



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**SUCCESSION CAUSE NO.396 OF 1994**

***In the Matter of the Estate of Stanley Maore Alias Stanley Maore M'barutua (Deceased)***

**GEOFFREY M'MAUTAM'BARUTUA.....PETITIONER**

**VERSUS**

**M'MAUTAKAMUNDE.....OBJECTOR**

**JUDGMENT**

**Use of evidence of witness who has died**

[1] By the judgment of the Court of Appeal dated 13<sup>th</sup> day of June 2013 in **COURT OF APPEAL AT NYERI, CA NO 220 OF 2009**, the ruling and order dated 3<sup>rd</sup> July, 2000 by this court (Emukule J) was set aside; and the petition and objection in this cause were remitted for rehearing by this court before a judge other than Emukule J. When this cause came up for hearing on 6<sup>th</sup> September 2016 the parties recorded a consent that the evidence which was recorded by this court earlier and before the Appeal herein be the evidence for purposes of a decision on the petition and the objection. Accordingly, the court ordered that:

**Evidence recorded earlier by the court shall now be evidence for purposes of determining this case in accordance with the decision of the Court of Appeal.**

[2] As a meticulous court, I wish to be properly grounded on this course of action taken by the parties. Mr. Riungu, learned counsel for the Objector submitted to the court that the objector is now deceased. He stated further that; the only two witnesses who were conversant with the facts of this case cannot testify because one is deceased and the other is senile. There was no medical report produced to back that allegation but I have no reason to doubt that submission. That is not the end of the ominous state of affairs in this case. Despite substitution of parties, the other two witnesses, i.e. the son (personal representative) and daughter of the deceased objector are not conversant at all with the facts of this case. After evaluating all their options parties agreed that the evidence recorded earlier to be evidence for purposes of a decision on the petition and the objection herein. What does the law say about this course of action?

**Borrowing a leaf**

[3] Nyamwea J, although it was a criminal appeal, dealt with section 34 of the Evidence Act and she made the following statements and findings in the case of **Daniel Mutiso Ngui vs. Republic [2015] eKLR** that:-

**On the second issue as to whether it was necessary to produce the exhibits during the de novo trial, this Court notes that the term de novo means that the case was to begin afresh from the beginning. Black's Law Dictionary, Eight Edition defines a de novo trial as follows:**

**“A new trial on the entire case – that is, on both questions of fact and issues of law – conducted as if there had been no trial in the first instance.”**

**The Evidence Act in section 34 also provides as follows as regards the admissibility of evidence given in previous proceedings:**

**“(1) Evidence given by a witness in a judicial proceeding is admissible in a subsequent judicial proceeding or at a later stage in the same proceeding, for the purpose of proving the facts which it states, in the following circumstances—**

**(a) where the witness is dead, or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or where his presence cannot be obtained without an amount of delay or expense which in the circumstances of the case the court considers unreasonable, and where, in the case of a subsequent proceeding—**

**(b) the proceeding is between the same parties or their representatives in interest; and**

**(c) the adverse party in the first proceeding had the right and opportunity to cross-examine; and**

**(d) the questions in issue were substantially the same in the first as in the second proceeding.**

**(2) For the purposes of this section—**

**(a) the expression “judicial proceeding” shall be deemed to include any proceeding in which evidence is taken by a person authorized by law to take that evidence on oath; and**

**(b) a criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused”**

The judge went on to state that:-

**The import of the foregoing provisions is that even if a de novo trial is legally a new trial, evidence that was produced in previous criminal proceedings between the parties and where the accused were given an opportunity to cross examine on the same is admissible.**

[4] In this case, a re-hearing of the case was ordered by the Court of Appeal. Evidence had been adduced in this case before the order for re-hearing of this cause was made by the Court of Appeal. Critical witnesses who testified are either dead or are incapable of giving evidence. I note that the parties were given an opportunity to cross-examine all the witnesses- including those who are now deceased or incapable of giving evidence. And, under section 34 of the Evidence Act, such evidence together with exhibits that was adduced, recorded and admitted is admissible in evidence at a later stage in the same proceeding. Therefore, the evidence on record is admissible in this case at this stage in time. I am now properly grounded on this judicial course and I will proceed to determine the petition and the objection on the basis of the evidence previously recorded in these proceedings.

### **Back to the trenches**

[5] By the above rendition, we are back to the old trenches. I will now draw water from the ancient well of evidence. I need not rehash the evidence herein as it has been recorded, typed and is part of record. But I will accordingly evaluate it in order to make a decision in this cause. From the record and evidence adduced, these proceedings relate to the estate of Stanley Maorealias Stanley

MaoreKM'BarutuaKanyui(the deceased). According to the Certificate of death herein he, died on 10<sup>th</sup> August 1992 at Meru Hospital. But, much controversy has emerged on the date of death. The original objector is deceased, thus, reference to the objector shall mean the personal representative of the deceased objector.

[6] The petitioner, applied for grant of letters of administration in his capacity as the brother of the deceased. According to the petition, the deceased was survived only by the Petitioner. And, the only asset of the deceased is L.R. NO KIEGOI/KINYANKA/1006 measuring approximately 1.40 ha (hereafter the suit property). But, on 27<sup>th</sup> September 1995, M'MautaKamunde, the deceased objector filed an objection to the making of a grant and also filed a cross-petition for a grant of letters of administration of the estate of the deceased. His major ground for filing the objection and cross-petition was that he was the *bona fide* purchaser of the suit property, the only asset of the deceased. Parties called evidence in support of their respective positions.

### **Objector's case**

[7] M'MautaKamundi testified on 15<sup>th</sup> day of May 2006. He told the court that he had bought the suit property from the father of the deceased in 1978. He produced an agreement to that effect (OB EXH1). He also produced record of registration which showed the land was registered in the name of the deceased (OB EXH2). According to him, the deceased was already dead at the time of the agreement. It was his testimony that the deceased was married but with no child. He also said that the deceased's widow was not at home at the time of the agreement as she had gone back to her father's home. His evidence was that, at the time of the agreement, the deceased's father one IsayaM'BarughwaKajugi was the rightful beneficiary of the estate of the deceased. He said that Isaya also had two other sons; John Kiunga who deserted him and went to Mombasa; and Geoffrey M'MautaM'Baruthwa who was born out of wedlock. This Geoffrey is the petitioner. He said that after paying the purchase price he took possession of the land. He, however, did not construct any dwelling house on but he planted 3000 tea bushes and yams and installed water pipes on the land. It was his testimony that, other than himself and his son M'Mwereru no one else uses the suit land. His testimony was that he has never moved from and nobody can remove him from his land.

[8] In cross-examination, he defended the purchase and admitted that the person with the right to file this cause is the petitioner except he has interest in the matter.

[9] Salome Karoki also testified. She said that she was the widow of the deceased but has since remarried. She stated that the deceased died in 1969 and not in 1992 but on a date she could not remember. She also stated that by the time of his death, the suit land was registered in the name of the deceased. She gave further evidence that she gave the title deed to the suit land to Isaya, the father of the deceased. In cross-examination she stated that she is not able to understand how the land could have been registered in the name of the deceased in 1980 whereas he died in 1969.

[10] David Kanathi also testified and stated that he knew the deceased, Isaya the father of the deceased, widow of deceased and the objector. He stated that the deceased died in 1969. He also said that he witnessed all transactions and signed the sale agreement before an advocate between the father of the deceased and the objector in 1978. The objector then took possession of the suit land and has been using the land since then. He told the court that the petitioner has never used the suit land as he has another land nearby. He did not complete evidence before stating that Isaya died soon after the objector took possession of the suit land. He confirmed that the suit land was registered in the name of the deceased.

### **Petitioner's case**

[11] The Petitioner also testified in support of his petition and in opposition of the objection. He stated that he was the son of Isaya and a step-brother to the deceased. He said that the suit land was given by his father but was registered in the name of the deceased. He denied knowledge of sale of this land to the objector. He also refuted claims that the deceased died in 1969. According to him, the deceased died in August 1992 at Meru General Hospital. He stated that the objector has no house on the suit land. He said

that he is the surviving brother of the deceased and so the rightful beneficiary to his estate. He therefore prayed that the objection be dismissed and grant of representation be issued to him.

[12] In cross-examination, the Petitioner stated that in 1974 Isaya, their father distributed his land to his children including the Petitioner and he gave the suit land to the deceased as his inheritance. He told the court that the objector threatened him with death over the suit land.

[13] The Petitioner called Stanley NyingiKiambatiKimunya as a witness. He said that he knew both the petitioner and the objector. He was of the view that since the suit land belonged to the deceased, it should be inherited by the petitioner who is the brother of the deceased; and that the objector could not inherit anything from the deceased. He, however, stated that the objector has been in exclusive possession of the suit land and taking care of the tea bushes.

[14] The Petitioner's witness known as Benjamin Mutua also testified and stated that the deceased died before his father.

## **DETERMINATION**

### **Issues**

[15] I see the following major issue to fully encapsulate all the issues in controversy, that is to say:-

#### **1. Whether the suit land is estate property or it had been validly sold by IsayaM'Barrurua and John Kiunga to the Objector.**

Under this issue, I will determine whether the suit land could have been or was validly sold. I will also determine the thorny issue on when the deceased died. And ultimately be able to determine the objection, the petition and cross petition.

### **Death of deceased**

[16] The objector did not give the exact date or year when the deceased died. He only stated that the deceased had died by the time of the agreement herein, i.e. 10<sup>th</sup> August, 1978. I note that the said agreement also described Stanley Maore as deceased. But, again, the actual date of his alleged death was not stated in the agreement. However, the objector's witnesses including Salome Karoki who was married to the deceased stated that the deceased died in 1969. On the other hand, the Petitioner claimed that the deceased died on 10<sup>th</sup> August, 1992 and not 1969 as had been alleged by the Objector. Amidst these controversies, I see on record a Certificate of Death No 311117 issued on 16<sup>th</sup> November 1994 in respect of death of Stanley MaoreM'BarutuaKanyui. Clearly, the question as to when the deceased died is in sharp controversy and given the strong objections from the Objector and his witnesses I expected much more to have been done in unravelling this squirm. I must say that 1969 is a long time and 1992 is much more recent time. The gap is huge as to elicit some curiosity even on the part of the court. Unfortunately, the objector did not provide cogent proof that the deceased died in 1969. I will put it in a different but more direct way; there is no evidence that the date of death of the deceased is not 10<sup>th</sup> August 1992 as per the Certificate of Death herein. By implication, the evidence by the Objector attacks the integrity of the Certificate of Death herein. But, the court was not told categorically and no proof was laid before the court that the said Certificate of death was a fraud or forgery. And, nothing would have been easier than for the objector to say so, plead so and proof it to be such in these proceedings. I am saying these things because the law has provided for a clear way of correcting any erroneous entry in the Register of Births and Deaths. See section 28 of the Births and Death Registration Act. In addition, under the said Act and the Penal Code, giving of any false information for purposes of registration or forgery in entering the information on the register of births and deaths is criminal offence punishable under the law. See section 22 of the Births and Death Registration Act that, any person who willfully gives any false information or particulars for the purpose of registration, shall be guilty of an offence and be liable to a fine not exceeding five hundred shillings or to imprisonment for a term not exceeding six months, or to both such

fine and such imprisonment. The objector left much to chance and the gaping holes thereto will consume his remedy. In saying this, I am fully aware that witnesses have died or are incapable of giving evidence in this case. Nonetheless, some of the matters I have alluded to would only have needed to invoke simple procedures in the Births and Deaths Registration Act. At least, it has not been claimed that the Certificate of Death herein does not relate to the same person who was the registered owner of the suit property. Despite all these matters, I will have to fall back to the law in deciding this issue. On the basis of the law, the Certificate of Death produced herein shall be received as evidence of the dates and facts contained therein without any or other proof of such entry. See section 26(4) of the Births and Deaths Registration Act which provides that.

**A certified copy of any entry in any register or return purporting to be sealed or stamped with the seal of the Principal Registrar shall be received as evidence of the dates and facts therein contained without any or other proof of such entry**

Accordingly, but with great trepidation, in the absence of any evidence to the contrary I find that the deceased died on 10<sup>th</sup> August, 1992.

### **Validity of sale agreement herein**

[17] Now that I have found that the deceased died on 10<sup>th</sup> August 1992 as per Certificate of Death herein, could the deceased's father and brother have validly sold the suit land in 1978? Two inextricable things are not in doubt; that the deceased was the registered owner of the suit property and was so registered on 10<sup>th</sup> March, 1980. Therefore, the agreement dated 10<sup>th</sup> August, 1978 predates the registration of the deceased as proprietor of the suit land. The said agreement was also between persons other than the deceased. In any event, from the facts of the case and in accordance with the regime under which the suit land was registered and the applicable law at the time, i.e. the Registered Land Act (now repealed), such registration of the deceased as proprietor of the suit land was first registration which was absolute and could not be impeached unless on account of fraud or trust. In this case, neither fraud nor trust was pleaded and proved in relation to registration of the deceased as proprietor of the suit land. But, at this point, I must admit once again that insinuation that the deceased may have been registered after his death still lingers; but yet still it was another simple matter that could have been channelled through the provisions on rectification of register by the Registrar or by the order of Court under the Registered Land Act (now repealed). Even under the new laws especially Land Registration Act, 2012 rectification of register and title is allowed unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default. The objector did not seem to lay much attention to these processes which could as well have been most apt. Perhaps the death of the original Objector and witnesses may have overwhelmed the personal representative- but these are mere speculations. On the above processes, see a work of the court **In the Matter of the Estate of M' Twerandu M' Irungu (Deceased) Rukaria M' Twerandu vs. Leonard Kimbu Mwanthi [2016] eKLR** that:-

**I should also state that, failure to cite section 143 of the now repealed Registered Land Act in this application for rectification of register does not hold much weight in the face of the elegant provisions of article 159(2) (d) of the Constitution of Kenya, 2010 which completely diminished such technical objections in favour of substantive justice. In any event, this application clearly seeks for rectification of register of the estate property- a matter which is inextricable to the implementation of the grant herein- and sufficient request for purposes of section 143 of the repealed RLA on "Rectification by court". Accordingly, the objection by Mr. Kioga does not help his client's case; in fact it aids the application for an order of rectification of the register especially now that there are no proceedings pending on the ownership squabble herein. Under the new land laws- particularly section 80 of the Land Registration Act, 2012, No 3 of 2010- rectification of register by order of court is permitted in the following terms:-**

### **Rectification by order of Court**

**80. (1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.**

**(2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.**

[18] Accordingly, the upshot of the above analysis is this. In the circumstances of this case, and in light of the evidence before the court, the agreement dated 10<sup>th</sup> August, cannot vitiate the registration of the deceased as the proprietor of the suit land. Therefore, the suit land herein is the estate property to which these proceedings relate. On that basis, I dismiss the objection and the cross petition as it was based on the claim of purchase of the suit property. Given the nature of these proceedings and the circumstances which I have outlined above, I order that each party shall bear own costs of the objection and the cross-appeal. The path is now clear to determine the petition.

### **Grant of letters and confirmation of grant**

[19] There is no pending objection to the making of letters of administration of the estate of the deceased. Under section 39(1) (d) of the Law of Succession Act, the Petitioner has a right to inheritance in the estate of the deceased. Similarly, under section 66 of the Law of Succession Act, the Petitioner is entitled to preference as the person to administer the estate of the deceased. Accordingly I make a grant of letters of administration of the estate of the deceased to the Petitioner herein. But, as much time has passed by, I direct the Petitioner to apply within 14 days for confirmation of grant. It is so ordered.

**Dated, signed and delivered in open court at Meru this 17<sup>th</sup> day of January 2017.**

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**F. GIKONYO**

**JUDGE**

**In the presence of:**

Mr. Kiogora advocate for petitioner

Petitioner – present

Mr. Nyaga advocate for Riungu advocate for objector

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**F. GIKONYO**

**JUDGE**