IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Madan, Potter and Kneeler, JJ A)

CIVIL APPEAL 54 OF 1981

MOSES KARANJA KARIUKI …….. APPELLANT

AND

1. NAOMI NJERI KARIUKI)

2. JONAH KAMAU KARIUKI)

3. WILLY KIBIRO KARIUKI) ……..……..
RESPONDENTS

4. JAMES KAHUNYO KARIUKI)

5. JAMES GICHINGA KARIUK I)

(Appeal from Judgment of the High Court of Kenya at Nairobi (Nyarangi, J) dated 3rd February, 1981

in

Civil Case 26 of 1980)

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JUDGMENT OF KNELLER J A

Samson (or Simon) Kariuki Kirigo died ion November 26, 1964 at Gilgil leaving Naomi Njeri as his relict and five sons called Jonah Kamau, Willy Kibiro, James Kahunyo, James Gichinga and Moses Karanja. He predeceased some daughters but they play no part in this appeal.

When he died he was already registered as proprietor of a 5-acre rural plot Kiambaa Thimbigua 118 and a 25-acre town plot Kiambaa Muchatha T 362.

Although he and his forebears hailed from Thimbigua sub location in Kiambaa location in Kiambu District he and most of his family had emigrated in 1961 to Ol Kalou Settlement Scheme in Upper Gilgil where they occupied plot 5 of 38 to 40 acres for which he was still paying when he died. While he was there Jonah Kamau and Moses Karanja were born. The Kiambu plots were looked after by his mother and Moses Karanja was sent by him to Kiambu to help his grandmother look after these ancestral properties when he was not at school while his father, mother and four brothers and sisters (as they were born) lived in upper Gilgil.

The Assistant Land Registrar of Kiambu District applied to the President of Kiambaa District African Court on December 29, 1964 for a certificate of succession to the local rural and town acres of the Late Samson Kariuki Kirigo.

The application was the beginning of Succession Case of 1965 in Kiambu African Court which began on January 29, 1965 before three members, Mr Gichiri, who presided, and Mr Ithebe and another, whose name is indecipherable, who recorded the proceedings. The Assistant Land Registrar, Naomi Njeri, the widow, Jonah Kamau, the first son, and Joseph Gathogo Kirigo, a stepbrother of the deceased appeared before court. The Assistant Land Registrar was described as the plaintiff and appeared for himself while the second son, Moses Karanja, was the defendant for whom, according to the record, his mother, the widow, elder brother and step uncle appeared and were sworn and gave evidence for him.

Naomi Njeri, the widow testified thus:

> "it is true that Simon died on November, 26 1964 at Gilgil. He left me as (his) only wife. This land and his town plot should be registered under the name of Moses Karanja my son who inherited the land from his father."

Joseph Gathogo Kerigo, the stepbrother, and Jonah Kamau, the first son, swore that they supported the widow's words.

The members accepted this evidence and decided and ordered that the Kiambaa rural and town land of the late Samson Kariuki Kirigo should be registered in the name of Moses Karanja, the second son, because he was (on January 1965) the right heir to those parcels.

The certificates of succession recording that the Kiambu District African Court had ordered that the name of the heir to receive these lands was Moses Karanja was dated March 3 1965 and presented and registered on April 12, 1965. There was provision for an appeal from this but none was filed.

All this was said and done by the family of the late Samson Kariuki Kirigo and an Assistant Land Registrar and three members of the Kiambu African court who were Wakikuyu and presumably ateeped in their customary law. There the matter seems to have rested until January 3, 1980 (about 15 years) when it was re-agitated by a plaint presented in the High Court in Nairobi on behalf of Naomi Njeri and four of her sons against Moses Karanja Kariuki the second son who then became the plaintiffs and the defendant in Civil Suit 26 of 1980.

These plaintiffs claimed that it was agreed by them and the defendant that the Upper Gilgil plot should be registered in the name of Jonah Kamau Kariuki, the first son and the second plaintiff, the Kiambaa acres in the name of Moses Karanja Kariuki, the second son and defendant, and each was to hold these pieces of land in trust for himself and for his brothers. (The plaint is not in these exact terms for it says 'all plaintiffs' which would include Naomi Njeri, the widow, but that is what it should have said).

It went on to state that in pursuance of that agreement, Moses Karanja Kariuki, the second defendant, was issued with the certificate of succession and registered as owner of the Kiambaa lands. The Public Trustee insisted that Naomi Njeri should be registered as the owner of the Upper Gilgil acres because they were still not paid for in 1965 or so. The loan for the purchase was probably repaid towards the end of 1980. Why the Public Trustee should select the widow when the first two sons were also of age is not clear unless it is because both were probably still at school though this did not prevent him agreeing to or acquiescing in the defendant being registered as sole proprietor of the Kiambaa plots.

The plaintiffs asked the defendant to acknowledge the trust and discharge his duties under it to them by letting them use the Kiambaa lands. He resolutely refused to do so and then it was that they asked for judgment against him for a declaration that he was registered as owner of these parcels and held them in trust for himself and the plaintiffs, an order that the trust be dissolved and each plaintiff and the defendant be registered as proprietors in common in equal shares of these lands.

The defendant in his defence asked for the plaintiffs' claim to be dismissed because he denied there was a family agreement in those terms or that he agreed to hold the Kiambaa plots in trust for himself and all the plaintiffs' or any trust arose or that the certificate of succession and registration was issued on such a basis. Quite the contrary, he said, for the family agreed the Kiambaa land was his inheritance and the Upper Gilgil farm was the plaintiffs' inheritance. He also pleaded estoppel based on the evidence of Naomi Njeri and Jonah Kariuki before e the Kiambu African Court and the findings and orders of that Court. He also referred to his occupation of the Kiambaa parcels since 1956, but, it seems, he made no more of it than that.

The trial began on January 28, 1981 and Naomi Njeri Kariuki, the widow, Jonah Kamau Kariuki, the first son, and Joseph Gathogo, the step brother of the deceased, gave evidence for the plaintiff and Moses Karanja, the second son, for the defendant. There was no change, then in the dramatis personae at any rate, from those in the Kiambu African Court sixteen years before. They were now represented by advocates so the testimony of the plaintiffs and their witnesses was fuller and more detailed. It was also greatly different.

Naomi Njeri Kariuki now swore each son was entitled to inherit not only the Ol Kalou acres but also the Kiambaa ones, whereas she said, in the earlier proceedings, it will be recalled, that the latter "should be registered under the name of Moses Karanja my son" the defendant "who inherited the land from his father.

She claimed in the High Court she told the African Court her husband's step brother told the defendant to hold the Kiambaa land in trust for himself and all the other sons until they were of age but there is not a word of this in the African Court's proceedings and Jonah Kamau back in Ol Kalou was and is older than the defendant.

She also told the Judge she was to have the Kiambaa acres but she did not tell the African Court this.

Jonah Kamau, the first son and second plaintiff, did not base these trusts on the orders of the step uncle but on the oral agreement between the brothers, including the defendant, and their mother in 1965. He did not enlarge on where or when the family met and agreed to all this and he denied they met anywhere in 1965. He admitted there had been no letter of demand before action (as pleaded in the written statement of defence denying the plaintiffs' claim that there had been one). He put the date of his approach to the defendant for a share of the Kiambaa acres at sometime in early 1979 and, he added, this was when his youngest son was 21 (which is probably significant because about this time land would have to be found for that son and those 40 or so acres at Ol Kalou being cultivated by four brothers their families and their mother for over fifteen years must be becoming less and less sufficient for their needs.

What did the stepbrother swear in the High Court? There was no family discussion before 1965 but Naomi Njeri and Jonah Kamau told him that Moses Karanja would hold the Kiambaa land in trust for himself and his brothers and they would do the same for the Ol Kalou plot. He went to the African Court and he supported what Naomi Njeri said about the Kiambaa acres but he did not know (when he gave evidence in the High Court sixteen years later) if she had mentioned that Moses Karanja was to hold them on trust. We know she is not recorded as saying so. He heard the ruling and orders of the African Tribunal and so did Monica Njeri and Jonah Kamau and they all acquiesced in them though they were contrary to what they insist (now) was the agreement.

The Kikuyu customary law for succession to land, he said, is that each son has share of his father's land especially of that land where his father was born. This was in answer to a question from the court and it was not challenged by the advocates fro the parties. He attended a meeting in1980 before a chief and sub-chief when the mother suggested each son should have one acre at Kiambaa and an equal share of the Gilgil land but he did not specify where this meeting occurred or who else attended it and what the upshot, if any was.

The defendants case was that Samson Kariuki Kirigo, his father, before he died in November 1964 said to his wife, Naomi Njeri, his sins and daughters he wanted her and his four sons to inherit his largest plot

(the upper Gilgil one) and the Defendant, his second son, to inherit the Kiambaa ones and he asked his wife if she objected and she said she did not nor, he implied did brothers. He called this a verbal will. He defendant did not call any witness.

The learned Judge saw and heard all these people in his court. He thought Naomi Njeri, the mother was anxious that all her sons should have a share of their father's lands, and he described her as a fair person. He was favourbaly impressed by Jonah Kamau the first son. He did not in so many words deal with the credibility of the step uncle or the defendant but it is probable he believed the formed and not the latter. He certainly described as false the defendant's evidence about his father's wish expressed in 1964 to him and all his close family and added that it was uncorroborated. He suggested that the defendant was sent to Kiambu to look after the land there because his father thought he would look after it better than the others.

He emphasised that Kikuyu custom that the sons all inherit in more or less equal shares the land their father owned at his death especially that which he had inherited from his father and more especially still if his father were born on that land.

Therefore, he went on, Naomi Njeri, the mother when she said in the African Court Moses inherited the Kiambaa plots from his father and should be registered as its owner she must have meant he was to hold them in trust for himself and his brother in equal shares. It seemed to him that that was what the mother, step uncle and elder brother understood they were saying. He read the ruling and orders of the African Court as being subject to the proviso to Section 20 of the Registered Land Act (Cap 300).

So the plaintiffs were given judgment for the declaration and the costs of the trial. They were not granted their prayer for dissolution of the trust and registration together with the defendant as proprietors in common in equal shares of the Kiambaa parcels because, it was held, they could only obtain these orders by way of an originating summons.

Now Moses Karanja, the second son and defendant, appeals from this decision and asks for it to be set aside with costs and for an order that the plaintiffs' suit in the High Court be dismissed with costs, all of which the plaintiff's oppose.

Some of his learned advocate's submissions were that the judge should have believed the appellant's evidence of his father's oral will which was corroborated by the evidence of his mother, step uncle and elder brother in the African Court and by their allowing him alone to occupy and cultivate the Kiambaa lands from 1964 to 1980. The African court's ruling and orders were that he was by inheritance the sole beneficial owner of these plots and entitled to registration as such. These were the right answers to the issues and the matter was *res judicata.*

Those submissions of the plaintiffs' learned advocate were that the judgment of the High Court was right and the only possible answer to the issues. It was inconceivable that the parties and the rest of their family would agree to the appellant being the sole beneficial owner of the Kiambaa land because it was contrary to their customary law. He proceedings in the African Court had to be read with that in mind and that was part of the reason why the judge preferred the evidence of the plaintiffs and step brother to that of the defendant. Those proceedings were inconsistent with a claim that the father made an oral will. So much for the submissions.

Now by the custom a Kikuyu father has to distribute his lad among his heirs during his lifetime, if possible, and usually does so. This often happens when a son marries and it counts as that son's share if his father has not revoked this gift before he dies. *(See Restatement of African Law:* Kenya: 2 Succession by Eugene Cotran, 1969, 1st edition page 15). He may make a will in old age or on his death bed and the only formalities required are that he must say before the elders of his family (mbari) and of the clan (muhiriga) and close friends just who will be the administrator (mumurati) of his estate and to whom each item of it shall go. (op cit pages 2 and 15).

Customary succession to land in the areas where land is registered is however, the subject of a process

dealt with in Sections 120 and 121 of the Registered Land Act and that is what happened here. The Registrar was told, and satisfied himself, that Samson Kariuki Kirigi owned his Kiambaa land and that he died intestate so he applied to the African Court for determination of the heirs and the court had to decide who was entitled to it according to the customary law applicable to the deceased proprietor.

If that were the end of the matter then I would agree that the African Court should have held that the brothers who were alive on November 24, 1964 (the day after Samson Kariuki Kirigo died) were entitled to equal shares in it, subject to any disposed of by their father in his life time or by will though no heir may be disinherited completely (page 16 op cit) but in my view, it is not for there is no prohibition on the heirs with the sanction of the mbari or muhiriga elders consenting to the size of the shares in the land or their location being different from those enjoined by the deceased proprietor's customary law. The power to dispose of it in his lifetime or by will in great old age or in extremis and the course the proceedings took in the Kiambu African Court by its Kikuyu Members having heard the two other beneficiaries at the time and one mabri elder support this.

It was, in effect, a consent judgment or a finding based on what the beneficiaries then wanted and which the elders and Registrar accepted was the right answer to the issue of who was entitled to the Kiambaa acres and all this was still in accordance with the customary law of the deceased proprietor. There was no appeal from it and it was unassailed for sixteen years.

It was also, at that time, a very pragmatic family agreement. Moses Karanja had looked after the Kiambaa immoveable property and Naomi Njeri and Jonah the Ol Kalou farm so each could keep what he or she had before. Their value in 1965 was about the same. None of these plots needed to be subdivided, notionally or physically, and the consent of any authority to a divided share in the land of the deceased proprietor was not required and would not prevent the Registrar from giving effect to the certificate: section 120(5) Registered Land Act.

The appellant did not, in fact, plead he inherited these small plots from his father under an oral will and I agree with the judge that a review of the evidence leads to the finding that he was unable to prove on the balance of probabilities his father made one.

He did plead, however, he inherited it, which must mean by disposition by his father while he was alive and that, with respect, the learned judge could and should have found he proved by the same standard but he did not do so because he looked for corroboration, which was not required, but was in fact there in the testimony and consent of the first and second plaintiff to the certificate succession being granted to the appellant because he was "the right heir" to these two plots belonging to his late father. The judge would have rejected that support for the appellants' claim to these plots, however, because he would not accept that by customary law any son of a Kikuyu father who dies intestate could inherit any of his father's immovable property save on trust for himself and his brothers but, as I have endeavoured to show, this is, in my respectful view, incorrect.

It is for these reasons that I would allow this appeal with costs and order the dismissal of the plaintiffs' suit with costs.

JUDGMENT OF MADAN J A

I respectfully agree with the judgment just delivered by Kneller JA.

In addition to the evidence delivered by the widow, Jonah Kamau, the first son, and the deceased father's stepbrother Kirigo to the Kiambu African Court, there is a well entrenched principle of customary law which decisively resolves the dispute between these parties. Among the Kikuyu the eldest son normally inherits land upon the death of his father under customary law. This rule of succession under customary law is indefeasible except in a case of disability arising from infirmity of body or mind or from any other cause or relinquishment by the eldest son himself.

If the land now being clamed from the appellant was not to be eventually inherited by him exclusively as

testified in the African Court by hi mother, elder brother and step uncle, there was no reason whatever why the and, as also the land at Ol Kalou, should not have been registered in the name of Jonah Kamau who, as the oldest son, was rightful as well as the natural heir to hold it for development under customary law.

The three members of the African Court who were Kikuyus themselves and "steeped in customary law" (per Kneller JA) and the mother, the eldest son and step uncle, Kikuyus also, could not but be aware that Jonah Kamau was the primary heir to be registered as owner of the land. The fact that all these persons agreed and allowed the appellant's title to go forward to registration clearly indicated the existence of a genuine arrangement between the parties that the appellant was to inherit the Kiambaa plots for himself alone. None of the other descendants of Samson Kariuki Kirigo appealed against the decision of the African Court which was a judgment in rem, in effect a consent judgment, and which stood unchallenged for about fifteen years.

As Potter JA also agrees the order will be in the terms proposed by Kneller JA.

JUDGMENT OF POTTER J A

I also agree.

Dated and delivered at Nairobi this 20th day of April , 1983.

C.B MADAN

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JUDGE OF APPEAL

K.D POTTER

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JUDGE OF APPEAL

A.A KNELLER

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR