



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT EMBU**

**E.L.C. CASE NO. 28 OF 2017**

**1. ALEXANDER NYAGA MWAKE**

**2. CHARLES MUNYI NJIRU**

**3. JOHN NGARI KAUMBUTHU**

**4. BARNABAS NYAGA KAUMBUTHU**

**5. MBAKA ATHAT RUMBIA**

**6. ANTONY MWANGI NJIRU**

**7. CECILIA NJURA ETHAN.....APPLICANTS**

**8. JOHN MWANIKI MWAKE**

**9. NJERU ETHA**

**10. SIMBA ATHA**

**11. PETERSON NJERU MERU**

**12. BENEDICT NGARI NYAGA**

**VERSUS**

**JOHN MWANIKI MAKENGE.....1<sup>ST</sup> RESPONDENT**

**ESPON N.T. MAKENGE.....2<sup>ND</sup> RESPONDENT**

**ALFRED NGIRI MARANGLI.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**A. Introduction**

1. By an originating summons dated 18<sup>th</sup> August 1997 and amended on 4<sup>th</sup> October 2017 expressed to be brought under **Order 37 Rules 1 (a), (b), (e) & (g) and Rule 2 (c)** of the **Civil Procedure Rules** the Applicants sought determination of the following questions:

a) Whether land Title Nos. Nthawa/Riandu/1568, 1569, 1570, 1571, 1793, 1794, 1796, 1797, 1798, 281 and 287 currently registered in the names of the late Timothy Makenge Mucogo and Nthawa/Riandu/5916 registered in the name of Espon N.T. Makenge and Nthawa/Riandu/5917 registered in the name of Alfred Ngiri Marangi are Keere clan land liable to be distributed amongst Keere clan members who are landless or who were not allocated any clan lands at the time including the Applicants herein.

b) Whether the late Timothy Makenge Mucogo, Espon N.T. Makenge and Alfred Ngiri Marangi were registered as proprietors of the above land Title numbers in paragraph 1 above as Trustee for all landless Keere clan members including the Applicants herein he being their chairman then.

c) Whether the first, second and third Applicants herein having been elected as chairman, secretary and treasurer respectively of all the current Applicants who ought to have been allocated Keere clan land by the late chairman of the Keere clan Timothy Makenge Mucogo before his death but have not been allocated any; should be registered as Trustees in the land parcels set out in paragraph 1 above for the benefit of all the Applicants as the current rightful beneficiaries of the aforesaid but undistributed land parcels.

d) If the court's findings in question numbers 1, 2 and 3 above are in the affirmative, whether the ruling of this court should be registered against all the suit land parcels in paragraph 1 above and override the confirmation of grant of probate to the Respondent herein in Succession Cause No. 65 of 1995 issued by the Principal Magistrate's Court in Embu.

e) If the answer to issue number (d) above is in affirmative, and in case of failure by the Respondent to surrender the original land titles to the District Land Registrar Embu or Mbeere Districts for cancellation should the respective District Land Registrar Embu or Mbeere District proceed to automatically issue new title deeds and cancel the old ones in the names of the late Timothy Makenge Mucogo the Respondents?

f) Who is entitled to costs of this application and against whom?

**B. The Applicant's case**

2. The said originating summons was supported by the near identical affidavits sworn by the 1<sup>st</sup> Applicant, Alexander Nyaga Mwake, on 18<sup>th</sup> August 1997 and 4<sup>th</sup> October 2017 respectively. The Applicants contended that at all material times the late Timothy Makenge Mucogo (*the deceased*) was registered as proprietor of the suit properties on behalf of members of Keere clan of the Mbeere tribe during the land adjudication process. It was contended that the deceased had during his lifetime distributed some of the land he was holding on behalf of Keere clan but had not distributed the suit properties by the time of his demise in 1989 or thereabouts.

3. It was further pleaded that upon the demise of the deceased his son, Obadiah Makenge, took out letters of administration in *Embu PMCC Succession Cause No. 65 of 1995* whereby he listed the suit properties amongst the assets of the deceased for the purpose of distribution solely to his family members. The Applicants stated that upon learning that a certificate of confirmation of grant had been issued in the said succession cause they lodged cautions against the suit properties and filed the instant suit in order to protect their beneficial interest as Keere clan members.

#### **C. The Respondent's response**

4. The Respondents filed a replying affidavit sworn by Obadiah Ileri Makenge on 3<sup>rd</sup> November 1997 in answer to the said originating summons. He stated that his deceased father was never the chairman of Keere clan but he was merely appointed to represent the clan in land disputes with other clans.

5. It was further stated that not all Keere clan land was registered in the name of the deceased and whatever parcels were registered in his name on behalf of Keere clan were actually transferred to the beneficiaries before his death. The deponent listed several parcels of land which appear to have been transferred by the deceased to some of the Applicant's parents and relatives.

6. The Respondents further stated that the suit properties solely belonged to the deceased and that they intended to distribute them through the succession proceedings as part of the estate of the deceased. They contended that the cautions lodged against the suit properties were unlawfully registered.

#### **D. Directions on the hearing of the summons**

7. Although the suit was initially to be canvassed through *viva voce* evidence, the advocates for the parties recorded a consent on 30<sup>th</sup> January 2020 to have the suit disposed of on the basis of the witness statements, affidavits, documents on record and the written submissions of the parties. Accordingly, the court adopted the consent of the parties and directed the Applicants to file and serve their written submissions within 30 days. The Respondents were granted 30 days upon the lapse of the Applicants' period to file theirs. The record shows that whereas the Applicants filed their written submissions on 24<sup>th</sup> April 2020, the Respondents' submissions were not on record by the time of preparation of the judgement.

**E. The issues/questions for determination**

8. The Applicants framed six (6) issues for determination in the proceedings. The court shall determine those 6 questions in the order in which they appear. However, the 1<sup>st</sup> and 2<sup>nd</sup> issues shall be combined and dealt with together since the key issue raised in both is that of trust. Accordingly, the court shall consider the following issues for determination:

*a) Whether the late Timothy Makenge Mucogo (the deceased) was holding the suit properties in trust for Keere clan or Mucogo house.*

*b) Whether the Applicants should be registered as proprietors of the suit properties in place of the Respondents to hold them on behalf of Keere clan.*

*c) Whether the judgement/decree of the court should be registered against the suit properties and whether it should override the succession proceedings.*

*d) Whether the Land Registrar should cancel the Respondents' titles and issue fresh titles to the Applicants.*

*e) Who shall bear the costs of the suit.*

## **F. Analysis and determinations**

a) Whether the late Timothy Makenge Mucogo (deceased) was holding the suit properties in trust for Keere clan.

9. The court has considered the affidavits and documents filed on behalf of the Applicants as well as the witness statements of Alexander Nyaga Mwake, Antonina Muthoni, Mbaka Atharuri-Mbia, Anselimo Njeru Mbanda and Sospeter Nyaga Rurago. The court has also considered the documents and replying affidavit filed on behalf of the Respondents as well as the witness statements of John Mwaniki Makenge, Ngari Mwereca and Justino Ngari Mbogo.

10. The Applicants asserted that the deceased was the Keere clan leader at the material time he acquired the suit properties and that it was in that capacity that he was registered as proprietor on behalf of the clan. It was the Applicants' case that Keere clan had a long-standing land dispute with Mururi clan (represented by Manunga Ngochi) which escalated into *Minister's Land Appeal Case No. 22 of 1976* whereby the deceased was awarded the suit properties on behalf of Keere clan. The said dispute escalated further into the High Court and ultimately to the East African Court of Appeal whereby the deceased prevailed against Manunga Ngochi of Mururi clan in *Civil Appeal No. 25 of 1978*. This case is currently reported in the Kenya Law Reports as **Timotheo Makenge V Manunga Ngochi [1976-80] 1 KLR 1136**.

11. The 1<sup>st</sup> Respondent contended in his witness statement dated 6<sup>th</sup> December 2017 that in **Minister's Land Appeal Case No. 22 of 1976** the deceased represented only his Mucogo house of Keere clan hence all the suit properties were awarded to him to share solely with his Mucogo household members. It was further contended that the deceased shared out some of the properties to eligible beneficiaries and that the remainder of the properties belonged to the deceased absolutely. The other two witnesses supported the 1<sup>st</sup> Respondent's contention that the suit properties belonged solely to Mucogo house of Keere clan.

12. The court has fully considered the evidence of the parties. The court has also carefully considered the proceedings and decision in *Minister's Land Appeal Case No. 22 of 1976* and the judgement of the East African Court of Appeal reported as **Timotheo Makenge V Manunga Ngochi [1976-80] 1 KLR 1136**. The court has also considered the evidence of Anselimo Njeru Mbanda who hails from Nditi clan who was a retired senior chief. The court is satisfied on the basis of the evidence on record that the suit properties were acquired by the deceased on behalf of his Keere clan and not just his Mucogo house. Although the Minister's decision indicated that he was awarded the properties the subject of the appeal, the Minister clearly indicated that he was to share them with his clansmen. That is quite clear from his decision which appears at pg. 47 of the Applicant's trial bundle where the Minister stated as follows:

**“Judgement:**

**Appeal is allowed.**

**Order:**

**Parcel Nos. 265, 973, 1463, 1455, 972, 1394, 1378, 1379, 1380, 1419, 266, 267, 268, 270, 271, 273, 272, 274, 275, 276, 277, 278, 280, 281, 282, 283, 284, 285, 286, 287, 289 and portions of parcel Nos. 319 and 320 all situated in Riandu Adjudication Section in Embu District. Awarded to Timotheo Makenge and his clan.” (emphasis added)**

13. The court has also noted that the Court of Appeal correctly characterized the land dispute as a dispute between Keere clan, on the one hand, and Mururi clan on the other hand. It was not a dispute between Mucogo house and Mururi clan or between the deceased and Muriri clan. There is some evidence on record (from both sides) to demonstrate that the deceased had actually distributed some of the parcels the subject of the Minister’s appeal to some clan members. There is also evidence our record to demonstrate that the deceased passed on before he could complete the process of distribution hence the reason why the suit properties remained in his name.

14. In the premises, the court finds and holds that the deceased and the Respondents were subject to a trust in that they were holding the suit properties on behalf of members of Keere clan. It does not matter that the Applicants or some of their relatives may have obtained some other portions of clan land earlier. Such acquisition could not relieve the deceased and the Respondents of their trust obligations towards Keere clan hence it would not justify the Respondents’ appropriation of the suit properties to themselves through succession proceedings. Accordingly, the 1<sup>st</sup> and 2<sup>nd</sup> issues are answered in the affirmative.

*b) Whether the Applicants should be registered as proprietors of the suit properties on behalf of Keere clan.*

15. The Applicants sought to be registered as proprietors of the suit properties as trustees in place of the Respondents. In the originating summons the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Respondents claimed to be the current officials of the aggrieved clan members. The court is of the opinion that since the original trustee is deceased and his sons were not faithful to the trust then it would be just to allow the Applicants to take over the

trust. The court has already found that the deceased was not the absolute proprietor of the suit properties. He was merely registered as proprietor because he was the leader or representative of the clan during the land adjudication process and the subsequent cases.

16. The court has noted from the record of proceedings that the 2<sup>nd</sup> & 3<sup>rd</sup> Applicants did not pursue the matter. It was only the 1<sup>st</sup> and 5<sup>th</sup> Applicants who prosecuted the matter. In the premises, the court is inclined to direct that the 1<sup>st</sup> Applicant be registered as proprietor of the suit properties in trust for all the entitled beneficiaries of Keere clan.

c) Whether the judgement should be registered against the suit properties and override the certificate of confirmation of grant

17. The real question for determination here is what would be the effect of the judgement upon the suit properties which have already been subjected to succession proceedings and distributed amongst the family members of the deceased. The court has already found that the suit properties were all along held in trust by the deceased on behalf of Keere clan members. The deceased must have known as much and it would appear that he had distributed some of the parcels the subject of the Minister's appeal to some beneficiaries from Keere clan. The Respondents as children of the deceased must have been aware that the suit properties were trust properties at all material times including the time they conducted succession proceedings. The court is of the opinion that the suit properties were irregularly included in *Succession Cause No. 65 of 1995* since they did not constitute the free property of the deceased within the meaning of the **Law of Succession Act (Cap. 160)**.

18. In the premises, the court is inclined to direct that the decree of the court be registered against the suit properties and that the decree shall override any transactions entered on the basis of the certificate of confirmation of grant in *Embu RMCC Succession Cause No. 65 of 1995*. A court of law should not allow the process of succession proceedings to be used to defraud or deprive Keere clan of their clan land. Accordingly, the 4<sup>th</sup> issue is answered in the affirmative.

d) Whether the Land Registrar should issue fresh titles should the Respondents fail to surrender the original titles.

19. Although the court has found for the Applicants on all the preceding issues, the court is not inclined to direct that new titles should be issued to them. The court is, of course, inclined to direct the Land-Registrar Embu/Mbeere to recall and cancel the existing titles for the suit properties which the Respondents may be holding. Should they fail to surrender them, the Land Registrar may still publish the relevant

gazette notices and proceed to cancel them.

20. The court is not, however, inclined to direct the Land Registrar to issue fresh titles to the 1<sup>st</sup> Applicant lest Keere clan members find themselves in a similar quagmire in the next ten years or so. Since the suit properties belong to Keere clan, they should be allocated to the deserving beneficiaries within a reasonable period after which the ultimate owners may be issued with individual titles. The genesis of the current dispute was the registration of land and issuance of titles to an individual who did not fully discharge his trust obligations to the clan for several decades. That process should not be repeated after the conclusion of this suit.

e) *Who shall bear costs of the suit?*

21. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event as stipulated in the proviso to **Section 27 of Civil Procedure Act (Cap. 21)**. As such, a successful litigant should normally be awarded costs of an action or proceedings unless, for good cause, the court directs otherwise. See **Hussein Janmohamed & Sons V Twentsche Overseas Trading Co. Ltd [1967] E A 287**. The court finds no good reason why the successful litigants should not be awarded costs of the suit. Accordingly, the 1<sup>st</sup> and 5<sup>th</sup> Applicants shall be awarded costs of the suit to be borne by the 1<sup>st</sup> and 3<sup>rd</sup> Respondents.

#### **G. Conclusion and disposal orders**

22. The upshot of the foregoing is that the court finds merit in the Applicants' originating summons dated 18<sup>th</sup> August 1997 and amended on 4<sup>th</sup> October 2017 and makes the following determinations thereon:

a) ***That** land Title Nos. Nthawa/Riandu/1568, 1569, 1570, 1571, 1793, 1794, 1796, 1797, 1798, 281 and 287 currently registered in the names of the late Timothy Makenge Mucogo and Nthawa/Riandu/5916 registered in the name of Espon N.T. Makenge and Nthawa/Riandu/5917 registered in the name of Alfred Ngiri Marangi are Keere clan land liable to be distributed amongst Keere clan members who are landless or who were not allocated any clan lands at the time.*

b) ***That** the late Timothy Makenge Mucogo, Espon N.T. Makenge and Alfred Ngiri Marangi were registered as proprietors of the*

above land Title numbers in paragraph (a) above as Trustee for all landless Keere clan members.

c) **That** the 1<sup>st</sup> Applicant should be registered a Trustee of the land parcels set out in paragraph (a) above for the benefit of all the rightful beneficiaries of the Keere clan land. However, no title deeds should be issued to the 1<sup>st</sup> Applicant but individual titles shall be issued to the ultimate beneficiaries upon allocation.

d) **That** the court's decree shall be registered against all the suit land parcels in paragraph (a) above and override the confirmation of grant of probate to the Respondent herein in Succession Cause No. 65 of 1995 issued by the Principal Magistrate's Court in Embu.

e) **That** should the Respondents fail to surrender the original land titles to the Land Registrar Embu or Mbeere Districts for cancellation the respective Land Registrar Embu or Mbeere District shall proceed to cancel the old ones in the names of the late Timothy Makenge Mucogo and the Respondents.

f) The 1<sup>st</sup> and 5<sup>th</sup> Applicants are hereby awarded costs of the suit to be borne by the 1<sup>st</sup> & 3<sup>rd</sup> Respondents.

Orders accordingly.

**JUDGEMENT DATED** and **SIGNED** in Chambers at **EMBU** this **14<sup>TH</sup> DAY** of **MAY 2020** in the absence of the parties due to the prevailing Covid-19 situation. The Judgement was transmitted to Rose W. Njeru Advocates for the Applicants and Mogusu & Co. Advocates for the Respondents through the email addresses which they provided.

**Y.M. ANGIMA**

**JUDGE**

14.05.2020