Mwaura. He was the first born and the father used to refer to him as “Muramati”. (Trustee).

30. She said that the deceased told her that the suit land herein belonged to his house. That Tabitha the 3rd wife had the documents for the land which she gave to her including the allotment letter. That the family agreed that the land be changed from the deceased to the rest of the family members. She spoke of the 3 family meetings which deliberated on the same. The objector attended the first meeting but not others. She said that the land be divided according to the houses.

31. On cross-examination she said that they could not bury the deceased at Suwerwa as the title to the land had not been obtained and that the same was yet to be divided.

32. **DW2 Geoffrey Ndungu** is the uncle to the deceased and a brother to the deceased's father Moses Mwaura. He said that he went to the land in 1965 when Moses bought the land. He did the fencing with the deceased after getting the fencing materials from settlement. He said he stayed for a year and in that period Moses wives Ziphora and Phylis would come. The children would come when school are closed.

33. He said that the objector after coming out of the custody was sent by his father Moses to the land in the year 1965. He said on cross-examination that the deceased signed the documents. He said that the objector's wife went to the land in 1965.

34. **DW3 Samwel Karanja Mwaura** testified that the deceased was his step brother and the objector his real brother. He said that the land belonged to the deceased the same having been bought by Moses his father. He was to hold it in trust for him. He however said that he did not know the signature on the allotment letter whether OR NOT it belonged to the deceased.

35. He said that in 1965 he went to the suit land with the objector's wife. He schooled in the local primary school and the proceeds from the maize out of the said land paid the loan. He maintained that the land belonged to their father. He produced the receipt for kshs 7000 which was the balance of the loan.

36. On cross-examination he said that there are no graves on the suit land even those of the deceased 's 2 children. One of the deceased children was buried at kapenguria cemetery.

37. **DW4 Evans Kamau Mwaura** is the administrator of the estate herein and the deceased was his step brother. He said that the deceased was given money by his mother to purchase the land which were proceeds from maize produce. He was therefore a trustee. He came to the land while in form 1 at Tambach High school. He went as far as seeing the objector in prison. He said that they agreed as a family to share out the land. He referred to the minutes of the family meeting.

38. **DW5 Jackson Chege Mwaura** is a real brother to the Objector. He testified that the financing of the purchase of the suit land was from the maize produce which was from her mother. He said that the land was registered in the name of his step brother as a trustee. He said that their mother Tabitha gave them the letter of allotment which he gave to the objector. That they paid Kshs 7000/= to SFT which amount was contributed as a family.

39. The witness further stated that there is another land at Molo namely Molo South Kuresoi/67 which belonged to his father thought registered under his name. He is just a trustee on behalf of other family members.

Analysis and Determination

40. The court has carefully perused the proceedings herein as well as the lengthy written submissions by the Counsels on record together with the cited authorities.

41. The issues herein are clearly discernible namely whether the deceased was the allottee or the objector to the suit land and whether whoever was allotted the land held it in trust for their late father Moses Mwaura and therefore the entire family.

42. Secondly, in light of the above whether the land should therefore be shared equally between the deceased family as was done by the administrators herein.

43. There is no doubt that all the parties herein are related by virtue of being the children of the late Moses Mwaura and his 3 wives. All their parents have since died.

44. The land was a settlement scheme and it appears that the same was to be bought on terms and conditions stipulated, namely a certain percentage was paid then the balance was through a loan. The fencing materials provided, namely barbed wire, nails and ironsheets were not disputed as well as the cows. It appears also that there was provisions for the land to be ploughed for the allottees to work on.

45. There was no agreement of course between the deceased herein and his late father Moses to have him allotted the land as a trustee or “Muramati” as was commonly expressed by the parties. Further, there was nothing which was exhibited to show that the purchase consideration was paid by the deceased herein courtesy of sale of maize produce by Moses wives.

46. The Objector and his wife specifically stated that the Objector had been paid Kshs 900/= from the employer, forest department and that was the money used to pay for the land. It is not disputed that the Objector worked for the Forest Department till the time he was incarcerated in the year 1966. It is easy therefore to conclude that he had means of income and thus capable of purchasing the property.

47. Apparently, none of the Defendants/Petitioners were able to explain how much money accrued from the sale of the maize and how much was permitted by Moses to have it given to the deceased to buy the land.

48. The court has perused the receipts produced and the same were not disputed by all the parties. The Settlement Officer did acknowledge that they all including the letter of allotment emanated from the SFT office. They are all in the names of Evans Kamau Mwaura. The allottee clearly signed the allotment letter dated 16/2/1965 and accepted the terms.

49. It was alleged that Tabitha the deceased step mother had the documents but the same were produced by the Objector. How then did the Objector. How then did the Objector come into custody of these original documents? This was not clearly explained by the defendants.

50. That brings in the next question of the names. The allotment letter from S.F.T. states that the allottee is Evans Kamau Mwaura and the certificate of acceptance states the same. Save for the additional name Mwaura, which seemed to have been added later, all the names remain the same.

51. Equally, the bundle of demand letters from SFT dating way back between 31/12/1965 to 31/12/ 1993 showed the allottee to be Evans Kamau Mwaura.

52. The receipts dated 16/2/1965, Exhibit 4, Exhibits 5(a), 5(b) and 5 (c) which shows the building materials given are in the names of Evans Kamau Mwaura. They are all signed by the Objector.

53. Going by the above documents as produced by the Objector and apparently admitted by the Respondents/or defendants, none of them is in the names of Evan Kamau Mwaura.

54. The Objector equally produced two sets of identity cards. The first one is in the name of Evans Kamau Mwaura, which is his and the second Evan Kamau Mwaura the deceased. The only difference of course are the missing letter 'S' in that of the deceased but more importantly the registration numbers are different. That of the Appliance is 3530522166 and the deceased is 0401324166.

55. Obviously, legally, these are two different persons. Although its admitted that Evans Kamau Mwaura are in the three houses, the two identity cards produced are for different persons. I am certain that the other Evans Kamau Mwaura from the 3rd house has a different identity card.

56. What then is the way forward?

57. From the evidence adduced by the two factions I am convinced that the land does not belong to the deceased herein. I state so for the following reasons.

First of all there is a nexus that shows that the objector was a person of means capable of purchasing the land. Being a civil servant, he was salaried and thus earning an income. I have not been shown how the deceased purchased the property. Even if there were proceeds from the maize, there was nothing to show that their late father owned any land while staying at Elgeyo forest.

58. It must be noted equally that the purchase of the land was through a loan and that is why the same was concluded several years later.

59. There was also proceeds from the milk delivered to KCC. It was agreed that a cow was given to each allottee. The receipts produced were a testimony to this.

60. At the same time, the plaintiff's witnesses who included the clerk to the farm, the area Chief and the retired AP officer all demonstrated the connection between the Objector and the suit land. It was not farfetched for the objectors father as well as his relatives to come to the land on visits. This was natural and normal whether during schools closing days or any other day.

61. There was no evidence that the deceased came to the suit land. He was buried at Elgeyo forest and none of his 2 deceased children was buried on the said land. Infact one of the Children was burried at Kapenguria cemetry.

62. On this point of burial none of the rest of the family members including the Objector's father Moses, or his wives were burried on the suit land. The reason given that the land had not been apportioned or the title deed had not been issued was to say the least unbelievable.

63. Even if there were problems with the names on the identity card of the deceased, there was no demonstration that the deceased desired to occupy the land. As a matter of fact between 1965 and 2003 when the Succession proceedings were began there was no evidence that the petitioners or any family members resided or attempted to reside on the suit land. The Objector resided there for several decades without any interruption from family members.

64. The various family meetings exhibited by the petitioners may have taken place with or without the Objector, but the same did not oust the fact that the land did not belong to the deceased.

65. I have examined the signatures placed on the letters of allotment as well as the receipts and further the signature on the pleadings herein

and though not an expert on handwriting, this court is satisfied, prima facie, that the same belongs to the Objector.

66. I have examined the death certificate herein issued on 20/5/1986 and the same is in the name of Evans Kamau Mwaura. Ordinarily, the same must be in the name of the deceased which is issued after the surrender of the National identity card to the Registrar of Births and Deaths. If therefore, the deceased was called Evan Kamau Mwaura, then it was imperative that the certificate of death ought to have been in that name and not Evans Kamau Mwaura. It cannot be assumed that this was a typing error.

67. The petitioners have urged this court to consider that the deceased was holding the land as a trustee or Muramati under the tenets of Kikuyu customary law. In other words, his father Moses Mwaura had entrusted him to have the land registered in his name as a trustee.

68. Whether this may have been possible, the evidence on board so far presented and the paper trail does not point to this. Infact as earlier stated, the said "Muramati" did not occupy the land. If at least that was the case there would have been some iota of evidence to that effect. Infact, he may have been buried on the land or at least his deceased children and wife. On the contrary he was buried in a government or public cemetery at Elgeyo forest.

69. The lack of identification numbers on the allotment does not point out to the fact that the land belonged to the deceased. It would have been persuasive if at least the first name was "Evan" and not Evans. For now no evidence was led to suggest that the land belonged to the deceased or his late father Moses Mwaura.

70. To sum it up, when the entire family of Moses Mwaura were chased out of Elgeyo forest in 1989 none of the family members came to the suit land. They all dispersed as far as Molo, Nyahururu, Nyandarua and Eldoret. Nothing was shown to suggest that they came and settled on the "family" land at Suwerwa.

71. In the premises I find that the objection proceedings herein must succeed. It is of course unfortunate that the land had already been subdivided and sold out. The level of stress to both sides must be enormous. However the adversarial system becomes unfair in such circumstances.

72. The certificate of confirmation of grant issued on 24th April 2013 is hereby cancelled with all the attendant consequences. All the titles issued pursuant to the sub division of land parcel **No. Trans Nzoia /Suwerwa/174** are hereby cancelled and the register rectified so as to revert to the original title namely **Trans Nzoia/ Suwerwa/174** in the name of Evans Kamau Mwaura.

73. Being a family feud, each party shall meet their own costs.

Delivered, signed and dated at Kitale this 2nd day of April, 2019.

H.K. CHEMITEI

JUDGE

2 /4/19

In the presence of:-

Mr Kaosa for the Objector

No appearance for the Petitioner

Court Assistant – Kirong

Judgment read in open court.