



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 2931 of 1999**

**IN THE MATTER OF THE ESTATE OF JOSHUA MARURI THUO (DECEASED)**

**PLEADINGS**

The deceased, Joshua Maruri Thuo died on 22nd December 1979 intestate. On 28<sup>th</sup> December 1999, the Judgment Creditor of the deceased's estate filed a citation to the 3 children of the deceased, namely, Ndungu, Kareko and Njoki Maruri. They did not enter appearance within the requisite period. On 16th day of August 2005, Peter Njoroge Jairo the Creditor filed the Petition herein.

In his Affidavit in support of Petition for Letters of Administration Intestate he stated that the Deceased died intestate and left the following surviving him:

1. **Ndungu Maruri (Son)**
2. **Kareko Maruri (Son)**
3. **Edwin Kinyanjui(Son)**
4. **Njoki Maruri (Daughter)**
5. **Wambui Maruri (Daughter)**
6. **Mburu Maruri (Son)**
7. **Gacomo Maruri (Son)**
8. **Mugure Maruri (Daughter)**
9. **Wanjiku Maruri(Daughter)**

In Paragraph 5 of the Affidavit in Support, the Petitioner/Creditor deposed that he is the deceased's creditor claiming part of **L.R.NO. LIMURU/BIBIRIONI/1284** as an adverse possessor.

The deceased's estate comprised of the suit property **L.R.NO. LIMURU/BIBIRIONI/1284**. The grant of letters of administration was issued on 18<sup>th</sup> January 2006.

He later filed summons for confirmation of the grant on 12<sup>th</sup> January 2007 which was confirmed and the mode of distribution of the suit property **L.R. LIMURU/BIBIRIONI/1284** was as follows;

**1. L.R. NO. LIMURU/BIBIRIONI/1284 be shared by:-**

**a. Ndungu Maruri - 5 acres to hold in trust for himself and in trust for;**

**(i) Kareko Maruri**

**(ii) Gacomo Maruri**

(iii) Wambui Maruri

(iv) Mburu Maruri

(v) Njoki Maruri

(vi) Mugure Maruri

(vii) Wanjiku Maruri as Tenants in common.

**b. Peter Njoroge Jairo - 0.50 acres to hold in trust for himself and in trust for Paul Kamau and Patrick Kigo as tenants in common in equal shares.**

**c. Mwaura Francis Shairi - 0.50 acres absolutely**

**d. John Karanja Kiambui - 0.50 acres, to hold in trust for himself and in trust for Peter Njoroge, George Mungai and Grace Wanjiru as Tenants in common in equal Shares.**

The beneficiaries did not consent to the confirmation of grant and only the Applicant signed.

On the 16<sup>th</sup> of April 2009, the Applicant George Mburu Maruri, 1<sup>st</sup> born of the family of the deceased, filed for revocation of confirmed grant and sought;

1. THAT pending the hearing and final determination of this application, the Respondent **PETER NJOROGE JAIRO** who is the current administrator of the estate of the late Joshua Maruri Thuo be restrained by way of an injunction from;

*a) alienating, wasting, disposing of, subdividing, transferring and/or otherwise dealing or interfering with the deceased's parcel of land L.R. NO. LIMURU/BIBIRIONI/1284 which has now been fraudulently registered in the name of the Respondent PETER NJOROGE JAIRO.*

2. THAT the grant of representation to the estate of the late Joshua Maruri Thuo herein issued to the Respondent **PETER NJOROGE JAIRO**, on 18<sup>th</sup> January 2006 and confirmed on 26<sup>th</sup> November 2008 be revoked or annulled on the grounds:

*(i) The grant was obtained fraudulently by making of false statements that the lawful beneficiaries of the deceased's estate had refused to take out letters of administration, that the lawful beneficiaries of the deceased's estate had been served with citation proceedings and that the Respondent (current administrator) was a creditor to the deceased's estate.*

*(ii) The grant was obtained by concealing from the Court of some material facts particularly of the existence of other Court Cases touching on the subject of this case namely;*

*- Nairobi HCCC Misc. Civil Application No. 143 of 1979 – Jairo Kiambuthi vs. William Maruri Thuo*

*- Nairobi HCCC No. 2612 of 1981- Jairo Kiambuthi Magondu vs. Nyambura William Maruri.*

*- Kiambu SPMCC Land Case No. 3 of 1998 – Peter Njoroge Jairo vs. Ndungu Maruri & 2 others.*

*(iii) The grant was obtained by means of untrue allegations of a fact essential in point of Law to justify the grant.*

3. THAT Title for the deceased's parcel of land Title No. **LIMURU/BIBIRIONI/1284** fraudulently transferred to the Respondent (Peter Njoroge Jairo) be cancelled and reverted back to the deceased's estate.

4. THAT the Respondent **PETER NJOROGE JAIRO** be ordered to bear the costs of this application.

In response to the Application of Applicant dated 16<sup>th</sup> April 2009 and Affidavit in Support, the Respondent filed a Replying Affidavit sworn on 8<sup>th</sup> May 2009 and deposed;

(1) A CITATION was filed in this Honourable Court on 28<sup>th</sup> December 1999.

(2) The Citation was served upon the Applicant on the 4<sup>th</sup> of March 2000 who duly accepted service thereof and signed at the back of the CITATION: That the applicant/Objector entered appearance to the Cause through GACHOMBA & CO. ADVOCATES on the 16<sup>th</sup> March 2000.

(3) The Applicant/Objector did not Petition for a Grant of Letters of Administration within the period prescribed by the CITATION and/ or the law.

(4) That the Respondent/Petitioner was not a party in **HCCC Misc. Application No. 2612 of 1981**.

The Respondent filed a further Replying Affidavit sworn on 9<sup>th</sup> June 2009 and deposed;

- (1) It is true that the Citation was served upon Ndungu Maruri, Kareko Maruri and Njoki Maruri but not the Applicant/Objector.
- (2) That he was advised by his advocate that this matter concerns the estate of the late JOSHUA MARURI THUO and service of the documents on any of his children was sufficient in law.
- (3) That he was advised by his advocate that there was no duly appointed Personal Representative of the Estate of the late Joshua Maruri Thuo and my Petition of Representation was within the law.
- (4) That the dispute over the land in question has never been heard and determined by a Court of competent jurisdiction contrary to what is alleged by the Applicant/Objector in paragraph 7 of his affidavit.
- (5) That it is his sincere belief that the Applicant/Objector and his brothers and sisters have made a deliberate decision not to apply for a Grant of Letters of Administration of the estate of the late Joshua Maruri Thuo with a view to blocking the Respondent/Petitioner from recovering two acres from LR No. LIMURU/BIBIRIONI/1284 formerly registered in the name of the Applicant's deceased father.
- (6) That LR. No. LIMURU/BIBIRION/1284 measures seven (7) acres or thereabouts and he had indicated in the Certificate of Confirmation of Grant that the Applicant/Objector and his family are to take five acres and he representing the estate of his late father JAIRO KIAMBUTHI MAGONDU are to take 2 acres: Annexed hereto and marked PNJ: 5 is a copy of Grant of Letters of Administration in respect of the estate of his late father.

The grant and confirmed grant was revoked vide Court order of 12<sup>th</sup> June 2012 by Hon Justice G.B.M.Kariuki and fresh/new grant was issued on 30<sup>th</sup> April 2012 to George Mburu Maruri and Mary Wambui Maruri.

Summons for confirmation of grant were filed on 22<sup>nd</sup> January 2013 and the list of beneficiaries included;

- 1) **Johana Kareko Maruri**
- 2) **Gachomo Maruri**
- 3) **Robert Ndungu Maruri**
- 4) **George Mburu Maruri**
- 5) **Mary Wambui Maruri**
- 6) **Josephine Wanjiru Maruri**

The Respondent Peter Njoroge Jairo filed caution over the suit property Limuru/Bibirioni/1284 and filed Protest to the summons for confirmation and sought distribution proposed was;

- 1) **Peter Njoroge Jairo- 2acres**
- 2) **George Mburu Maruri- 5 acres of the suit property.**

The Petitioner filed Replying Affidavit to Protest on 15<sup>th</sup> March 2013 and stated that it is not true that the protestor's father had acquired 2 acres in the deceased's property **L.R.No Limuru/Bibirioni/1284** either by way of purchase and/or adverse possession.

#### **HEARING:**

#### **PROTESTOR'S CASE**

Peter Njoroge Nyairo (PW1) testified on 27<sup>th</sup> May 2015 that he is administrator of his late father's estate. He obtained the grant for his father's estate in **Succession Cause 369 of 1997 Kiambu Law Courts**. His claim is 2 acres from **L.R. No Limuru/Bibirioni/1284**, the deceased's Joshua Maruri Thuo's estate.

He alleged his father bought 2 acres from the deceased in 1966 at Ksh 3600/-and they had a written Agreement. His father planted 3000 tea plantation on the said farm and he produced the Licence from Kenya Tea Development Authority (KTDA) in the name of his father, Jairo Kiambuthi dated 12<sup>th</sup> April 1969 as **Exhibit 2**.

After the deceased's death in 1979, his widow Nyambura Maruri evicted them from the land. His father filed a suit at the **Land Tribunal**

**Case Number 1412 of 1981** against the deceased's widow.

There was also **Case number 2612 of 1981** which was not determined as the Protestor's father died in 1997. The protestor took over the matter and lodged it before the Land Tribunal. The Petitioners did not attend proceedings. The elders' verdict was that they were to be allotted the 2 acres from the deceased's suit property. He filed this Suit and obtained the grant and confirmed grant. Although the said grant was revoked he claims the portion of the deceased's estate 2 acres that his father bought from the deceased.

In cross examination, the witness admitted that the plantation license did not disclose the land where the tea plantations were planted. Therefore it was not conclusive ownership of the land in question.

**PATRICK KIGO JAIRO (PW2)** relied on his affidavit filed on 19<sup>th</sup> May 2010 and informed the Court that he was present and in fact authored the agreement between his father when he bought land from the deceased in the instant case. He was at home when the deceased Joshua Maruri Thuo and his wife Nyambura Maruri came to their home to collect the money paid in instalments as purchase price for the 2 acres that his father bought. Whenever the deceased came and received the money, his father told him to write it down. He is the author of the Agreements for sale of land 2 acres to his father.

**JOSEPH GACHUKI KAMAU (PW3)** and John Mbugua Nderu (PW4) relied on their affidavits both filed on 19<sup>th</sup> May 2010. PW3 stated that he knew the deceased and the Protestor's father. He belonged to a group of 12 people who assisted in digging out and uprooting couch grass near various neighbouring shambas. He confirmed that they dug and removed couch grass on the land the Protestor's father bought from the deceased and they planted tea plantations.

PW4 stated he worked at Limuru Tea factory in the 60s& 70s. The father to Protestor in 1973/1974 took him to his farm Kinyogori and he helped him prune the tea. He told him that he bought the land from Joshua Maruri Thuo whom he knew.

#### **PETITIONER'S CASE:**

Josephine Wanjiku Maruri (DW1) born in 1959, daughter of deceased Joshua Maruli Thuo stated that the suit property **L.R. No Limuru/Bibirioni/1284** belonged to their father (deceased). The children of the deceased namely, George Kamau, Robert Ndungu, Johana Kareko Maruri, Mary Wambui Maruri and herself have lived and live on the suit property to date. The tea plantation was planted by their parents after they were advised by KTDA and she produced the licence issued in 1964 which has the name of Alice Nyambura Maruri on L.R.1284. Their parents obtained tea seedlings as shown by the Growers Plant Permit produced as **Defence Exhibit 3 & 4** dated 2<sup>nd</sup> April 1970.

They conducted search at the Land Registry and found the land is registered in their father's name. Their father died in 1979 and their mother was sued by Protestor's father in **HCCC No 2612 of 1981**. The case was dismissed for want of prosecution as shown by **Defence Exhibit 6**. Their mother filed **Succession Cause 262 of 1995 Kiambu Law Courts** and before she obtained confirmed grant and distributed the deceased's estate she died in May 1997.

In 1998 the Protestor filed **Suit 3 of 1998** and the same was dismissed as shown by **Defence Exhibit 7**.

She learnt that the Protestor filed Succession Cause in the present Court file after he obtained confirmed grant. The children of the deceased were not aware of the matter and were not consulted and did not give consents.

George Maruri (DW2) son of the deceased born in 1954 stated that he has been on the suit property **L.R. No Limuru/Bibirioni/1284** since birth to date. Their parents planted tea plantation in 1964. He was/is not aware of any sale of land by his father to anyone. The first time he learnt of the Protestor's claim was in 1981 when his mother was sued by Protestor's father. He stated that if land was sold under Kikuyu Customary Law elders were involved and in this case no elder confirmed the fact of sale. He also asserted that there was no sale agreement of the land produced to prove the sale.

He learnt of the matter of sale when the Protestor came with Police Officers on their land and the Protestor showed them the Court order, the confirmed grant. They had the confirmed grant revoked.

#### **DETERMINATION:**

##### **PROTESTOR'S SUBMISSIONS:**

The Protestor submitted that he is administrator of his father's estate vide **Succession Cause 369 of 1997 P.M's Court Kiambu**.

During hearing, he presented the 1st Sale Agreement of 3<sup>rd</sup> July 1966, which states the purchase of 2 acres was Kshs. 3600/- paid by his father to the deceased herein.

PW 2 confirmed writing both Agreements.

Their father took possession of 2 acres in 1966 and planted Tea Plantation as per the license **No. LM 0157** and was cultivating the land up to 1981 which was 15 years and in law he became an adverse possessor.

After the deceased's death in 1979, his father was evicted from the 2 of the deceased's land acres and he died on 12<sup>th</sup> May 1996, The

Protestor filed **Tribunal Case No. Land Case 16/20/41** of 26<sup>th</sup> November 1997 concerning **L.R No. Limuru/Bibirioni/1284** and the Tribunal upheld the Protestor's claim of 2 acres from the deceased's estate.

The protestor filed a Petition in the instant Succession Cause and obtained grant and confirmed which was later revoked by consent of all parties.

The Protestor filed **ELC No 379 of 2013** claiming 2 acres from suit property **Limuru/Bibirioni/1284** which was part of the deceased's estate.

#### **PETITIONERS' SUBMISSION**

The Petitioners submitted that the Protest cannot be heard and determined as the same was canvassed before this Court during the hearing of Summons for Revocation of Grant dated 16<sup>th</sup> April 2009.

Secondly that, the Protest is barred by the principle of *res judicata* as provided by **Section 7 of Civil Procedure Act** and referred to in case of; **William Koross vs Hezekiah Kiptoo Komen & Others C.A.[2015] eKLR**;

*“With all due respect, we very much doubt that the distinctions the*

*Learned judge referred to can hold. Res judicata, which means literally and simply ‘the case is decided’ is embodied in Section 7 of the Civil Procedure Act, 2010 in pre-emptory exclusionary terms...”*

Thirdly that, the issue of the Protest was determined by the orders of GBM Kariuki on hearing the application for revocation of grant dated 16<sup>th</sup> April 2009.

Fourthly that, the Protestor cannot rightly and legally claim interest over land use by adverse possession and by way of purchaser's interest at the same time because as was determined in **Gachuma Gacheru vs Maina Kabuchwa [2016] C.A.**, the judges held that the burden is upon the person claiming adverse possession to prove claim on a balance of probability and further in the case of **Kimani Ruchine vs Swift Rutherford & Co Ltd (1980) High Court** the Court provided as follows;

*“The Plaintiffs have to prove that they have used this land which they claim, as of right; nec vi, nec clam, nec precario (No force, no secrecy and no evasion). So the Plaintiffs must show that the Company had knowledge (or means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purpose or by any endeavours to interrupt or by any recurrent consideration; See Wanyoike Gathire vs Bervely (1965) EA 514 per Miles J”*

The petitioner submitted that the Protestor cannot claim to have inherited the land and also depose the claim of adverse possession of **Limuru /Bibirioni/1284** as he had not instituted such claim in Court. The Protestor filed the same in **ELC 379 of 2013**. The Protestor stated that he lived on **Limuru Bibirioni /2856 and not 1284**.

On whether the Protestor has a valid claim in the land, the Petitioner claimed the genuine agreement of Sale was not produced or any evidence tendered to confirm payment of the purchase price. As to the tea plantations the Protestor claimed his father planted, the KTDA licence produced and purchase of seedlings did not have the land reference number and confirm that the same was on the suit property.

#### **ANALYSIS**

This Court has considered the pleadings, oral evidence and documents produced and finds as follows;

The Sale agreements that depict sale of 2 acres by Deceased to Protestor's father and were produced by PW2 are copies and not original documents.

They consist of;

1) Letter dated 3<sup>rd</sup> July 1966 in Kikuyu and copy translated in English; which in a nutshell states as follows;

*“The seller (not named) has sold Jairo Kiambuthi, 1 acre of his shamba on the side of the entrance at ksh 1,200/- and the acre will be from Title deed no 782.*

*William Maruri has received Ksh 800/- and the balance is Ksh 400/-*

*Buyer (did not sign)*

*Seller –Signature*

*Nyambura (wife to Seller-mother of Petitioners) carried the money*

*15<sup>th</sup> July 1966 -Nyambura collected Ksh.40/- at home*

*9<sup>th</sup> September 1966- Nyambura Wife of Maruri collected Ksh 100/-*

*8<sup>th</sup> September 1966 I will give Maruri Ksh.5/-*

*10<sup>th</sup> October 1966 William Maruri Mburu carried Ksh.200/-*

*7<sup>th</sup> November 1966 William Maruri carried Ksh.400/-*

*15<sup>th</sup> November 1966 “ “*

*I have received Ksh 100/- from Jairo Kiambuthi it is me William Maruri*

*18<sup>th</sup> December 1966, William Maruri has received and taken Ksh.100/- from Jairo Kiambuthi.”*

**2) Letter dated 11<sup>th</sup> July 1968 in Kikuyu and copy translated in English provided as follows;**

*“This is the agreement between Jairo Kiambuthi and William Maruri.*

*I as William Maruri have Jairo Kiambuthi’s debt of Kshs 1,272/-*

*Signed by the one with the debt*

*Wife and husband*

*Writer Paul Kamau*

*6<sup>th</sup> May 1970*

*I as William Maruri have sold Jairo Kiambuthi I acre at the price of Ksh 2,400/- and I have been paid Ksh 1837/- and what is remaining is Ksh 563/-*

*Signed by seller”*

**3) Letter dated 1<sup>st</sup> June 1960 in Kikuyu and translated in English**

*“The agreement of 3<sup>rd</sup> July 1966 which was for sale of 1 acre at Ksh 1,200/- the money was paid in Cash.*

*Now I have been sold another 1 acre for the 2<sup>nd</sup> time at Ksh 2,400/- Mr William Maruri has received Ksh 2,337/- and the debt remains at Ksh 63/- The 2 acres are from Title deed no 782. The land is in Sub location Bibirioni in the neighbourhood of Bata Limuru. The witness who was there is James Kabugi.”*

The Agreements are copies and original agreements were not presented in Court to prove authenticity or any explanation provided for producing copies provided by the Protestor.

1<sup>st</sup> 2 letters are not witnessed by any witness; the 3<sup>rd</sup> letter was witnessed by James Kabugi whose whereabouts and/or circumstances were not alluded to during the hearing and the reason why he did not testify in Court.

The translation was by the Advocate representing the Protestor and the Petitioners objected to this and subsequent production of document and translation.

The Petitioners raised the issue that 2 of the documents the author(s) were not disclosed to the Court or called to testify.

This Court notes with concern that the 1<sup>st</sup> and 2<sup>nd</sup> letters seem to have been written by the same hand; yet strangely PW2 wrote his name as the author only in the 2<sup>nd</sup> letter and not the first one. This in the absence of originals strongly suggests it was an afterthought and his name inserted later.

Also as raised by the Petitioners in their submissions that if PW2 was present and wrote the 2<sup>nd</sup> letter as alleged; and he stated he is 64 years old (in 2015) and he was born in 1951, then it means that at the time of writing the Agreement he was 15 years old and a minor and thus baffling that he drew the agreements for sale.

All letters/Agreements were not signed by both parties seller and buyer to signify agreement on what was sold, paid for and issue of

possession or occupation. The Agreements do not disclose witnesses or persons present or as was the custom then any elders present to witness the sale.

It is also strange that these agreements were in the sole custody of only one party the buyer and no copy was given to the seller. No confirmation of what was owed and when all payments were made.

Finally, the 1<sup>st</sup> Letter /Agreement is written in William Maruri selling land in the 1<sup>st</sup> paragraph. The rest shows his name and his wife Nyambura collecting money from Protestor's father's home. So was the document written on William Maruri's behalf or Jairo Kiambuthi's behalf or both? If both, then each party ought to have had a copy of what was written.

The 2<sup>nd</sup> letter depicts the goings of 11<sup>th</sup> September 1968 yet in the same letter, events of 6<sup>th</sup> May 1970 are also documented in the same Agreement/Letter. Does this fact of events of 2 years apart are recorded in the same document not create suspicion that the information was later inserted and possibly not true?

Cumulatively the import of these letters /agreements does not confirm or prove on a balance of probabilities that there was a sale of 2 acres from **Bibirioni/Limuru 1284** by deceased to Protestor's father. No-one in the neighbourhood testified that the sale occurred and/or that at any time the Protestor's family resided on the said suit property for any period of time.

As to planting tea seedlings, both Protestor's witnesses and Petitioners all confirmed growing tea and produced licences but none of them included land reference numbers. There is no evidence that the tea was on the contested 2 acres of land.

Therefore, the claim of adverse possession based on the Petitioner's submissions that this Court concurs with the Petitioners submission outlined above; that it is not a proved claim.

Lastly, this Court notes that during the lifetime of the deceased there was peace and harmony with regard to the land in question. Disputes arose and litany of cases were filed after his demise. He died in 1979, 14 years after he allegedly sold the 2 acres to the Protestors father. If as they claimed they planted tea on the 2 acres until 1981 when they were evicted by the deceased's widow, why and what prevented them from having the said 2 acres hived off and transferred to the Protestor's father's name during the deceased's lifetime? The search documents in the Court file show that the suit property remained in the deceased's name.

With regard to the Petitioners claim that the Protest should not be canvassed as it was *res judicata*, the position is not borne out by the Court record. The record confirms that on 22<sup>nd</sup> February 2012 Hon Justice GBM Kariuki gave directions for summons for revocation to be heard by *viva voce* evidence. On 30<sup>th</sup> April 2012, the matter was compromised by Consent Advocates of both parties that the grant be revoked and a new grant be issued to the present administrators. Therefore the issue of 2 acres claim from the deceased's estate was not canvassed.

The various cases referred to arose upon demise of the deceased over the suit property. **HCCC 2612 of 1981** was filed by the Protestor's father against the deceased's widow. It was dismissed for want of prosecution. The Protestor filed **Tribunal Case 16/20/41** of 26<sup>th</sup> November 1997. The award was in favour of the Protestor but the proceedings were in the absence of the Petitioners who failed to attend the Proceedings. Then **SPM Kiambu Court Land Case No 3 of 1998** was dismissed. There is **ELC Case No 379 of 2013 (O.S)** pending determination.

This Court upon evaluation of the evidence on record finds that the Agreements and/or letters detailing the alleged sale /purchase of 2 acres of the suit property do not conclusively confirm the sale due to the highlighted anomalies. Among the witnesses who testified, none of them witnessed the sale of or circumstances of the sale, save for what they were told. PW2 did not strike this Court as one who was old enough then to have written the agreements and confirm himself as writer in one agreement and not the other yet both seem to be by the same hand. This Court did not rely on his evidence.

## **DISPOSITION**

- a) Therefore the Protest filed on 18<sup>th</sup> December 2012 is dismissed.**
- b) The grant issued on 30<sup>th</sup> April 2012 is confirmed by virtue of summons for confirmation filed on 28<sup>th</sup> January 2013 in terms of list of beneficiaries, list of assets available for distribution, mode of distribution and consents by the beneficiaries.**
- c) Each party to bear its own costs.**

**DELIVERED SIGNED & DATED IN OPEN COURT ON 4<sup>TH</sup> JUNE 2018**

**M.W.MUIGAI**

**JUDGE OF FAMILY DIVISION OF HIGH COURT**

**IN THE PRESENCE OF PARTIES/COUNSEL**

**MR MWAURA SHAIRI FOR THE APPLICANT/PROTESTOR**

