



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 238 OF 2011

KAYUS MOKAYA BABU PLAINTIFF

VERSUS

CHARLES OMOSA KAYUS DEFENDANT

JUDGMENT

1. The plaintiff brought this suit against the defendant seeking a declaration; that the defendant holds a half share in all that parcel of land known as **LR No. Nyaribari Chache/B/B/Boburia/5343** (hereinafter referred to as “**the suit property**”) in trust for the plaintiff and an order compelling the defendant to transfer the said half share of the suit property to the plaintiff. In his plaint dated 25th October 2011, the plaintiff averred that the suit property was at all material times registered in the name of one, **Domiano Anunda Babu**, deceased who before his demise sold the property to the defendant at kshs.19,000/=. The plaintiff averred that the suit property was ancestral land and as such he is entitled to a portion thereof. The defendant entered appearance and filed a statement of defence on 17th February 2012 denying the plaintiff’s claim in its entirety. The defendant averred that he is the registered proprietor of the suit property and that the plaintiff’s claim over the same has no basis. The defendant averred that the plaintiff has no *locus standi* to bring this suit and that the claim is res judicata.
2. When the suit came up for hearing, the defendant and his advocate did not appear in court. The plaintiff gave evidence and called one witness. In his testimony, the plaintiff told the court that he is a polygamist and the defendant is his son with his first wife. He stated that the suit property was initially registered in the name of his mother one, Nyorita Babu Monyenye. His mother had three (3) sons namely, Richard Anunda Babu, Omanga Babu and himself. Anunda Babu was not married. When Anunda Babu died he (the plaintiff) is the one who was entitled to inherit his land. He therefore divided Anunda Babu’s land between his first wife and second wife. The defendant then took away the portion of that parcel of land that he had given to his second wife. Upon making inquiries, he discovered that the suit property was registered in the name of the defendant. He then lodged a claim against the defendant before Kiogoro Division Land Disputes Tribunal (“the tribunal”) which he lost. His appeal to the Nyanza Land Disputes Appeals Committee at Kisumu did not succeed. The plaintiff produced in evidence as exhibits; a copy of a certificate of official search on the title of the suit property, copies of the proceedings and decision of the tribunal and copies of the proceedings and decision of the Appeals Committee. The plaintiff told the court that his complaint was that the defendant had taken the entire parcel of land that was owned by Anunda Babu, deceased without considering the fact that he (the plaintiff) has another wife and children who require land.
3. The plaintiff’s witness was his second wife, Yunia Mbera Mokaya (PW2). PW2 told the court that the suit property belonged to Anunda Babu, deceased who was a brother to the plaintiff. Anunda was not married and when he died the family agreed after deliberations that the suit property be shared equally between the plaintiff’s two (2) wives. This agreement was

implemented in the year 1995 and she (PW2) was given a half portion of the suit property and the defendant's mother the other half portion. She occupied that portion of the suit property until the year 2003 when the defendant moved in and occupied her said portion of the suit property. PW2 told the court that a search carried out at the land's registry revealed that the suit property was registered in the name of the defendant. This is what prompted the filing of this suit.

4. After the close of the plaintiff's case, the plaintiff's advocates made closing submissions in writing. I have considered the plaintiff's case as pleaded and the evidence tendered in proof thereof. I have also considered the submissions by the plaintiff's advocates. The parties did not agree on issues for determination by the court. From the pleadings and the evidence on record, I am of the view that the only issues that arise for determination herein are;
 - i. Whether the defendant holds half share or portion of the suit property in trust for the plaintiff? and,
 - ii. Whether the defendant should be compelled to transfer the said half share or portion of the suit property to the plaintiff?

There is no dispute that the suit property is registered in the name of the defendant. According to the certificate of official search dated 20th July 2007 (P.Exh. 1), the defendant was registered as proprietor of the suit property on 13th February 1995. There is no evidence before me as to how the defendant acquired the suit property. According to paragraph 5 of the plaint, the defendant purchased the suit property from the previous registered owner thereof, one, Domiano Anunda Babu at a consideration of kshs.19,000/=. This position is supported by the proceedings and decision of the tribunal that was made on 10th November 2005. The same was produced in evidence as P.Exh. 2. Although the defendant is registered as the proprietor of the suit property, his rights as such proprietor are subject to whatever duty or obligation he may owe as a trustee in relation to the said property. See the proviso to section 28 of the Registered Land Act, Cap 300 Laws of Kenya (now repealed) and section 25 (2) of the Land Registration Act, 2012. The plaintiff's case is that, having regard to the manner in which the defendant acquired the suit property and the relationship between the parties, there should be an inference that the defendant holds half share of the suit property in trust for the plaintiff. The plaintiff's case is based on constructive trust. In the case of **John Gitiba & Another –vs- Jackson RiobaBuruna, Court of Appeal at Kisumu, Civil Appeal No. 89 of 2003 (unreported)** it was stated that:-

“Generally speaking, a constructive trust arises where the property the subject of a constructive trust is held by a person in circumstances where it would be inequitable to allow him to assert full beneficial ownership of the property.”

5. The defendant did not adduce any evidence in his defence. The onus of proving the case however remained with the plaintiff. He had a duty to place evidence before the court in proof of the constructive trust on which his case was based. The evidence before the court is that the plaintiff is the father of the defendant. The plaintiff had a brother called, Domiano Anunda Babu, deceased (hereinafter referred to as “**the deceased**”). The deceased was at all material times the registered proprietor of the suit property. The deceased was not married. Before his death, the deceased sold and transferred the suit property to the defendant at a consideration of kshs. 19,000/= on 13th February 1995. The defendant was duly issued with a land certificate on the same date. On this evidence, I am unable to see the basis on which the defendant can be said to be holding half share of the suit property in trust for the plaintiff. The plaintiff has in his own pleading stated that the defendant purchased the suit property at a consideration of Kshs. 19,000/=. The fact that the suit property was ancestral land and that it was owned by the deceased who was the plaintiff's brother before it was sold and transferred to the defendant does not confer upon the plaintiff any beneficial interest in the suit property. I am unable to say in the circumstances of this case that it would be inequitable to allow the defendant to assert full ownership over the suit property.
6. For the foregoing reasons, I am not satisfied that the plaintiff has proved his case against the defendant on a balance of probability. The suit is dismissed accordingly. The parties being father and son, each shall bear its own cost of the suit.

Delivered, signed and dated at KISII this 20th day of February, 2015.

S. OKONG'O

JUDGE

In the presence of:-

N/A for the plaintiff

N/A for the defendant

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE