

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Civil Case 341 of 1996

MUNYU MAINA PLAINTIFF

Versus

HIRAM GATHIHA MAINA DEFENDANT

JUDGMENT

The plaintiff sued the defendant who is his brother seeking a declaration that the defendant was registered as the owner of Parcel No. RUGURU/KIAMARIAGA/711 in trust for him and for the defendant. The claim was denied by the defendant in his defence where the defendant stated that the plaintiff had no interest in that parcel of land. In evidence the plaintiff stated that property is 3.6 acres. It was registered in the defendant's name during consolidation. That registration in the defendant's name was under the directions of their father. Their father was registered as the owner of adjacent land RUGURU/KIAMARIGA/710 which is 4.4 acres. The plaintiff's step mother resides on the Parcel No. 410 together with her sons and the party's brother called James Maina. The plaintiff resides with the defendant on the suit land. He has resided there since the end of emergency. He got married after moving on the suit land. By then the defendant was already married. He resided on the portion which he was shown by their late father. To date he is utilizing that portion. He has planted coffee bushes, trees and fruit trees. He has built four houses for himself and his sons and their family. The defendant has also developed his portion. That their late father subdivided that piece of land amongst the two of them to share equally. The parcel 710 is subdivided amongst three other sons of the deceased. That before their father passed away he called all his sons and gave direction how parcel 711 and 710 would be occupied by his sons. Initially the defendant accepted that subdivision but later changed his mind. On being cross examined by the defence counsel he confirmed that the late father is buried on parcel 710. That he began to occupy his portion of parcel 711 in 1965. On being asked the reason why his father registered parcel 711 in the defendant's name he responded that he did so to avoid paying rates. That the rates at that time were Kshs. 15 per parcel of land. In around about way the plaintiff stated;-

“If the two parcels were consolidated my father would have paid rates for only one title. The defendant fraudulently registered himself as proprietor of the suit land. My father raised the issue of registration of the suit land with the defendant. My father did not report the matter to the police or the lands office.”

The plaintiff confirmed that he does also own land in Naromoru which he had purchased. PW 2 stated that although he is a resident of Naromoru he originated from Ruguru in Mathira. He was at Ruguru at the time of consolidation. That the father of the parties in this action subdivided his land between his two wives. The plaintiff and the defendant reside on the land allocated to their mother called Nyatira. In cross examination he stated that the defendant was registered as proprietor of Parcel No. 711 as the first son to hold in trust. PW 3 stated that the plaintiff and the defendant are his brothers. He is the last born of that family. Their father had two wives. The second wife Miriam Wamuyu Maina had two sons. Their deceased father subdivided his land their land into parcel 710 and 711. He subdivided the land because being a man of olden times he feared of being bewitched. He therefore registered parcel 711 in to the defendant's name but indicated that it was to be used by the plaintiff and the defendant. This subdivision occurred during demarcation. Both the plaintiff and defendant settled and cultivated that land and resided with their family. He said that there was no boundary between 710 and 711. The plaintiff had cultivated

coffee and trees. Similarly the defendant had coffee on his side. When their father passed away he left them occupying that land in that manner. Their father had stated that the second wife, her sons and this witness were to inherit parcel no. 710. He therefore occupies parcel no. 710. On cross examination he said that he was born in 1952. Consolidation was done in 1959. He reiterated that their late father divided his land because it was too big. In total both parcels are 8 acres. The defendant confirmed that the plaintiff is his brother but denied that he owned Parcel No. 711 in trust for the plaintiff. At consolidation he said that his grandmother had a piece of land which she gave to him because he was named after her late husband. He produced the green card to show that registration. He denied that at any time he was asked by their deceased father to hold Parcel No. 711 in trust for the plaintiff. He stated that at consolidation the plaintiff was told by their late father to be staying on Parcel No. 711 until he purchased another piece of land. Since the request was by their late father he could not refuse. Their late father in 1968 purchased a property for the plaintiff in Naromoru. He produced that green card in evidence. His witness Timothy Muraguri Ngari said that he is a resident of Mathira at Konyu location. He is related to the parties in the matter in that the father of his father and the late father of the parties had the same father. That the parties grandfather and his grandfather were brothers. The Parcel No. 711 was given to the defendant at a year he could not recall by the wife of their grand mother. He however confirmed that he was given during land consolidation. The parties late father got Parcel No. 710. He stated that the family of these parties never discussed the plaintiff's occupation or right over parcel 711. The plaintiff's claim for declaration of trust is not supported by the plaintiff's own evidence. At first the plaintiff stated that their late father fearing to ordered to pay high rates had parcel 711 registered in the defendant's name. Later in evidence he alleged that the defendant fraudulently registered himself as the owner of the suit property. PW 2 in evidence stated that the parties late father divided his property amongst his two wives and had therefore parcel 711 registered in the defendant name to represent their mother. PW 3 said that the reason for registering the suit property in the defendant's names was because their deceased father feared being bewitched. The issue that the court needs to consider is whether the defendant was registered as trustee of the suit property on his behalf and on behalf of the plaintiff. The burden of proof lay on the plaintiff. The defendant in submissions argued that the plaintiff's claim is defeated by the provisions of section 143 of the registered land act. That section provides:-

“Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained or omitted by fraud or mistake.”

Although I am not necessarily of the view that the plaintiff has proved his case I do however wish to dissuade the defendant from the position he has taken in arguing the provisions of section 143 RLA. Clearly a claim in trust is provided for in section 28 RLA. That section provides:

“The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interest and claims whatsoever but subject –

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) unless the contrary is expressed in the register, to such liabilities, right and interests as effect the same and are declared by section 30 not to require noting on the register:

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.

It is clear that a claim in trust can be brought even on first registration on a claim in trust. Having considered the evidence tendered on the evidence of the plaintiff I make a finding that the plaintiff has failed to discharge the burden of proof. The plaintiff did not prove that the defendant was registered as a trustee of the suit property. Accordingly the plaintiff's case is hereby dismissed with costs being awarded to the defendant.

Dated and delivered this 15th day of December 2008

MARY KASANGO

JUDGE