



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 2790 of 1978

NJOROGE WAITWIKA.....PLAINTIFF

VERSUS

WANYOIKE WAITWIKA.....DEFENDANT

JUDGMENT

I. Delay and Background of Case

1. This land matter concerns a dispute over two parcels of land being Loc 5/ Kigunduini/1315 and Loc.5/ Kigunduini/ 977 consisting of 0.64 ha and 1.2 ha respectively.
2. The plaintiff Njoroge Waitwika is related to the defendant Wanyoike Waitwika. Both are brothers.
3. The plaintiff alleged that the defendant had registered both parcels of land in his name. That the Land belonged to their father and some he brought. That the said land is now being held in trust for him by the defendant. No agreement was reached by the elders.
4. The plaintiff filed suit in this High Court of Kenya on 6 November 1978. The defendant filed defense on
30 November 1978. As was the custom of this High Court, the matter was referred to arbitration between elders chaired by District Officer. They delivered their award on 6 April 1983.
5. The court ordered further evidence of witness on
18 February 1986. The award was read on 29 June 1987 which held that both parcels of land be equally divided between the parties.
6. Being dissatisfied with this award the defendant sought to set it aside. He delayed in executing this application but somewhere along these proceedings, the defendant passed away. His son Bernard Murigi Wanyoke was substituted to represent his late father's Estate.
7. The said Bernard Murigi Wanyoke did not respond to his advocate on 13 July 2005. Ransely J granted leave for M/s Kamere & Co. Advocate to cease from acting.
8. The matter came for trial.

9. The delay of finalizing this matter was the reference to arbitration and delay in dealing with the award.

II. Trial

10. The plaintiff gave evidence and stated how he was aware of his father's parcel of land. In 1964 the consolidation was being done. The younger brother (late defendant) registered all the land in his name and refused to have both of them being registered.

11. From the proceeding of arbitration before the elders (which I am permitted to refer to under section 34 of the Evidence Act) the plaintiff had redeemed his father's land which he had sold to others and consolidated them together which they were to apportion the same, the late defendant declined.

12. The defendant (son) stated he knew nothing of this matter. That if the matter could be referred to the elders. This was opposed by the advocate as prior to the case being filed and after the matter had been deliberated by elders the elders heard this matter.

III Opinion

13. The advocate for the plaintiff relied on the case law of:-

Gatimu Kinguru

v

Muya Gathangi (1976) KLR 250.

David Mbugua Mbogo and 3 Others

v

Justus Mugweru Mbogo

CA 116/94

Aluoch J.

Gathiba v Gathiba KLR (E & L) 356

Khamoni J.

Where the land having been registered in the name of one brother was held to have been registered in trust of the other brother.

14. In this case it is a clear indication of trust. I accordingly entered judgement for the plaintiff.

15. In summary

15.1 Judgement be and is hereby entered for the plaintiff against the defendant.

i) That this court declares the defendant holds Loc 5 Kagunduini /979 and

LOC 5 Kaguduini/1315 in trust of the defendant.

ii) That the said portion is to be delivered as per the elders award namely:-

a) LOC 5 / Kagunduini /977

Njoroge Waitwika 1.5. acres Wanyoike Waitwika 1.5 acres (deceased estate)

b) LOC 5 /Kagunduini /1315

Njoroge Waitwika 0.8 acres Wanyoike Waitwika 0.8 acres (deceased estate)

that is equal share of both properties.

15.2. I order that the trust be and is hereby determined

15.3. That this court hereby orders the sub-division of the said land, failure to, the Deputy Registrar do sign and execute documents to facilitate the sub-division.

15.4. The surveyor costs be met equally by the parties .

15.5. I award the costs of this suit to the plaintiff.

DATED THIS 29TH DAY OF JULY 2008 AT NAIROBI

M.A. ANG'AWA

JUDGE

K. Njau instructed by Kiania Njau & Advocates for the plaintiff – present

Wanyoike Waitwika – defendant in person - present