

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI

Civil Case 367 of 1993

EDWARD MUTHEE GITIMO.....PLAINTIFF

Versus

JOSEPH MATHENGE GITIMU.....DEFENDANT

JUDGMENT

This case came before court by way of formal proof. The Defendant had failed to file an appearance within the prescribed period and on the 30th November 2004 interlocutory judgment was entered against him. The Plaintiff began by stating that the Defendant is his eldest brother. That he is known by another name of Ndi Gitimu. That the Defendant is of the older wife while Plaintiff's mother is the younger wife. He confirmed that they were both the sons of Gitimu Ndi. His mother was called Monica Wairimu Gitimu and she had three sons and one girl. The girl who was married passed away in 1983. The older wife was called Prisca Mumbi Gitimu. She had two children, a boy and a girl but the girl had died. That property No. 326 belonged to their father. That it is 4.6 acres. That in 1956 or 1957 when the consolidation and demarcation was taking place that property was registered in the name of Gitimu Ndi. That that registration was done in the name of the Defendant because the Plaintiff and their father were away working at Nanyuki. He produced before court the Green Card in respect of the suit property where it shows that in 1963 there was a change of names to the name of Mathenge son of Gitimu. He stated that this property was passed on to Gitimu Ndi by their grandfather. He therefore stated that the land is held by the Defendant as trustee of the family of Gitimu. The Plaintiff had planted 870 tea bushes and that before his father's death in 1976 he had called him together with the Defendant in the company of five elders and he had stated that the suit property should be sub divided between the Plaintiff and the Defendant. After the death of their father the Defendant refused to abide by their father's wish. Hence why the Plaintiff had to file the present suit. He therefore prayed for orders.

I have considered the Plaintiff's claim as per the Plaint dated 30th September 1993. I have also considered the uncontroverted evidence of the Plaintiffs. I find that the Plaintiff has proved his case on a balance of probability that the Defendant was registered as owner of the suit property as trustee for him. I however have examined Plaintiff's exhibit No. 1, the Green Card in respect of property **MAGUTU/GAIKUYU/326**. I find that on 1st February 1979 there was a charge registered in favour of Agricultural Finance Corporation (AFC) for the amount of Kshs.10,000/=. Following that charge AFC was registered as proprietor. In considering the present judgment I find that it would be difficult for this court to enter judgment for the sub division to be undertaken until the Plaintiff brings before court evidence that AFC have been fully paid and also to bring before court a discharge of charge by AFC. Accordingly the court does in this judgment grant the Plaintiff a preliminary decree to the effect that the Defendant holds property No. **MAGUTU/GAIKUYU/326** in trust for the Plaintiff. The judgment in respect of sub division shall await further evidence to be presented by the Plaintiff by affidavit evidence. The court will also consider the costs of the suit when the final decree is issued by the court.

Dated and delivered at Nyeri this 20th day of July 2007.

MARY KASANGO

JUDGE