REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

CIVIL CASE 3178 OF 1997

JOHN MUNGAI ITIRU.....PLAINTIFF

Versus

JAMES NDUNG'U MUNGAI.....DEFENDANT

J U D G M E N T

This suit was heard by my learned brother Justice P. Kihara Kariuki virtually to the end and should have comfortably proceeded to write judgment in the matter but somehow the suit was subsequently bought before me to complete the hearing under Order XVII rule 10 of the Civil Procedure Rules the learned Judge himself having made the effective orders, with consent of the parties Mr. Mulanya for Mr. Namada for the Defendant and M/s Nandwa for Mr. Munyalo for the Plaintiff, on 6th march 2009 and that was because of the transfer of the judge to the Judiciary Training Institute.

Looking at the pleadings, the Plaintiff filed this suit praying for judgment against the Defendant for

"(a) A declaration that the Defendant holds land parcel Matindiri Scheme 209 – Ndundori-Nakuru Plot No. 107 in trust of the Plaintiff.

(b) An order compelling, commanding and directing the Defendant to transfer half-undivided share in plot No. 109 situate as above to the Plaintiff. "

When the taking of evidence was concluded before me on 27th October, 2009, Mr. Munyalo and Mr. Namada agreed to file their respective submissions for a mention on 23rd November, 2009 before me with a view to fixing the date for judgment. But when the court case file was brought before me for mention on 23rd November, 2009, no written submissions had been filed by any of the learned counsels, who also made no appearances. I decided not to wait for them and proceed to write the judgment with option to use the written submissions if brought before I finished writing the judgment as I had a number of judgments to write during the Christmas Vacation and leave days. By the time I am completing writing this judgment, and it is the last of the judgments I have been writing, no party has filed its written submissions and I have therefore decided to do away with those written submissions as I see them now as a cause of delaying justice in this matter and therefore any brought now or hereafter is not acceptable.

The Plaintiff is said to be a paternal uncle of the Defendant and says claims half undivided share in the suit parcel of land measuring approximately 56 acres. Though the land is registered in the name of the Defendant, the Plaintiff claims that the Defendant is so

registered as a trustee.

The Plaintiff, therefore contents that he has a beneficial interest in the said land parcel same having been purchased jointly and severally by both parties through proceeds from a common business venture.

He alleges the Defendant has breached the trusteeship by failing to transfer to the Plaintiff the interest the Plaintiff is claiming and that is why this suit has been filed.

The Defendant does not accept the Plaintiff's case as the Defendant responds saying the suit parcel of land belongs to him exclusively and entirely having been allocated to him in 1964 by the Settlement Fund Trustees, as a sole purchaser and has since made full payments for it. Having completed payment on or a bout 22nd December, 1989, he was issued with the relevant title deed as sole proprietor.

The Defendant does not accept the trust claimed by the Plaintiff and points out that he never received financial contribution from the Plaintiff or anyone else, to purchase the land adding that there were no funds from any joint business venture with the Plaintiff.

From the evidence, these relatives and age mates grew together playing and eating together and therefore also did a number of other things together.

According to the Plaintiff, the two started business together in 1956 and in 1964 the two bought the suit parcel of land. The Defendant told the Plaintiff that they bought the land from the Settlement funds Trustee at a price of Ksh.30,000/-. The Defendant told the Plaintiff and the Defendant was the person who was dealing with the vendor. The Plaintiff said he was always at the shop and so the Defendant was the one who was interviewed by the vendor.

The Plaintiff went on to say he was not able to read and write but could sign his name; that when the Defendant told him they were required to make a deposit of Ksh.5,000/-,the Plaintiff, gave the Defendant that money from their joint business at the shop; that the balance was to be paid from family invoices, that the Defendant also told him that the Vendor was to provide cattle and sheep on the suit parcel of land to enable them pay the balance purchase price as the domestic animals were to generate income, that they agreed to plant pyrethrum to generate income, that the Plaintiff did not visit the farm often as he was running the shop.

He first went to the suit property in 1964 when they took possession, that in 1966 the Plaintiff took his wife, his mother and the Defendant's mother to the suit property, that the Defendant was representing family activities on the suit property, that the Defendant as the sole registered owner of the suit property had opened a bank account, that proceeds of milk sales from the farm were used by the Defendant to pay off the price of the land, that they also bought a vehicle and were selling cabbages and could also use proceeds to pay the suit property's purchase price, that subsequently the herd of cattle on the sit property were sold and paid off the whole purchase.

The Plaintiff added that when he subsequently asked the Defendant to divide the suit property between them in accordance with their agreement, the Defendant refused and started avoiding the Plaintiff. It became clear the Defendant would not sub-divide the suit property.

In 1982 they agreed to dissolve their partnership and divide the joint assets including their shop at Gikuni and in 1994 they shared the last remaining shop. The suit property was not shared that is why the Plaintiff brought this suit to have the sharing done as the Defendant had maintained that the suit property belonged to him alone.

The Plaintiff talks of subsequent acquisition and disposal of other properties by the two parties together and how they shared them sometimes being with other people. He claims that all those properties were acquired from joint funds and refutes the Defendant's claim that the suit property was acquired by the defendant alone.

The Plaintiff continued to tell the court that the properties owned by him and the Defendant were all financed from their Gikuni shop, an ordinary village general shop including items of clothing. Although it was always full, it was never valued which he thought was

making approximately Kshs.4000/- to 5000/- per month.

There is another case between the parties similar to this one still pending. Plaintiff here is Plaintiff in that suit and claim similar in Redhill L.R. 152/5 where the purchase price was Kshs.77,740/- and rented in the name of the Defendant in whose name the trade licence also was. While the Plaintiff was educated up to standard 4, the Defendant was educated up to standard 6.

There were some plots or pieces of land which were registered in names of both parties and while others registered in name of one of the parties only. Even the Plaintiff has some in his name alone. The Plaintiff did not know where loan repayments for the suit property was being made because the Defendant was all along responsible for the same. The Plaintiff's last visit to the suit farm was in 1983 before this suit was filed in 1997 prompting the Plaintiff to give evidence on 30th March 2006 when he was telling the court all these things.

The Defendant was the one who negotiated outside while the Plaintiff generated the money as he remained in the shop.

The procedure for acquiring the suit piece of land from the Settlement Fund Trustees (SFT) was similar to the procedure the party used to acquire another piece of land at Nakuru – Bahati of 54 acres from the SFT and this one was shared by the parties.

According to the Defendant, he set out to acquire the suit parcel of land on his own and passed through the process alone having passed an examination among the 40 successful applicants out of 200 applicants. The price was Ksh.60,000/- and not Kshs.30,000/- as stated by the Plaintiff. The Defendant made a prerequisite deposit of Kshs.5500/-. He entered into an agreement to pay the purchase price over a period of 30 years and by 1994 he had completed paying the purchase price and was issued with the title Deed dated 30th August, 1993. There was also a development loan of Kshs.30,000/- payable in 15 years.

The Defendant even tried to interest the Plaintiff and other people at home to make similar applications individually to the Settlement Fund Trustees for land and some respondent positively and obtained land.

He denies the Plaintiff's allegation that the suit parcel of land was acquired jointly by the parties for their mutual benefit. He says that as age mates and close relatives they grew up together as close friends and by 1954 the two begun doing business but separately even in the years of 1960s. It was never joint business. Each of them financed his business and operated it separately. They would however travel together to buy goods for their businesses.

It is not therefore true that the shop at Gikuni was a joint business venture between the Plaintiff and the Defendant. That shop belonged to the Defendant alone. It was his sole business licensed and rented in his sole name. But the Plaintiff as a close relative and close friend would after his work, often visit the Defendant at Gikuni and they would sit together in the shop and chat and on occasion the Plaintiff would also assist the Defendant in serving customers. The shop was a retail outlet for groceries and in 1964 the Defendant would manage a net profit of between Kshs.1000/- and Kshs.1500/- per month. Although the shop was not very well stocked.

The Defendant confirms he employed PW 4, Margaret Wanja Rugu in about 1979/80 when he had changed the stock in the shop to deal in animal Feeds. Margaret was employed to assist the Defendant run the shop.

The Plaintiff also used to assist the Defendant run the shop and the Defendant could call on him to assist in running the shop for sometime when the Defendant was away instead of closing the shop when on visits away from home for example to purchase stocks. The Defendant said there were also other friends who would assist him in similar manner the Plaintiff used to assist.

The Defendant further confirms he employed PW 2 Hirum Mburu as a young man to look after cattle and sheep at the suit parcel of land. The closeness between the Plaintiff and the Defendant may not have enabled PW 2 and PW 4 know who their real employer was as the two witnesses each told this court they were employed by the Plaintiff and Defendant jointly.

The Defendant went on to tell the court he remembers that after he acquired the suit parcel of land he took the Plaintiff to see the land, the Defendant, had purchased. On another occasion, the Defendant took the Plaintiff, his family and other members of their family to see and bless the land by slaughtering a got. The Plaintiff never visited the shamba in the Defendant's absence except on one occasion when

he accompanied the Defendant's lorry to the shamba. The lorry was going to fetch potatoes from Ndundori and as the Plaintiff owned a farm in Bahati, Nakuru, he got on the lorry which first went to the Defendant's farm to collect the potatoes and on the way back dropped the Plaintiff at Nakuru to proceed to his Bahati farm.

The Defendant told the court that since 1964 when he purchased the farm, the Plaintiff never at any time whatsoever made any claim of ownership of the suit parcel of land or any part or share therein. The first time the Defendant was ever confronted with such a claim was when he was served with court papers in respect of this case.

The Defendant pointed out that he knew from his own knowledge that the Plaintiff owns shambas in his own right. The one at Nakuru Bahati at a place called Kabatini involved a different and longer process. This is the one the Plaintiff clams had been acquired by the Defendant in similar manner as the suit parcel of land here. According to the Defendant, the whole piece of land was above 700 acres when they purchased it as a group in 1964 the Defendant using the name Kamau Mungai. That group split into two, consequently splitting the land into two. The Defendant remained with the group which retained about 400 acres. They sub-divided the 400 acres into several portions which were sold to various parties one of who was the Plaintiff getting L.R. No. 10453/4 at Ksh.9000/. The Defendant clarified that he is also known as Kamau Mungai and that he is also nick named "**WaRaken**" (Wa Rachel) which is most commonly used. He has been sued as James Ndung'u Mungai but Kamau was his given name at birth. The Plaintiff knows all those names.

The piece of land at Redhill L.R. 152/5 was acquired jointly by the two parties contributing purchase price equally. 60 acres meant for three people, but having been acquired by two people, they sold a third of it to a third party a Mr. Matheri. In short the Plaintiff and Defendant owned some farms or plots jointly while each owned some other farms or plots alone. The Defendant's case is that at no stage has the Plaintiff ever claimed or demanded or indicated that he has a share in the Matindiri plot, the suit plot, either directly or through a third party. He has no right or interest in the Matindiri plot and therefore the Defendant wants this suit be dismissed.

To conclude on the basis of careful consideration of the evidence before me, the first thing I am looking at is the fact that the Plaintiff took 33 years to file this suit. Bearing in mind the procedure through which the Defendant went to get the land allocated to him, the impression I get is that anyone wishing to be allocated such land had to directly approach the Settlement Fund Trustees to vindicate his interest personally to be subjected to personal interviewing to assess his suitability for allocation the land. The Plaintiff age mate of the Defendant were people of the same age each understanding the situation and it is difficult to see how the Plaintiff could have allowed the Defendant to go through that process alone while the Plaintiff thought he was also thereby getting half share of the said land, and thereafter living with the Defendant for 33 years while knowing the land was allocated to the Defendant alone and the relevant title deed subsequently issued in the sole name of the Defendant alone.

In the circumstances the evidence given by the Defendant when he says he even asked the Plaintiff and other relatives to also apply becomes more acceptable than what the Plaintiff is saying. The Defendant gave them relevant information to act upon. The Plaintiff did not act on it. He now wants to use their closeness to get the land he claims.

But even looking at that closeness, here are people who acquired other things jointly while acquiring some other things individually. Then one of them would sometimes transfer to the other person a thing or two and vice versa and that included parcels or plots of land. Out of such situation, what evidence is there for a court to identify a particular thing as acquired jointly when the parties handled the matter the way they have handled the suit parcel of land?

These are parties who were so close that even PW2 and PW 4 could not know whether they were employed by one of them or by both of them. Those employees could not know correct ownership of the properties they were given to care for. They could not know the person who paid them salary.

Another very important point is that this is a suit concerning registered land. The Plaintiff comes to court to claim that land without

thinking about the state of the relevant title at the time the suit is filed and the state of the title at the time the suit is heard, yet land titles are trade business commodities changing hands every-day like any other such commodities.

The Plaintiff exhibited no title deed, and if he could not get access to that document, he exhibited no copy of the relevant land register maintained under the Registered Land Act, Cap 300 Laws of Kenya said to be the law under which the suit parcel of land is registered.

Yes, the Defendant came up exhibiting a land title deed issued on 30th August, 1983 without backing it with a recent certified copy of the relevant land register, but as I have said, this is a kind of commodity which change hands almost daily. It is 26 years to-day from 1983. In the absence of the exhibits I am talking about from the Land Registrar, how sure are we to say to-day the suit parcel of land is still registered in the name of the Defendant for a lawful and valid court order to issue against him as prayed by the Plaintiff? This court should not be made to issue orders in the darkness; being useless court orders.

From the foregoing, I do find the Plaintiff has not, even on the balance of probabilities, succeeded in proving this suit against the Defendant. I do hereby dismiss the suit in its entirety. The Plaintiff to pay costs of the suit to the Defendant.

Dated at Nairobi this 5th day of February, 2010.

J. M. KHAMONI

JUDGE

Present

Mr. Munyalo for Waweru Gatonye & Co. Advocates for the Plaintiff

Court clerk - Kabiru

Court

Further order upon oral application by Mr. Munyalo, Counsel for the Plaintiff:

Copy of typed proceedings be provided to the Plaintiff upon payment in the normal manner.

J.M. KHAMONI

JUDGE

5/2/2010