IN THE COURT OF APPEAL

AT NYERI

(CORAM: GICHERU, KWACH & MULI JJ A)

CIVIL APPEAL NO 153 OF 1989

GEOFFREY MUGAMBI.....APPELLANT

FREDRICK K. MWORIA .....APPELLANT

M'IKIAIRA .....APPELLANT

AND

DAVID K. M'MUGAMBI.....RESPONDENT

JOSEPH MEEME MUGAMBI.....RESPONDENT

JULIUS KIMAITA .....RESPONDENT

MUTHURI M'MUGAMBI .....RESPONDENT

(Appeal from a Judgment of the High Court at Meru (Mr Justice Oguk) dated the 3rd day of August, 1989

in

Civil Suit No 60 of 1984)

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JUDGMENT

Kwach JA. In 1957, during land adjudication in Meru District, Mugambi Imanyara was allocated a piece of land by his clan and was registered as the proprietor of parcel number Abothuguchi/Kithirune/97, measuring 24 acres. At the same time, the clan also gave three, out of his eleven sons by five wives, Justus Mbaya Mugambi, Mbogori Mugambi and Stanley Ntiritu, their pieces which were registered in their names.

Mugambi Imanyara (the deceased), died in 1985, after the institution of the suit in the Superior Court but before the trial and Mikiaira Kagwabii, the third appellant, was substituted as his personal legal representative.

At some stage, the deceased sub-divided parcel number Abothuguchi/Kithirune/97, into 4 portions. Three of these, Abothuguchi/Kithirune/1360, 1361 and 1362, measured 2 acres each. The fourth, number 1363,

measured 18 acres. The deceased then gave parcel number 1360 to his son Samwel Mikiaira Mugambi, number 1361 to another son Geoffrey Kanumbe Mugambi and 1362 to another son Fredrick Mworia Mugambi. The deceased retained for himself parcel number 1363 (the suit land). The deceased sub-divided the suit land into 4 portions as follows:

Abothuguchi/Kithirune/1624 - 5 acres

Abothuguchi/Kithirune/1625 - 5 acres

Abothuguchi/Kithirune/1626 - 5 acres

Abothuguchi/Kithirune/1627 - 3 acres

He transferred parcel No 1624 to his son Fredrick Mworia (Mworia): parcel No 1625 to Geoffrey Mugambi (Geoffrey), also his son, and No 1626 to Richard Mugambi (Richard), also his son. The deceased retained parcel No 1627 for himself.

A dispute then erupted in the family regarding the distribution of family land by the deceased among his sons. Attempts by the clan to settle the dispute amicably failed and 4 of the sons, namely, David Kimuu Mugambi (David), Joseph Meeme Mugambi (Joseph), Julius Kimaita Mugambi (Julius) and Muthuri Mugambi (Muthuri) for whom the deceased had apparently made no provision filed a suit against Geoffrey, Mworia and the deceased each claiming a share in the suit land. They claimed that the deceased, Geoffrey and Mworia had stealthily and unlawfully subdivided and shared it among themselves in complete disregard of the trusts in their favour. For some reason, which is not apparent from the record, Richard, who got 5 acres (No1626) from the suit land, was not joined as a defendant and his portion was not therefore affected and no orders were made against him in the suit. The suit therefore related only to parcels Nos 1624, 1625 and 1627, measuring all together 13 acres. The claim by David, Joseph, Julius and Muthuri, was denied by the deceased, Geoffrey and Mworia. The deceased contended that he had divided his land according to the houses of each of his 5 wives and that he had no more land left to give the 4 sons. Geoffrey and Mworia on the other hand, contended that if the 4 brothers were entitled to any land, they should claim against their respective brothers.

At the trial, Geoffrey, Mworia and Kagwabii, produced what purported to be the will of the deceased dated 20th January, 1983, virtually confirming the respective shares of Geoffrey, Mworia and Richard (5 acres each) in the suit land with a direction that the remainder of his land (3 acres) and personal properties were to be shared among his children in accordance with Meru customary law.

The Judge, quite properly, decided to disregard the will because, although the deceased was said to have died on 14th October 1985, nothing was said about the will until 5th June 1989 when it was suddenly produced by Kagwabii and long after the 4 brothers had closed their case. The will had apparently been drawn by Mr A Mbaya the same advocate who has throughout acted for the deceased, Geoffrey, Mworia and Kagwabii and who must have been aware of the existence of the will and must have known when the deceased died. He has also appeared for Geoffrey, Mworia and Kagwabii in this appeal. The Judge also rejected the contention by Geoffrey and Mworia that David, Joseph, Julius and Muthuri should claim land from their brothers. He considered the position under Meru customary law and declared trusts in favour of David and Joseph over parcels held by Geofrey and Mworia and also declared trusts in favour of Julius and Muthuri over parcel No 1627, which was still registered in the name of the deceased. Thus, David and Joseph got 2 acres each and Julius and Muthuri got one and a half acres each. The Judge made appropriate orders to give effect to the judgment and decree. It is against that decision that Geoffrey, Mworia and Kagwabii (the appellants) have now appealed.

The memorandum of appeal contains some 7 grounds which Mr Mbaya, for the appellants, argued together. The complaint in grounds 1, 2 and 3 is essentially that the Judge misunderstood and misapplied the Meru customary law relating to distribution of land. Mr Mbaya also admitted that the findings on customary law were made without proper or sufficient evidence. On the issue of customary law, the Judge had this to say:

> "Generally in a polygamous family amongst the Meru tribesmen, land is distributed according to the house of each wife. In the instant case, if the land of the first defendant were to be distributed amongst the houses of his wives, then it is only land parcel No Abothuguci/Kithirune/1363 measuring 18 acres which he was holding in his own name. It is also an accepted principle of Meru customary law that a man distributes his properties equally between his sons. It was held by C HE Miller, J (as he then was) in the case of *Maria Wambui & others v Kuria Ndiwi* (Nairobi Civil Appeal No 97 of 1977 – unreported) that –
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> > 'It is a principle of Kikuyu customary law that a man distributes his property equally between his sons and I believe that a similar principle exists among the Merus."

The Judge then referred to section 3(2) of the Judicature Act (cap 8), to lay the basis for the application of customary law, and then continued:

> "I do not think that under Meru customs, a man is entitled to render some of his children landless by giving the whole of his land or a large chunk of it to his few selected children leaving the rest landless."

It was Mr Mbaya's submission that there was no evidence to support these conclusions as no evidence had been called to prove the relevant Meru customary law. That the deceased had made no provision for the respondents cannot be denied. The issue is whether the Judge was entitled to rely on a custom which had not been proved. The law is that if the custom in question is notorious enough, the Court can take judicial notice of it without evidence being called to prove it. Section 59 of the Evidence Act (cap 80) provides that no fact of which the Court shall take judicial notice need be proved. And section 60(1)(a) of the Evidence Act provides that the facts of which the Court shall take judicial notice include all written laws, and all laws, rules and principles, written and unwritten, having the force of law. Customary law falls into this category.

The former Court of Appeal for East Africa in the case of *Kimani v Gikanga* [1965] EA 735, held that where African customary law is neither notorious nor documented it must be established for the Court's guidance by the party intending to rely on it and also that as a matter of practice and convenience in civil cases the relevant customary law, if it is incapable of being judicially noticed, should be proved by evidence or expert opinions adduced by the parties.

In this case, the parties did not adduce evidence to prove the relevant Meru customary law of land distribution. But in my judgment, as the custom is not only notorious but is also documented, the Judge was perfectly entitled to take judicial notice of it and it was not therefore necessary to call evidence to prove it. In chapter 4, page 30, of his *Restatement of African Law* (Vol 2), which covers the Meru and the Tharaka, Contran says:

> "Inheritance under Meru law is patrilineal. The pattern of inheritance is based on the equal distribution of a man's property among his sons, subject to the proviso that the eldest son generally gets a slightly larger share. In a polygamous household, the distribution of land is by reference to the house of each wife equally, irrespective of the number of sons in the house."

This is the Meru customary law which the Judge applied in an attempt to distribute the deceased's land among his sons. There was no evidence to suggest either that the deceased had divided his land among the houses of his wives or among his sons. The respondents' claim was made in their capacity as the sons of the deceased and not on the basis of membership of the various houses of the deceased's wives. There is no doubt that the Judge understood the custom and applied it correctly in this case. The respondents had shown that no provision had been made for them by the deceased. This ground of appeal therefore must fail.

Mr Mbaya's other complaint was that the Judge made erroneous findings of fact and law. As to law, I have already found that the Judge was entitled to take judicial notice of the relevant Meru customary law. With regard to the alleged erroneous findings of fact, Mr Mbaya did not draw our attention to any specific

instances. Be that as it may, the Court of Appeal will not normally interfere with a finding of fact by the trial Court unless it is based on no evidence, or on a misapprehension of the evidence, or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did (See *Marube v Nyamuro* [1982] 1 KAR 108). But that is not the case here. All the findings of fact made by the Judge were fully supported by the evidence. I would also reject this ground of appeal.

Mr Mbaya also criticised the judge's decision to disregard the deceased's will. A copy of the will was produced by Kagwabii at the trial. It was made on 20th January, 1983. It was drawn by Mr Mbaya and witnessed by Kagwabii and a certain Stanley Mugambi. The deceased appointed Kagwabii as the executor of his will. Each witness was given a copy of the will. Although Kagwabii knew about the existence of the will and had retained a copy of it since 20th January, 1983, he concealed this information from the respondents until 5th June, 1989, when he gave evidence at the trial. Mr Mbaya must also have been aware of the existence of the will. All the Judge did was to disregard the will. He did not declare it invalid. Kagwabii did not explain why the will had not been read following the death of the deceased nor did he explain why he had not applied for the grant of probate of the deceased's will. It seems to me that the main object of the will and the principal characters in this drama was to disinherit the respondents. No Court of law can countenance such injustice.

This was no doubt a very difficult case but in the end I have arrived at the conclusion that the Judge made a just and fair determination. I am of the opinion that this appeal has no substance and I would dismiss it with costs.

Muli JA. I have had the advantage of reading in draft the judgment of my noble brother Kwach JA and I agree with his conclusions and orders he has proposed.

Let me add, with respect, that land in the African context is a very sensitive issue and must be tackled with maximum care and especially so when the dispute involves members of one family. There would be no peace in that family if substantial justice is not dispensed to the satisfaction of each member of that family. Equally true is the fact that there must be an end to litigations concerning land. Having said that I fully agree with my brother Kwach JA that the learned trial Judge was fully justified on the evidence available and did apply the Meru custom correctly.

With regard to the will, it had not been probated and its production at the end of the trial was an attempt to defeat the respondents' claims. The contents of the unprobated will were inadmissible and properly rejected by the learned trial Judge. I hope that the decision arrived at in this difficult land dispute will dawn an era of harmony in the deceased's large family.

I would dismiss this appeal with costs.

Gicheru JA. I have had the advantage of reading in draft the judgment of Kwach, JA. I agree with it and with the orders proposed therein. As Muli JA also agrees, it is ordered that this appeal be and is hereby dismissed with costs to the respondents.

Dated and delivered at Nyeri this 16th day of October, 1992

J.E GICHERU

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JUDGE OF APPEAL

R.O KWACH

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JUDGE OF APPEAL

M.G MULI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR