



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 66 OF 1984

KOINANGE & 13 OTHERS.....PLAINTIFF

VERSUS

CHARLES KARUGA KOINANGE.....DEFENDANT

JUDGMENT

Ex-Senior Chief Koinange wa Mbiyu died in the year 1960 at Kiambaa Kiambu District after a period of almost a decade in detention and custody away from his homestead, family lands and property. He was taken into custody as far back as 1952 for what was resistance to the then colonial exploitation of land in the Central Province of Kenya. As he was not cooperating with the colonial powers he remained in detention during the duration of the state of emergency in the country and it was only in 1960 that he was released from this custody. At the time of his release he was an old and sick man he was brought by one of his sons (defendant in this case) who was not in detention and who was the chief of Kiambaa location Charles Karuga Koinange to his home. The ex-senior chief Koinange died on June 28, 1960, shortly after his release from detention. It is common ground in this case that he did not regain his health after his release and that he was unable to attend to his personal affairs including his lands due to his grave ill health.

The head of the family tree is ex-senior chief Koinange wa Mbiyu who at the time of his detention in 1952 was seized of some 600 acres of lands in Kiambaa District and the other areas of Kiambu and other various types of moveable property and livestock. He had six wives namely Mariamu Wambui, Julia Njeri, Joyce Kagendo, Phylis Wambui, Elizabeth Gathoni and Beatrice Gata. The deceased and all his wives and issue lived on the land as their family land till the year 1952. On his detention, a number of his wives and sons were also detained. The defendant, Charles Karuga s/ o Mariamu Wambui was not arrested. He was a colonial chief of the Kiambaa Area. His brother, Peter Mbiyu, was then in the United Kingdom and was not detained. Mariamu Wambui the mother of the defendant Charles Karuga was also not detained. She died subsequent to the death of the ex-senior chief. Julia Njeri died but has left three sons who are plaintiffs in this case and Beatrice Gataa also subsequently died leaving no male issues.

The state of emergency saw the consolidation, demarcation and distribution of the Koinange lands.

A large part of these lands were allocated to the house of Mariamu Wambui and her two sons. This is seen from the distribution made. An analysis of Koinange family lands as divided amongst houses has been provided in Exb H and G supplement. These exhibits have been admitted in evidence. This shows as follows:

1. House of Mariamu Wambui – 247.97 acres - includes

- (1) 90.93 acres in the name of Peter Mbiyu (two sons – Peter Mbiyu, Charles Karuga)
- (2) 102.52 acres for Charles Karuga (This includes 50 acres which he personally claims he individually purchased)
- (3) 36.2 acres registered on 12.11.73.

2. Julia Njeri – 124.31 acres – 3 sons – Frederick Mbiyu, James Njoroge, Joseph Karuga
3. Joyce Kagendo – 60.49 acres— 2 sons – Fredrick Mbiyu, Noah Karuga.
4. Phylis Wambui – 57.395 acres – 2 sons – Edwin and Raymond Njenga
5. Elizabeth (Nyakanini) Gathoni – 58.73 acres— 3 sons – Wilfred Mbiyu, Geoffrey Mbugua, Leonard Karuga
6. Beatrice Gataa – 32.87 acres— No male issue – 1 daughter Gachambi

The case before this court has been filed by 14 applicants who include 9 sons, 3 wives of the ex-senior chief and two wives of deceased sons. The applicants claim that the applicants and the respondent are all beneficiaries in the estate of the late senior chief Koinange wa Mbiyu of Kiambaa Kiambu District and at all material times entitled to share equally in the estate of the deceased.

It is the distribution of this land and the other movables which senior chief Koinange owned which is the subject matter of this dispute. This tragic and unfortunate dispute the solution of which had evaded the parties to arrive at a mutually acceptable settlement relating to the event of the last 25 years or so finally came in the open and was heard in a tense and emotionally charged atmosphere.

The plaintiffs and the defendant have submitted agreed issues for determination by the court.

These are as follows:

1. Did the late Koinange wa Mbiyu die intestate?
2. Did the defendant cause certain pieces of land to be registered prior to the death of the deceased as alleged in paragraph 4 of the plaint? If so, was such registration fraudulent as alleged in paragraph 4 of the plaint?
3. Did the defendant dispose of the deceased's property and if so was such disposition in accordance with the law, whether customary or otherwise? If not, in what manner was such disposition irregular?
4. The precise nature of the claims of the Plaintiffs and each of them and the loss or damage allegedly sustained.
5. Are the plaintiffs' claims or any of them barred by the Limitation of Actions Act (cap 22)?
6. Alternatively, have the said claims been defeated by the doctrine of laches and acquiescence?
7. Does the Registered Land Act (cap 300) operate so as to make the plaintiffs' claims which would result in rectification of the register unsustainable?

I have taken due note of these issues and I shall deal with each of these during the course of my judgment.

The plaintiffs aver in the plaint that the senior chief died on July 20, 1960 without having left a valid will either according to law, custom or under the statute. They aver that prior to the death of the deceased in 1960 the defendant Charles Karuga registered in his name and those of his brother Peter Mbiyu Koinange,

his step brother James Njoroge and six wives of the deceased certain pieces of land belonging to ex-senior chief Koinange. They claim that such forced registrations were effected by use of fraudulent means and were calculated to defeat the rights of the plaintiffs' rightful shares of the deceased's estate. They particularise the alleged fraud. They aver that at the time of demarcation and consolidation and the distribution of the area the defendant was chief of Kiambaa and he was by virtue of that position chairman of the land consolidation department of the Kiambaa area. As a part of the fraud they also refer to the detention of the senior chief and his sons. They also allege that the deceased on June 24, 1957 instructed the consolidating officer not to sub-divide his land until he came out of detention.

On April 30, 1985 an elder son of the senior chief who was detained at Lamu wrote to the consolidation committee Kiambu requesting them to await his release. The plaintiffs' case is that these requests were ignored by the defendant and he distributed the land and registered the same contrary to the express wishes of the deceased and the other sons and he did so by using his office of the chief of the area and chairman of the land consolidation committee. They also allege that the senior chief when he left detention was not informed of these distributions of land and that the deceased died without knowing that the land had already been disposed of fraudulently. The plaintiffs further aver that the whole scheme of the defendant was fraudulent and unjust, and was intended and calculated to defeat the plaintiffs as heirs of the estate of the deceased. The plaintiffs also aver and claim that the various movables left by the deceased were not accounted for. The plaintiffs also aver that no account was taken of the deceased's entire estate which responsibility the defendant unilaterally placed on himself without the consent or prior knowledge of the plaintiffs.

The defendant in his defence has denied that he was the administrator of the estate or that all the plaintiffs were entitled to share equally. He avers that the deceased left his estate according to the customary law. The defendant denies registration of land by fraudulent means or that such registrations were calculated to evade the rights of the plaintiffs in the deceased's estates. The defendant avers that the registration of the deceased's land was affected in accordance with his wishes, expressed in a letter written by him to the District Commissioner Kiambu on 1/3/57 which letter was signed in the presence of the DO, Marsabit, his wife Mariamu Wambui and two others. For the sake of convenience I now refer to some material parts of this letter which is as follows:

Exhibit. B(1) is the letter of Koinange Mbiyu when he was detained at Marsabit addressed to District Commissioner Kiambu. The letter is dated March 1, 1957. This letter commences with the words:

"I, Koinange s/o Mbiyu wish to award the following allocation to my wives and sons". The lands are then enumerated as Thimbigwa land, Gichungu, Kiambaa, Githunguri, Limuru, Njiru Warithu, Mangu.

100 acres of these lands were specifically awarded to Peter Mbiyu Koinange one half of 118 acres situated at Gichungu was left to Charles Karuga chief.

James Njoroge s/o Julia was also made a gift. Under the heading Kiambaa land following provisions is made:

"The remaining 50 acres is left on my own name where I have built my own house and planted coffee".

Certain other lands were also kept by the senior chief in his own name. It is this letter and the distribution of land which is the bone of contention in this suit.

It is evident from the description of the lands that these lands were not properly surveyed, demarcated or registered. The total acreage was not precisely known. It was in the region of 600 acres.

It is agreed that the actual demarcation and the registration of all the lands was undertaken, during 1956 to 1958, in the absence of the senior chief and his sons except Charles Karuga who was, as is already seen, the chief of Kiambaa area.

The defendant also denied that he was chairman of the consolidation committee in any of the area where the deceased had lands. The defendant also avers that the letter of June 24, 1957 Exhibit 3/6(a) and the letter of February 17, 1958 Exhibit 3(9) from the late senior chief Koinange were received together with a letter from the deceased's sons but these letters were received after the consolidation and demarcation had already taken place.

The plaintiffs and defendant had also made further submissions which I will deal with at the proper time when considering the evidence before me.

A reply to defence was also filed and in this the plaintiffs joined issue with the defence regarding paragraph 4 of the defence. It is also averred that in February 1958 the defendant's land at Wagutu sub-location had not been consolidated. The plaintiffs also aver that the letter dated November 25, 1953 Exhibit 3(1) written by the defendant to the deceased shows the responsibility attached to the defendant and undertaking given by him in respect of the properties of the deceased. This is a letter sent by the defendant to his father who was then at Marsabit.

In support and to prove their claim the plaintiffs tendered their evidence. This included the evidence to two wives and 4 sons and they also called other witnesses. I will now briefly deal with the salient features of the plaintiffs' evidence. The first witness Joyce Koinange who is one of the plaintiffs and a wife of the late senior chief testified that a long time ago before his death ex-senior chief Koinange left for Europe ie 1931. He returned after three months. He was detained in 1952 and that she stayed with him in detention for part of the time. She also testifies that the deceased died in 1960, that he did not make a will except the pieces of land he gave to them, he did not sub-divide his property when he died. He also owned livestock, other movable property and money. She said that she did not know what had happened to their properties. She also maintained that Mbiyu (Peter) was not the administrator. He was out of the country. She stated that the parcel of land at Kiambaa where Peter stayed is the land situated at Kiambaa given to her. Under cross examination she further maintained that in 1957/58 her husband's lands were consolidated. The ex-senior chief was then in detention he had not agreed to this and he did not know this land was consolidated and distributed. She also contends that she lives on the piece of land 67 acres and that she received a sum of Shs 300 from the District Commissioner's office but that she did not receive any other property movable or otherwise from the properties of her late husband.

She maintained in her evidence that she is suing because "she wants to see the property of Koinange she has not even seen a spoon". She conceded under cross-examination that she was awarded 4 1/2 acres of land as a result of a case in 1982 concerning the lands heard by the elders. This award she did not accept. Joyce Koinange agreed to the suggestion that the eldest son is the administrator of the estate of his deceased father under the Kikuyu customary law but this was not so "as Mbiyu was away". She further maintained in respect of the stone house "my husband did not say this should go to Mbiyu as it was my piece of land". This witness also alleges that the piece of land given to her was taken away from her by the defendant during the "war". She also informed the court that she was detained at Kamiti for 7 years.

Another plaintiff is Elizabeth Gathoni Koinange, she is another wife of senior chief Koinange she testifies, *inter alia*, that her husband died about 25 years ago and at the home of Charles Karuga the defendant.

She maintained that the deceased did not leave a will. At the time of his death he was in possession of many properties and these properties have not been divided to date. All his properties were left with Charles and she would like to have share of it. She produced copy of a letter dated June 24, 1957 Exhibit 6 which she received from her husband.

The letter is addressed to the land consolidation officer. The late chief in this letter, *inter alia*, informed the officer that it would create a lot of dissatisfaction and trouble if his lands were divided when he was away. He also maintained that his grown up children were also away and would be improper to allow Charles and the younger children with their mothers to distribute the land.

The late chief further maintained that although he gave a suggestion to Charles when he wrote to him, to

speak the truth he had not finally decided this matter. He concluded this letter by requesting that status quo be maintained till his return. Her husband was a sick man when he was released from detention and shortly afterwards he died. She also maintained that her husband had a bank account which Charles the defendant took from her under the threat that he would kill her if the pass book was not given to him. She maintained that she did not accept the letter of March 1, 1957 Exhibit B1 as valid because it was not made under customary law. She further conceded that she did not get 4 1/2 acres land which she would have received under the elders' award.

Another plaintiff (James) also gave evidence. The witness was in detention in Lamu and chief Charles the defendant was the chief of Kiambaa when the witness was released from Lamu detention camp. He found the land had already been consolidated.

He maintained that these were not the wishes of his father as he wanted the consolidation and the division to take place when the father and the sons would be out of detention. They wrote a letter to the other beneficiaries of his father and objected to the consolidation having been done in their absence.

Edwin Mbiyu Koinange the son of Phylis Wambui also gave evidence. His evidence as to the detention of the ex-senior chief, his subsequent release and his death is similar to the evidence of the previous witnesses. He maintained that he objected to the division, he, Njenga, Raymond and Mbiyu. Nyakanini wrote a long letter to the District Commissioner Kiambu with a copy to his father and to the defendant and district commissioner Marsabit on January 30, 1958; this is Exhibit 3(8). They received a copy of their father's letter of 7/2/58 this is Exhibit 3(9) addressed to chief Charles Karuga the defendant from Marsabit. In this letter their father objected to the distribution of the land and requested that it should not be sub-divided until his return.

Exb 3(9) was addressed to Charles Karuga. The deceased requested and also asked for assistance for his immediate release to be made to District Commissioner.

The letter of January 30, 1958 (Exhibit 3(8) (*supra*)) addressed to the district commissioner by Raymond Koinange and other sons commences with the following words:

“this is to let you know that there was a plan for my father's land allocation which you of course know and for which you were responsible to see it done.”

The witness maintained that he did not like Mbiyu's distribution scheme that is Exhibit 13 in May 1965 but due to the respect of Peter Mbiyu Koinange, Peter was not sued. The plaintiff further maintained that his father did not leave a will and his father, the witness testifies, left lorries, a personal car, other vehicles, a sawmill, wattle trees, cattle and other properties and a bank account and he maintained that Karuga knows all this. He once took them to see the land on which there were 120 cows at Njiru.

Another plaintiff Leonard Karuga Koinange (PW 8) also gave evidence. He testified *inter alia* that he was at school in Kiambu in 1960. His father left a lot of movable and immovable property when he died. He and the other plaintiffs did not get their fair shares. In 1981 an effort was made for a fair share for everyone of each of the Houses. It was the defendant's idea. A list was later prepared. Lilian Wairimu, wife of Bishop Kariuki, a sister, would not agree and walked out of the meeting. It was later that the witness was shown Exhibit B(1) (*supra*). There were the proceedings of the elders' tribunal at Karuri only a few elders signed the award. The witness and the elders did not consider this to be a will and a proper award. They challenged it at the Resident Magistrate's court Kiambu and it was set aside as a nullity.

This witness gave evidence in a great length and detail some of which was related to matters of his father's detention and release. He also mentioned that there was strong opposition by the groups who were on the side of the colonialists, that his father should not be released at all. This witness also referred to the lands which remained in the deceased's name at the time of his death. He maintains they were also apportioned at the discretion and the instruction of Charles Karuga the defendant. This witness also refers to a Kenya Gazette in 1967 which informed about the estate of ex-senior chief Koinange who had died intestate. This witness testified that J M Karuga a plaintiff, wrote to the then Attorney General on the

plaintiff's behalf. The Attorney General's reply was dated May 27, 1967 (Exhibit C) and informed the beneficiaries that the consent forms had been sent to Charles Karuga Koinange for them to sign.

This witness gave particulars of the Kikuyu customary law and explained different types of grants pertaining to land rights in particular.

Stephen Kamunyu Ng'ang'a (PW 6) of Kiambu also gave evidence that he had known the family of the late ex-senior chief Koinange for the last 30 to 35 years and that he was one of the committee members who demarcated all the land. This witness maintained that Charles Karuga the defendant was in charge when ex-senior chief Koinange was in detention in 1957 and that he was one of the persons who was elected from Kiambaa location for consolidation purposes.

There were also other persons. He gave 9 other names of the committee members and he stated he had forgotten the names of the rest.

The plaintiffs' case therefore is substantially that they are the wives and sons and the beneficiaries of the ex-senior chief Koinange. That he was a man of substantial means having both movables and immovable properties. The ex-senior chief was detained in 1952 and remained in custody till a short while before his death during 1960. The defendant Charles Karuga at this time was the chief of Kiambaa the person who took over the possession of the various properties of the deceased.

He did not account to the deceased before his death or to the beneficiaries in respect of movable properties. As to the immovables these were distributed despite the protest of the deceased and the plaintiffs against this form of distribution. The consolidation, demarcation and distribution of lands during 1956/1958 was done in contravention to the Kikuyu customary law where equality of the various Houses in distribution is to be preserved. The plaintiffs also maintain that the other lands and property still registered in the name of the deceased Koinange at the time of his death was also taken over by the defendant and the House of his mother Mariamu. All the above stated actions were on the part of the defendant and were done fraudulently.

The defendant Charles Karuga Koinange gave evidence, and called other witnesses. He agreed he is the second son of the House of Mariamu Wambui wife of Koinange Mbiyu and his elder brother Peter Mbiyu Koinange is now dead. He told the court *inter alia* that he was working with his father on the timber works before the declaration of the state of emergency and later during the emergency, he was a chief of Kiambaa and after independence he was made a Provincial Commissioner of the Central and Easter provinces. He is a holder of the colonial award and also he is a holder of EBS of the Government of Kenya. On retirement he was made chairman of the Kenya Tea Development Authority, a position he still holds. He agrees that his father was detained during the emergency and some of his brothers were also detained. Mbiyu the eldest son was in England. He had been there since 1930. He came back briefly and returned before emergency was declared. He came back when the emergency was over. He states that he was given 50 acres of land by his father and Peter Mbiyu 100 acres while he was still in England. Some land was also given to James Njoroge. He told the court that he was also a chief during the emergency and that it was not his duty to issue passes. Under cross-examination he however conceded that he issued movement passes. The defendant testified that he accompanied the surveyors to ascertain the extent of his father's land. This was required when the government decided to consolidate the land. He states that he had passed this information to his father. He denies the story of his father marrying his mother by Cannon Ngure. Cannon Ngure is now dead as well as the other witnesses who had visited his father then.

The defendant further testifies that he did not see the letter dated 1/3/57 Exhibit B1 and had not known about this letter. This was given to him Exhibit B1 (*supra*) by John Golds the District Commissioner Kiambu when he brought this letter to the land consolidation committee at Thimbigwa. The other committee concerned with the land consolidation was at Waguthu. John Golds has since left the country. The defendant denies that he was a member of any of the consolidation committees. He also states that Stephen Ngugi was not a member of the consolidation committee. The witness did not attend, he testifies, any of the discussions and action regarding his father's land before the committee. These were carried out in terms of the letter of 1/3/57 (Exhibit B1). The witness explained a number of signatories of this letter.

The defendant says that he is shown as the owner of 90 acres of land but the land in excess of his 50 acres he had bought from various persons before demarcation and these were consolidated together with what he received from his father. Witness also gave particulars as to how he bought 30 acres from Kinani Munduru. In total he testifies he bought 60 acres of land.

The witness states that at Marsabit when the elders were there he did not join the discussions as he was preparing meat for them.

The defendant further testifies that he has not registered any land secretly in his name or in the name of his mother's house. He agrees that when his father was released from detention he was brought to the defendant's House and not the deceased's House which had no amenities like water etc. The deceased stayed in the house with his wife, mother of the defendant, Mariamu and Joyce and her daughter and shortly afterwards he died.

The witness also told the court that before his death his father had allocated land for sub-division to all his wives. The defendant says that his father's sawmill was abandoned during the emergency when people moved away. The defendant contends that Noah Karuga was driving his father's car and that he did not see this car again. He has not seen any loose cash. He also denied that he took the savings pass book by force. The witness further testifies that Mbiyu was appointed Muramati but he was not present when his father died. The defendant said that he had a copy of the letter of 1/3/ 57 Exhibit B1 which was signed. He did not keep it as he thought that the matter was finalised. The witness also testified that he had transferred the land which was registered in his names to the names of his sons. He agrees that there was a Gazette notice in 1957 declaring his father having died intestate. He agrees that some people were killed during the emergency and that it was a difficult situation and that he was loyal. He also maintains that he always helps his family. Under cross examination the defendant concedes that John Karebe Kamau, a relative of his, filed a suit No 11/83 against him claiming that he had taken land from him by force. The defendant concedes that about 14 plaintiffs represent all the other Houses of his other mothers except the House of his mother Mariamu Wambui. The defendant gives the explanation that they have filed the suit against him because they think he is too wealthy and that they have a grudge against him. The defendant denied that he ever issued any pass. Permit No A773312 (Exhibit 5) issued to Elizabeth and Ngata was then put to the defendant. He then conceded that he had issued the pass in 1955..

The defendant told the court that he bought some land and exchanged some but he was unable to give explanation which land he gave in exchange. He was also uncertain how much he paid to buy the land or whether it was compensation in respect of the lands of his father. The defendant concedes that in his correspondence and in particular in this letter to his father in 1953 (Exhibit 3(1)) he was explaining the situation to his father in respect of developments at home and what he had done with his money and that he could see all these when he returned.

The witness also told the court that his father did not know the English language and could only sign his name. The witness insisted that it was consolidation committees and John Golds who as District Commissioner who did all the consolidation, demarcation and distribution. The witness also denied that certain forms were given to him by the then Attorney General for the consent of all concerned. The defendant emphatically denies allegations of fraud committed against the plaintiffs and contends that action was taken in conformity with Exhibit B(1) letter dated 1.3.1957 his later father's directions. This was, he contends, in keeping with the Kikuyu customary law.

Apart from the defendant a number of defence witnesses were summoned who also gave evidence. I now briefly review this evidence.

Samuel Rubia Kamunge, was one of the defence witnesses. He gave evidence as to Kikuyu customary law at some length. He gave his age as 103 1/2 years. This witness knows the family of the deceased well. Concerning evidence as to his age and general matters I am not placing much reliance on his evidence. I found him inconsistent and contradictory in his testimony.

At the end of his evidence he told the court that one of the wives of the deceased who was a plaintiff in

this case, Joyce was older than him and Joyce certainly did not tell the court that she is over 103 1/2. He was at times unsure of himself.

Isack Mwangi Mwaura also gave evidence and DW 5 Kautu Kabichu also gave evidence on the formal aspect of the dispute.

David Kimani s/o Ayub DW 6 was a sub-chief at the time of the consolidation. This witness told the court that the Koinange family accepted the consolidation 1957/58. This witness was prejudicial and partial and made several sweeping statements. It would be impossible for the family to have agreed to any consolidation since most of them were in custody and it is on record of this court that they were vigorously objecting to such consolidation. I do not consider this witness a truthful one and I do not place much reliance on his evidence.

Christopher Mutiso Mutasya of High Court Registry also gave evidence and testified that administration cause No 186/67 was entered into the register of the probate registry on 19/6/67. The name of the deceased was Koinange wa Mbiyu. This was registered by the High Court of Kenya and the letters of administration intestate were issued on June 19, 1967 by the public trustee. The gross value of the estate was shown as Shs 16,098.59 only.

Two other witnesses Mukunge Kiarie and Kanyoro Mugungi also gave evidence for the defence. These witnesses testified that it was a European, Golds, who brought the letter and read the letter in English and it was translated to them in Kikuyu language.

These witnesses were members of the sub-committee of the land consolidation Thimbigwa sub-location of Kiambaa. They further testified that the division took place according to this letter. These witnesses in cross-examination conceded that Charles was the only member of the family who was present and if there had been any questions they would have been referred to Charles.

Mr Couldrey, the learned counsel for the defendant who appeared with Mr Kinuthia addressed the court both as to facts and law. He concedes that the document referred as a will was not found at the National Archives. The original of the document Exhibit B(1) is lost. He further contends that the plaintiffs have not proved what share the plaintiffs claim and what amount of land is to be released to them. He contends there is very little of the lands left after Exhibit B1, the distribution is made the directions of the deceased. Mr Couldrey accepts that the defendant was the chief of the area and that he was also attached with some land consolidation committees. The deceased was in detention as were some of his sons during the period relevant to this case. He contends that the letter from three sons of 30/7/1958 Exhibit 8 and the deceased's letter of 20.2.1958 Exhibit 9 were received but by that date it was too late as the consolidation committees had already distributed the land. The lands were registered and distributed mostly when the deceased was in custody but Mr Couldrey further contends that the defendant did not take part in the consolidation, demarcation and distribution of these lands. The consolidation committees were established by the statute and that these acted independently. Golds the chairman read to the members the directions of senior chief Koinange in the letter of 1/3/57 Exhibit B(1) and the committee acted accordingly. It is contended that no pleading in law can amount to fraud and it is further argued that an action for delays or for the abuse of office does not amount to fraud. Any action it is argued as one before the court must be brought within the prescribed period as in accordance with the statute of limitations. Submissions were also made in respect of the application of the various statutes and enactments pertaining to this matter. The defendant has not committed any fraud.

I have taken note of and considered all these submissions of the learned counsel carefully in arriving at my judgment.

Mr Karanja argues that this is the first time that the court has heard that the defendant bought his own land. There is none of this mentioned in his defence. The plaintiffs' case is that all the 600 acres or so belong to the deceased. Mariamu Wambui's House, the defendant's mother is holding 349.49 acres. He contends that the plaintiffs' case is that one House cannot take almost half of the estate. Under the Kikuyu custom each house must share equally. He argues that under land registration No KW 533 (Exhibit G)

36.25 acres was transferred by Succession Act in the defendant mother's name, this was done wrongfully by mistake and fraud and is null and void. ex-senior chief Koinange built a stone house on this land and that he is buried there with some of his wives and this is where any member of the family would go to be at home. This is a family shrine.

It is also argued that there were livestock and other property and that the court should quantify the share of each House. In his submission Mr Karanja further submits that this is a unique case and that he knows of no other case of this nature as the one now being heard before the court. The defendant is accountable to render full accounts to the surviving beneficiaries in respect of movable and immovable properties left in the hands of the defendant.

Most of the facts pertaining to this case before me are of extraordinary nature and on the balance of probabilities find the following facts established:

- 1) The ex-senior chief Koinange was in detention and not a person enjoying elementary freedom of action when his lands were consolidated, allocated and distributed and later registered.
- 2) He died soon after his release a sick man and there is no evidence before the court that he approved or disapproved the division of his land amongst his wives and sons.
- 3) There is nothing on the record of the court to show that all the beneficiaries of the estate consented to the division of his properties.
- 4) This is a dispute which is almost a quarter of a century old.
- 5) The plaintiffs and the defendant have not ceased their disputes and litigations from inception. The last one being in the Resident Magistrate's court Kiambu in 1982 (Exhibit 1) when the decision of the elders of Karuri was held to be a nullity.
- 6) Almost all the grown up sons of the senior chief Koinange wa Mbiyu were under detention. The eldest son Peter Mbiyu Koinange was out of the country.
- 7) Charles Karuga Koinange was at the time a chief employed by the colonial regime and was the only person involved who was free, and infact more than a free man as it was in his power to issue or to refuse movement passes to the other members of the family.
- 8) No will was formally made by the deceased in the presence of the clan and family members.
- 9) The Exhibit B1 letter dated 1/3/1957, a letter presented by the defendant as a will, direction or a confirmation and is a copy (original having been lost) it does not bear any signature of the senior chief or any of the witnesses and there is substantial conflict in evidence as to who these witnesses actually were.
- 10) No *Muramati* was appointed under the Kikuyu customary law as the said eldest son appeared over a year later after the death of his father and was not present when the land was allocated to him, to the defendant and to the household of his mother Mariamu Wambui who is also the mother of the defendant and to the other Houses.
- 11) That no wives were involved in the distribution of land as such.
- 12) The movable properties belonging to the deceased were left in the hands of the defendant.
- 13) There is nothing to show from the evidence that the father ultimately took over charge of his affairs.

In fact most of his land had already been distributed and subsequently registered in the names of various Houses even before his death in 1960.

14) There are in all fifty six registered titles pertaining to these lands. This is contained in Exhibit G which is an analysis and Exhibit H which is supplementary analysis of Koinange family lands as divided amongst Houses.

15) The land remaining in the name of ex-senior chief Koinange at the time of his death were also subsequently transferred except land now shown in Exhibit M a letter dated January 21, 1986 admitted by the consent of the parties to the case. This shows an area of 23.79 acres only.

16) On the question of consolidation and demarcation, each of the houses were allocated a total area of land as shown above. This was uneven division of land and not in strict conformity with the Kikuyu customary law.

17) The deceased's estate was administered by the public trustee (Kamaa Madam) on 19.6.1967 – Gross assets – Shs 16,089.59.

18) Subsequently the position was further altered as follows:

1) House of Mariamu – land registered Kiambaa/ Wagutu, 532— 36.25 acres were registered in the name of Mariamu Wambui, the mother of the defendant in 1973.

2) Land registration Kiambaa Wagutu 532 area 7.66 acres was transferred to Joyce Kagendo in 1973 increasing share of this House to 60.49 acres.

The lands at present remaining registered in the name of senior chief are:

1) Githunguri/Gathangari 490 area is 17.8. This land is rented out by Gathoni, 14th plaintiff and Phylis Wambaa.

2) Gatundu/Mangu T.240 area 4 acres Gatundu/Mangu T219 area 0.27 acres Gatundu/Mangu 217 area 0.21 acres Joseph Karuga – 5th plaintiff, Joyce Kagendo 12th plaintiff at present looks after this land.

3) Kiambaa town plots were donated to the Koinange memorial school. This leaves a total area of land now remaining in the deceased's name to approximately 22.28 acres only.

House of Beatrice Gataa - no sons

– is the registered owner of lands:

Wagutu KW 424 - 16.9 acres

Kiambaa town T29 - 0.23 acres

Gitangari G950 - 15.7 acres

Total - 32.87 acres.

This land I find reverts back to the estate on the death of Beatrice Gataa.

19) Prior to the distribution the lands and properties were under the care of the defendant – except such lands allocated to wives for cultivation.

20) No account was given in respect of the movable properties by the defendant.

21) Various attempts to reconcile the parties were made but reconciliation was not achieved.

The evidence tendered by the plaintiffs and their witnesses has been generally direct and straight forward

and I have been impressed by the same. The evidence of Leonard Karuga Koinange has been questioned by the defence as being tainted with malice and venom. I do not consider it so. It was somewhat emotionally charged, I find, due to the fact that the plaintiffs were of the opinion that had not been accorded a proper hearing over their claim and over the years their claims had been neglected and ignored. At first, a number of them were in detention. Subsequently they complain that they were treated without consideration and all their pleas were to no avail. They wrote letters and attended meetings. The defendant and his side of the House were well provided for and ignored some of the various attempts made to discuss the matter. For obvious reasons the defendant was not as much interested as the plaintiffs to discuss.

This is established that the deceased was in detention and a person of very advanced age. Not sure of his release the fear of death must have been present at all times. A large number of persons were in detention. The future was uncertain, many perished, others incurred material and financial loss. If the consolidation committee had only taken the care to call on the deceased in person to receive clear and personal instructions rather than to rely on vague correspondence, the deceased's family would have been spared the misery of this lengthy litigation. Perhaps this was too much to have been expected in 1956/58.

This is of course the maturity of our system of the administration of justice, that, each of the parties were able to state his side of the case with frankness and ease in matters relating to 30 years or so ago. I carefully considered the evidence tendered for the plaintiff as well as the evidence of the defendant and his witnesses. This I have done to establish the credibility of the witnesses and to establish the factual bases of this dispute and the plaintiffs' claim – in respect of which I have made factual finding based on the whole of the evidence before me. The wives have given I am satisfied a straight forward and concise account of what they experienced.

Dedan Kimani PW 8 and ex-chief relates the incident which took place at Marsabit when senior chief Koinange was in detention. The witness was also in detention. I find this witness somewhat bitter. Perhaps due to the effects of long detention, but I do not doubt his evidence as a correct account of what he observed at Marsabit and the incident of the Rev Nguni's attempt at a Christian marriage for the senior chief with Mariamu Wambui in exclusion of the other wives. This attempt if there was one I find did not succeed.

The defendant Charles Karuga Koinange – told the court that he was not a committee member and he did not participate in the division of the deceased's lands.

I am at least in three aspects not satisfied by the evidence tendered by the defendant. These are:

- 1) Movement pass – the defendant categorically denied that he did not issue any movement passes but had to retract from this stand when an actual pass issued by him in 1955 was put to him. This is Exhibit No 5.
- 2) He directly contradicted a material part of a letter concerning him which a former Attorney General sent on May 27, 1957 to senator John Mbiyu Koinange in which reference was made to defendant.
- 3) No intelligible explanation was forthcoming as to how the lands at Limuru were acquired by the defendant which were then exchanged for the lands at Kiambaa.

It might well be that the defendant was not forthcoming or that since these matters took place a very long time ago the witness was unable to recollect them in this context.

Be that as it may this land distribution as I have already observed, was carried out when the senior chief Koinange was still alive but in detention and he did not physically take part in this exercise. Most of the plaintiffs, and his sons, likewise, were detained and were not able to take part in this action. Infact, some of those who could, did vigorously oppose this method of distribution. District Commissioner Golds as chairman and his consolidation committees had entire control over this whole exercise. Evidence also established that he was brought out specially for the purpose of land consolidation and distribution. He

left after the “war”. I find on the basis of the probabilities that the defendant who was either a member and/or chairman of the committee specifically dealing with the lands which are the basis of this suit did take part. He was not only a member but a powerful chief of the area. All these privileges and opportunities, due to the office, the defendant enjoyed were denied to the other members of the family who were indeed equally interested and affected by the method of distribution. I am satisfied on the preponderance of the evidence before me that the defendant had a part to play in this whole matter. What part did he in fact play and to what extent? This is in conflict.

The defendant and his witnesses had been at pains to accept as little as possible of the responsibility for allocation of lands and the defendant’s involvement and his powers in relation to these matters. On the other hand it is seen from the evidence of the plaintiffs that they contend that Charles Karuga Koinange, the defendant, was the person who was solely responsible for and affected the consolidation, demarcation, distribution and subsequent registration of the land of which his brother and his mother were substantial beneficiaries.

In my view it is a question of law for this court to determine on the basis of facts before it as to whether the defendant did act fraudulently or that although the distribution which took place was highly objectionable, prejudicial and unfair to the plaintiff, it lacked the element of fraud on the part of the defendant.

The question before the court, therefore, is how the alleged fraud is to be determined.

I have before me the testimony of the plaintiffs and the witnesses for the plaintiffs and the defendant and, their testimony, of the documents tendered in evidence. I have already made a finding in this respect as to their credibility and weight.

The fraud is alleged by the plaintiffs. The onus is on the plaintiffs. It is therefore upon them to discharge this burden of proof. Have they done so?

The defendant also relies on letter dated July 2, 1957 Exhibit 3(7) in which the consolidation officer conveyed *inter alia*, the following to the deceased:

“The Division of your land has been received with considerable satisfaction and it will be on this basis, as directed by your, that we intend to divide up the land”.

This letter is signed, I note, by John Golds on behalf of the Consolidation Committee. This letter was in reply to a complaint made by the deceased and his sons in respect of the distribution of lands.

It is a well established rule of evidence, that whosoever asserts a fact is under an obligation to prove it in order to succeed.

Most of the plaintiffs were either detained or restricted. They had no opportunity to actually witness what took place. They found out much later what had taken place. Their direct evidence is on this issue of fraudulent intent and forgery on the part of the defendant is therefore lacking. It is either hearsay or at best of a circumstantial nature and is not conclusive. The evidence on its own falls short of the standard of proof required if such is to be proved. The testimony of the defendant that the District Commissioner Golds, the chairman of the Land Consolidation Committee carried out the entire exercise by the directions of the letter of the deceased therefore remains unimpaired.

In arriving at my decision in this respect I have relied upon the principle enunciated in *Ratilal Patel v Lalji Makanji* [1957] EAR 314-317:

“There is one observation which we must make – burden of proof— standard of proof required – allegations of fraud must be strictly proved, although that standard of proof may not be so heavy as to require proof beyond reasonable doubt. Something more than a balance of probabilities is required.

This was followed in *Urmila w/o Mahidnra Shah v Barclays Bank International Ltd and Another* (1979) KLR p 67 (per Law JA)

“A high standard of proof is required to establish such a finding, appropriate to the gravity of the offence concerned.

The plaintiff’s contention is that the relations between the District Commissioner Golds and Charles Karuga were close and that they had both stayed at the Home Guard Camp. However strong this affinity might have been, it is inconceivable for me to visualise, to accept and to subscribe to the proposition that a colonial chief, however important he may well have been, was controlling nay manipulating a British Colonial District Commissioner for his own personal interest. Such a situation, I am satisfied, did not exist. On the contrary the respective roles in the reverse position would have been more in keeping with the situation then existing.

It is also furthermore well established that during the exercise of the consolidation, this method was extended throughout the Central Province, and throughout the Kikuyu land and that such an exercise was carried out through the legally established machinery. The answer therefore to the issue No 2 is in the negative.

I am furthermore satisfied that the case before the court was to be determined by the application of the Gikuyu customary law.

I also find that one of the cardinal principles of inheritance is the observance of equality amongst the different Houses. This court of action is, however, subject to the senior house and the eldest son receiving somewhat more if the donor would so desire. The making of a gift is also permitted but in keeping with the spirit and the word or the customary law, such gifts must be reasonable and not out of all proportions. I find that in the case before me the house of Mariamu Wambui and her sons Peter, now deceased, and Charles Karuga, the defendant did receive land out of proportion to what the other “house” received. I have already held that I let the distribution stand which was held in conformity with the Exhibit B1 by the consolidation committee.

In my judgment equality of the ‘Houses’ as far as possible is to be maintained. This not only desirable but essential. In this respect I accept the evidence of Gibson Kamau Kuria BCL Oxford and Advocate of this court, who tendered evidence as an expert in Kikuyu Customary Law by the consent of the parties to the dispute. In his evidence Mr Kuria *inter alia*, was of the opinion that to keep family secrets is of paramount importance and that reconciliation is to be encouraged and indeed forced upon. This is a departure from English Law. Success of reconciliation was unfortunately not achieved in this case, despite all the necessary efforts in that direction to restore equilibrium and peace within the family. The equality of the ‘Houses’ is to be observed subject to some above referred variations.

Reliance is also placed in arriving at my judgment on the authority of the *Restatement of African Law Vol 2 (Succession)* by E Cotran Esq.

The principle enunciated, *inter alia*, is that inheritance under Kikuyu Customary Law is patrilineal. The pattern of inheritance is based on distribution of a man’s property amongst his wives’ Houses, subject to the provision that the eldest may get a slightly larger share.

In a polygamous household the reference is to the house of each wife.

The institution of making a will is recognised in the Kikuyu although such a will must not depart from the general pattern of inheritance. Certain lands remained in the name of the deceased at the time of his death, according to my finding. He was seized of these lands and his estate was therefore to be distributed amongst his heirs according to the principles of Gikuyu Customary Law (*supra*). This was not done. I therefore find and declare that the land situated at Wagutu Registration No 533 which is 36.25 acres was transferred by mistake, fraud or error and registered in the name of Mariamu Wambui Koinange subsequent to the death of the senior chief. She had no right to this preferential treatment. The defendant,

I note, is a direct beneficiary of this registration. I also find that the deceased's lands were under the defendant's control. This registration promotes further the existing imbalance amongst the houses of this polygamous household. I am also satisfied, from the whole of the evidence that the said land and the house are the burial grounds where the senior chief and two of his wives now lie. It is more of a family shrine.

As the present owner is not entitled to this property on her own account or on account of her House I declare as follows and order the Registrar to amend and rectify the appropriate register accordingly:

1. An area of 6.25 acre of the house and grounds to be demarcated and to be held in common trust as a shrine.

The trustee of the shrine shall be the eldest sons of each house.

2. The remainder of the land is to be divided into five equal shares and is awarded to each of the houses:

1. Mariamu Wambui
2. Sons of Julia Njeri
3. Joyce Kagendo
4. Phylis Wambui
5. Elizabeth Gathoni

3. Any of the houses wishing to dispose of its share for consideration is at liberty to do so on a mutually agreed consideration or on terms of valuation prior to registration of the new title.

Under the provisions of section 143 (1) of the Registered Land Act which provides:

“Subject to sub-section (2) of this section, the court may order the rectification of the registration by directing that any registration be cancelled or amended where it is satisfied that the registration (other than the first registration) has been obtained, made or committed by fraud or mistake”.

I am satisfied that this was a second registration and was a mistake or error.

Had it been a first registration I would still have no hesitation in finding it to be a trust on behalf of and for the benefit and on account of all the other Houses in conformity with the decision made in *Gatimu Kingumu v Muya Gathanji* [1976] KLR per Madan J (as he then was).

In this connection, in addition to the wording of section 6(1) one should also carefully bear in mind the provisions of sections 28 and 126 of the Land Registration Act.

Section 28: the registration of a proprietor, whether acquired by first registration or acquired subsequently by consideration or by an order of the court, shall be held by the proprietor:

‘provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee’...

“As far back as *Mwangi Muguthu v Maina Muguthu* I said:

“As regards section 126 there was no need to register the defendant as a trustee – in any event this section

does not make registration as trustee obligatory. It states that a person may be described by that capacity.”

Under section 143 (1) as first registration may not be attacked even if it is obtained, made or committed by fraud or mistake”.

The section does exclude recognition of a trust provided it can be established. Parliament could not have intended to destroy this custom of one of the largest sections of the people of Kenya. It would require express legislation to enable the court to do so”.

In *Samuel Thata v Priscilla Misheck* High Court Civil Case No 1400 of 1973 as per Muli J this was the general practice and which has been said in this court over and over again. If this was not so Muthee’s brothers could not inherit any land from their father - but they had equal rights over their father’s lands just like Muthee and again:

“I have given consideration to all issues raised by the parties and I am satisfied that these considerations are subject to the trust implied by law. Registration of title are creation of the law and one must look into the circumstances surrounding the registration of title to determine as to whether a trust was envisaged”.

In arriving at my judgment in respect of the claim of the plaintiffs for a share of the movable property besides the evidence adduced by the plaintiff which I accept, I have relied a great deal upon the letter Exhibit 3(1), the letter dated November 25, 1953. This letter is addressed by defendant Charles Karuga to his father when he was in detention. This letter commences by the words “my loving father Koinange s/o Mbiyu” the defendant apologises to his father for his delay in writing to him and then goes on in giving explanation of this delay. He explains his duty, *inter alia*, in the following words:

“people to be given passes –

patrol of day and night are to be carried out –

Barazas are to be held.

Confessions and cleansing ceremonies— these you

cannot know as you have not seen them before. The

defendant then goes on to state the following words:

“Now father let me answer your questions. First

question is what section of black wattle trees have been

sold since you were arrested and how much and what

did the money do?”

The defendant goes on to give figures:

“there were eight acres costed 8,000/- at 1,000/- per acre ... The Githiga part of the trees – 9 acres costed Shs 9,000/- and it is me who received monies from the buyers— money for the bark is not paid yet so far.”

The defendant goes on to give the nature of expenses. This includes part from domestic and personal expenses, the coffee planting preparations – land fencing up for grassing areas for the cattle from Buru Buru as they were removed from that area. The defendant concludes,

“I will be bringing you a full account on the above items if you so require, I am intending

to introduce better cattle next year if you will not be here by then.”

From the contents of this correspondence I am satisfied that the defendant clearly accepts his functions and his activities that he was in possession of and in fact in charge of the disputed properties and also receiving an income and incurring expenditure on account of such property. The defendant also concludes by stating that a full account will be submitted to the ex-senior chief on his release.

I also note from the letter of Koinange Mbiyu of March 1, 1957 Exhibit B(1) (*supra*):

The Directions –

The following instructions appear in para 2 of this letter:

Mangu land

This land will remain in my name

The lands which are in my name shall continued to be

looked after by my son Chief Charles Karuga and my

senior wife Mariamu Wambui while I am still in

detention camp.

“In future all the proceeds therefrom shall be paid direct to my bank account in Nairobi by chief Charles.”

As is already seen from Exhibit 3(1) letter of November 25, 1953 that the income was being generated from the lands and properties. This income, I find, was not accounted for by the defendant. I am satisfied that having accepted on his own admission the directions of March 1, 1957 (*supra*), the defendant has not rendered any account as to what further income he received from the lands and the property then remaining in the name of the deceased and which was left in the hands of the defendant.

The passbook account in 1967 was found to have a total amount of Shs 16,089.50 only. This amount was made up of the amount of the deceased’s account and the accrued interest and as shown as gross value in the Administration Cause No 186/67 of June 19, 1967. But there is not an iota of evidence to show that the defendant ever deposited any amount of money in this account at any time. I find that from the documents admitted and the whole evidence of the witnesses it was conclusively established that the defendant was in charge of these properties. I do not find his evidence offering any explanation as to what became of these.

There is no evidence that such an account was indeed rendered. I am also unable to detect from the defendant’s testimony whether he handed over such account to the deceased on his release or his other sons and wives. He has mentioned a car and the abandoned sawmill but nothing more. The plaintiffs are all emphatic that these properties were in the hands of the defendant and that they did not receive any share of such an income. I conclude from the whole of the evidence that there were livestock, cash and other movable property which was intrinsically valuable in the possession and under the control of the defendant and an income therefrom was also being derived, I have also taken into account the time, effort and money the defendant must have spent in this respect. He was indeed willing to account to his father to that extent he cannot be regarded as an Administrator *des-in-tort*. He was a trustee and must give the plaintiffs their share of the monies.

I also find on the basis of probabilities that such amount the defendant was in possession of and on account of the plaintiffs. He is I find a trustee for the beneficiaries and the plaintiffs have not abandoned this claim as they have been constantly demanding their share of it.

From the evidence as a whole in respect of this claim only one inescapable conclusion is arrived at and that is, that the defendant has not accounted for, in this respect, to his father or his mothers and brothers, the plaintiffs, and that they have not received their share of it.

One of the wives testified that she did not even receive a spoon. This manner of speech was the expression of the enormity of the defendant's default in this respect. I find this evidence correct. What should be the quantum of such a share? What compensation for this inordinate delay? The total value of this property is not clear. It was the defendant who could have provided such particulars. This he did not do. Some indication as to the nature of the properties and valuation is provided by Exhibit 3(1) *supra*. The plaintiffs also described the nature of some of these properties. Something is to be allowed. Some value of these livestock, trees, wattle bark and other property, development projections.

I have also taken note of the inflation, the reduced value of money today vis-a-vis 20/25 years ago. Shs 10,000 would have been a fortune then.

I declared the applicants/plaintiff have suffered loss. I assess in the circumstances this and award each of the four Houses against the respondent/defendant a meagre sum of Shs 40,000. In arriving at my award I have further taken into account Beatrice Gata's share, as well, which I have notionally divided in five equal shares.

The judgment is therefore entered in the following terms:

"The defendant to pay Joyce Kagendo, Phylis Wambui, Elizabeth Gathoni and Joseph Karuga and James Karuga sons of Julia Njeri a sum of Shs 40,000 each."

A further matter now remains to be dealt with and this is the distribution of lands now registered in the name of Beatrice Gata.

From the evidence before me I am satisfied that Beatrice Gata Koinange, one of the wives of the Senior Chief Koinange died intestate. At the time of her death she was the registered owner of land the total area which is 32.87 acres. I have already xxx that this total land area reverts back to the estate of the deceased, the registered owner having died without having left any male issue. I accept and find that Kikuyu Customary Law is applicable in this respect and that the equality in ownership by different houses is to be preserved. I find that the House of Mariamu Wambui, the mother of the defendant has already received almost half of the total lands, I also find the House of Julia Njeri having received more than the other three Houses.

I declare and distribute these lands as follows: T 49 Kiambaa 0.32 acres and 7.70 acres TITLE NCE 950 GT to be registered in the name of the daughter of Beatrice Gataa in order to preserve her name. The balance of the land 9 acres of MCG 950 Githanguri and 16.9 acres KW 424 I award to the House of Joyce Kagendo, Phylis Wambui and Elizabeth Gathoni as co-proprietors in equal shares. This will increase the individual holding of these three Houses by approximately 8 acres each. The appropriate registrar is ordered to carry out these directions.

I have already made my finding in respect of the land Thimbigwa KW 533 – 36.25 acres which was registered in the name of the senior chief at the time of his death.

The other parcel of land comprised of 7.66 acres and was subsequently registered in the name of Noah Karuga Koinange s/o Joyce Kagendo.

This registration has increased the total land holdings of the House of Joyce Kagendo from 52.83 acres to 60.49 acres.

I find this registration proper and towards achieving whatever equality amongst the Houses as is possible even at this late stage, in keeping with the Kikuyu Customary Law, which I have found to be applicable in this matter.

For the same reason I declare that Elizabeth Gathoni Koinange (14th plaintiff) and Phyllis Wambui are entitled to the land registered title No Githunguri Gathanga 490, the land area is 17.8 acres. I order the Land Registrar to register this title jointly in to above said names. This order will increase the land holding of the House of Elizabeth Gathoni from 58.73 to 67.63 acres and the land holding of the House of Phyllis Wambui from 57.395 acres formerly held, to 66.295 acres. The appropriate Registrar is so ordered.

I do propose to leave the Limuru/Bibironi/623 – 25.79 acres which is registered on January 21, 1981 in the name of Noah (4th plaintiff) of the House of Joyce Kagendo and Joseph (5th plaintiff) of the house of Julia Njeri in its present state. I find this action is a further step towards restoring some equality amongst the Houses.

This leaves Gatundu Mangu plots T 217, T 219 and T 240 to be dealt with. I order the appropriate registration for the same reasons that plot title Nos T 240 Gatundu Mangu be registered for Joseph Karuga Koinange and the house of Elizabeth Gathoni as co-proprietors in equal shares.

And as for T 217 and T 219 Gatundu Mangu, I award to the house of Joyce Kagendo. The appropriate Registrar is so ordered and directed to take appropriate action in this respect.

The land thus now located to the houses of Joyce Kagendo, Phyllis Wambui and Elizabeth Gathoni is in addition to approximately 8 acres which the House will also receive from Beatrice Gataa's lands in accordance with the order made earlier in this judgment.

I now consider the challenge made to the extra 50 acres or so which the defendant claims he is the registered owner of since 1958. It has not been specifically established that what exact lands these were and what sort of action was taken which perpetuated the fraud. The suspicion alone however strong is not a substitute for the actual proof. The defendant, it is established, was a colonial chief and was in a position of power and able to influence events, but whether the actions complained of were improperly or fraudulently carried out must be specifically proved.

Subsequent transfers have occurred. This is an impossible proposition for the plaintiff to succeed in.

This argument of the plaintiff is difficult to sustain for the reasons already given when considering Exb B(1), the letter dated March 1, 1957 when deciding a similar issue.

I have directed my mind to the issues submitted to the court by the consent of the parties and have dealt with an answered these issues when dealing specifically with each of the particular matters in dispute. I also observe that all the fifty six or so pieces and parcels of land having been consolidated, demarcated and allocated where subsequently registered in the names of the different Houses and sons during the period from 1956 to 1958. Some of these titles were subsequently transferred to third parties, some to the children of the registered owners, some are again charged for valuable consideration to financial institutions. The titles are registered under cap 300 Laws of Kenya Land Registration Act. This was 28 years or so ago. It is a long time indeed. Although the dispute did persist and remained, the nature of ownership was in certain cases materially affected. Delay due to the respect for Peter Mbiyu while it may well have been very credit-worthy and a noble sentiment does not provide a complete answer to this inordinate delay. Each title is to be individually examined in the light of its own circumstances. There is, I find, in this respect, no general rule applicable as such and each case is to be judged separately on its own merit. However in respect of issues No 6 and 7 of the Agreed Issues, I am satisfied on the whole of the evidence before the court and I conclude that the applicants/plaintiffs have not abandoned their claim over the years and the answer to these issues will be in the negative.

This brings me to the end of my judgment as to the distribution of lands and movable properties of the ex-senior Chief Koinange wa Mbiyu.

The defendant, I find, as a consequence of his own involvement and management of the deceased's properties both movable and immovable of his father, in his life-time, when he was in detention and also

subsequently held himself accountable for the same. His correspondence, actions and important position generally held in respect of these properties support this conclusion. I find this so.

Taking all the facts and the circumstances of this case and of this dispute I am satisfied that the action against the defendant before this court was properly brought and instituted and for good reasons.

However in view of my findings and the peculiar circumstances of this case I order that each party bear its own costs.

I wish to express my appreciation to the counsel for their assistance and courtesy shown to the court in this rather intricate and unfortunate family dispute which evaded the wisdom of the elders and the family for over a quarter of a century. I may add that Mr Wagithuku Karanja presented the plaintiffs' case with vigour and fairness and Mr Couldrey (and Mr Kinuthia who appeared with him), for the defendant argued his case with admirable ability and clarity.

For this assistance I thank them.

Dated and Delivered in Nairobi this 23rd day of May 1986

S.M.AMIN

JUDGE