



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**Civil Case 22 of 2002**

**PETER MUSHILA MBOYI .....PLAINTIFF**

**VERSUS**

**JOSEPH MUSOI AMBOYI .....DEFENDANT**

**JUDGEMENT**

The Plaintiff, Peter Mushila Mboyi, is a step brother of the Defendant, Joseph Musoi Amboyi. Their father and mother are dead and both were buried on the land known as Kakamega/Shiswa/326 which was registered in the name of the Defendant during the land demarcation and adjudication. The Plaintiff cultivated part of the land up to the year 2001 when he was stopped by the Defendant who is much older than him. The Plaintiff involved the local elders including the Assistant Chief of Shiswa Sub-location in Kakamega district where the land is situate to sort out the dispute but to no avail. The elders however ordered the Defendant to give the Plaintiff half of the land which he refused to do, hence this suit.

Francis Wakonya Anyula, who gave evidence on behalf of the Plaintiff testified that he knew the parties and that the suit land belonged to their father and that the parties should in his opinion share the land equally.

Moses Indege Shirungu who also testified on behalf of the Plaintiff stated that he knew of the dispute over the land involving the parties and that the suit land should be shared equally by them as it belonged to their late father. He was riled by the refusal of the Defendant to share the land with his step brother, the Plaintiff.

When he gave evidence, the Defendant claimed that the land was his and not his father's because, he asserted, he had bought it and placed his father on it in 1948. He told the court in evidence that he had papers showing that he had bought the land but none was produced. The Defendant admitted that he was born in 1931 and in 1948 was aged 17 yrs.

The Defendant's witness, one Samson Mukava Anyula, testified that his father had sold the suit land to the Defendant in 1963 for Shs.100/= and a bicycle valued Shs.300/=. He said the parties' father entered the land in 1963.

The burden of proving that the Defendant held half of the suit land in trust for the Plaintiff reposed on the Plaintiff. I observed the Plaintiff and the Defendant and their respective witnesses as they testified before me. I was impressed by the evidence of the Plaintiff and his witnesses which was credible and plausible. His evidence shows that the parties' father started living on the suit land in 1948 when the Defendant, on his admission, was a boy of 17 years. It is unlikely that at that age, the Defendant had, as alleged by him, worked gainfully and earned money and also engaged in purchase of the land. The parties' father and his two wives were on the land in 1948 and when they died in the 1960s, they were buried on it. Being an adult at the time of the land consolidation and adjudication after the death of the parties' father in 1963, the Defendant got registered as the proprietor of the suit land. The difference in age between the Plaintiff and the Defendant seemed considerable as I watched them give evidence. The Defendant appeared a much older person than the Plaintiff.

The Defendant did not appear a man of truth and his demeanour, which I observed, clearly showed that he was telling lies. The Defendant's witness, Samson Mukava Anyula, clearly lied to the court when he claimed that the father of the parties started living on the land in 1963. That is the year when both the Plaintiff and the Defendant agreed in their evidence that their father died and was buried on the suit land. I dismiss as lies this evidence.

On the basis of the evidence tendered to the court, it is my finding that the suit land belonged to the father of the parties and the Plaintiff and the Defendant were each entitled to half share in it as the sons and heirs of their father. It is also my finding that the Defendant's registration as proprietor was subject to the interest of the Plaintiff and that he held the suit land in trust for the Plaintiff.

I hold that there exists a resulting trust in favour of the Plaintiff to the extent of half of the suit land. I order that the name of the Defendant as the sole proprietor of the land be cancelled forthwith and the names of the Plaintiff and the Defendant be registered as tenants in common in equal shares. The Defendant shall bear the costs of this suit.

*Dated, signed and delivered at Kakamega this 24<sup>th</sup> day of February, 2006.*

**G. B. M. KARIUKI**

**J U D G E**