



IN THE COURT OF APPEAL

AT NAIROBI

(Coram:Madan, Law & Potter JJA)

CIVIL APPEAL NO. 33 OF 1982

BETWEEN

NJUGUNA & 5 OTHERS.....APPELLANTS

AND

NJUGUNA.....RESPONDENT

(Appeal from the High Court at Nairobi, Sachdeva J)

JUDGMENT

The six appellants and the respondent are all brothers by the same father, three of them born of his first wife, and the other four by his second wife. Before the father died he divided his parcel of land Number 78/Kabete/ Kibicho into two equal portions giving one portion to each of his two wives. Upon the father's death the respondent was registered as owner of the land in accordance with customary law, he being the eldest son, in trust for himself and his six brothers as to which there was no dispute.

The appellants filed a suit against the respondent with a prayer that the land be registered in their names in equal shares. Sachdeva J allowed the parties to address him "informally" without being sworn as witnesses, indeed the learned judge did not record any evidence. The respondent told the learned judge that he was prepared to give each appellant a plot of land which was also what the appellants wanted save that the respondent claimed that he had been on the land for 16 years, and he should be given "uramati" according to Kikuyu custom, the court to decide what he should get. The appellants also said that they were prepared to have "judgment" without the court hearing evidence. They also produced to the court copy of proceedings before the clan elders who had heard the dispute between the parties in respect of the land and recommended that the sons of each mother should divide her portion equally among themselves, and they could find no reason at all entitling the respondent to a bigger share than the others. The learned judge said that he had been asked to divide the land as best as he could taking into account the respondent's claim for "uramati". He made an order for the land to be divided into eight equal portions, the respondent to get two portions and each appellant one portion.

The appellants have appealed. They are now saying that the learned judge erred in not giving weight to the recommendations of the elders, and that his decision is no decision at all. The appellants want the elders' recommendation to be made the decision of the court.

The learned judge did not hold a proper trial for a good reason. There was goodwill on both sides.

Although not stated in so many words the parties wished by consent the court to divide the land between them as the court thought fit, and by their words and conduct they authorised the court to do so. This kind of procedure is not usual or authorised, and it should not be repeated. It is best left to a panel of elders appointed under the Magistrates' Jurisdiction (Amendment) Act, No 14 of 1981. However in this particular case it had the merit of bringing a quick ending to yet another land case which the parties clearly wished also.

On this first appeal we can exercise the same powers as the High Court. We consider the appellants' objection contains merit that the learned judge misdirected himself in regard to "*uramati*." Under customary law the eldest son inherits land to hold it in trust for himself and the other heirs. This is a firmly embedded and regular feature of land holding among the Kikuyu in Kenya. Normally no "*uramati*" is given. It is a derivative duty which by custom falls upon the eldest son, and he discharges it also as a moral obligation. The *muramati* or administrator is not automatically entitled to "*uramati*".

In our opinion the division of land recommended by the elders was in accordance with Kikuyu customary law – three real brothers and four real brothers to share equally their respective mothers' portion as bequeathed by their father himself, he also having declared his opposition to either wife getting a bigger share than the other.

Cotran in his *Restatement of African Law (Kenya)*, Vol 2, at pages 11, 12 and 13 points out:

"The *muramati* has a duty to distribute the shares to the heirs, either in the way stipulated in the deceased's will or according to the rules of intestacy as directed by the *muhiriga* elders. He is not entitled to vary this... The *muramati* is not entitled to any remuneration for his services as administrator. He may, however, get a slightly larger share of the inheritance if the elders consider that he is a good *muramati*... A slightly larger share may go to the eldest son, but otherwise the sons share the land equally. The larger share is unspecified and will only be received if the eldest son proves in the eyes of the *muhiriga* elders to be a good *muramati*. In other words the larger share is not a right, but may be given at the discretion of the elders... The general principle is that in the case of a married man with two or more wives each house gets an equal share of the land irrespective of the number of children in each house."

We would allow this appeal and set aside the decree of the High Court and substitute therefor an order giving effect to division of the land between the parties as recommended by the elders. Although the appellants have succeeded, in view of the long and honest services rendered by the respondent as *muramati* – 26 years, now he said, we make no order for the costs of this appeal, and we do not disturb the order for costs made in the High Court.

Dated and Delivered at Nairobi this 19th day of January 1983.

C.B.MADAN

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JUDGE OF APPEAL

E.J.E.LAW

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JUDGE OF APPEAL

K.D.POTTER

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR