



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 2155 of 1984

1. Land and Environmental Law Division

2. Subject of main suit –

a. Partnership

b. Assets land

LR Nyandarua/Matindiri/68 allegedly jointly owed by and through partnership

c. Trial 3 may 1986 – 30 July 1986 Shields J.

d. Judgment 6 August 1986.

Held:

i) Suit dismissed on grounds of Limitation of actions act

ii) Suit time barred (6 August 1986).

e) Decree 24 February 1987

f) Plaintiff appeals to court of appeal CA134/88

g) Appeal withdrawn by consent of parties on 4 October 1993

h) Plaintiff files application to allow appeal out of time 3 January 1996

Application dismissed 28 May 1997

i) Caution lodged by plaintiff on land 20 May 1981.

3. Application 18 August 2006

a) Removal of caution

b) Urgency 12 years will expire soon.

4. Held: Caution removed

5. Case law

Used at the main trial

a) Shepherd v Canturinght (1955) AC 431

b) Gatimu v Meenze Gathenji (1976) KLR 253

6 Advocate

D.I. Wasike for Kirundi & Co. Advocates for the defendant/applicant- present

Simon Kungu in person the plaintiff/respondent- present

MOSES NJOMBA MUKINDI.....PLAINTIFF

VERSUS

SIMON KUNGU.....DEFENDANT

RULING

I: Application to remove caution on LR Nyandarua/Matindiri/68 lodged on 20 November 1981 (dated 18 August 2006).

A) Background to application

1. The plaintiff and defendant are brother-in law. They entered into a partnership deed dated 15 October 1964 in a partnership called Kungu Njomba and Co. Both held equal shares.

2. The plaintiff/respondents claimed then that the partnership held assets known as Nyandarua/Matindiri/68 being 34 acres. It was agreed thereafter that this portion of land would be divided into two equal parts. The defendants a survey under the settlement scheme where this parcel of land fell under objected to such subdivision. He claimed that the partnership was merely to sell vegetable products and as such no agreement in effect arose as to sub-division of the land.

3. The plaintiff/respondent filed suit in 1984 to claim half of this property by way of plaint. The suit came for trial before Shields J who recorded evidence that showed the plaintiff, a carpenter did enter into an agreement with the defendant/applicant herein. That the said plaintiff/respondent was on the land constructed fenced the land but left at the end of March 1965. He never hired on the land for 21 years. His title therefore had long since extinguished under the statues of Limitation Act. His claim was dismissed. The Hon. Judge remarked that the plaintiff/respondent appeared to be a truthful witness. The Hon. Judge did not trust the evidence of the defendant/applicant. He found him to be a dishonest witness.

4. The main grounds of dismissing the case was due to jurisdiction. The suit was time barred and the plaintiff/respodennts case upon a ruling was dismissed.

5. The plaintiff/respondent appealed to the court of appeal in 1988 (CA 134/88). The appeal withdrawn by consent of the parties on 4 October 1993. The plaintiff/respondent then filed an application to allow the appeal be filed out of time 3 January 1996. This was duly dismissed Lakha JA on 28 May 1997. There was in effect nothing now left with this case.

6) Twelve years are almost up. The decree of the said ruling/judgment of Shields J had not been executed on grounds that there exists a caution of 20 November 1981.

II: Caution

7) The application before this court is for the removal of the caution lodged by the plaintiff/respondent against LR Nyadarua/Matindiri/68 on 20 November 1981.

8) The plaintiffs advocate no longer exists. Leave to remove them from record was granted Osiemo J (15 August 2007) and service upon plaintiff was made personally.

III: Held

9) The application of 18 August 2006 seeking orders to remove the caution be and is hereby allowed.

10) There be costs to the applicant/defendant

Dated this 2nd day of October 2007 at Nairobi.

M.A. ANG'AWA

JUDGE

D.I. Wasike for Kirundi & Co. Advocates for defendant/applicant- presence

Simon Kungu (in person) – plaintiff/respondent - presence