



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 524 of 2004

ZACHARIA MUGENYU KABURU.....PLAINTIFF

VERSUS

JOSEPH MUGENYU KABURU.....DEFENDANT

RULING

The plaintiff brought this suit against the defendant seeking judgment for:-

- (a) A declaration that all that parcel of land known as LR NO. 26/MUGAGA/KAHUHO registered in the name of the Defendant was so registered in trust for the benefit of the defendant and the plaintiff.
- (b) An order that the suit land be subdivided equally between the plaintiff and the defendant.
- (c) An order of injunction restraining the defendant from dealing, alienating and transferring or in any other way interfering with the suit land pending the hearing and final determination of this suit.
- (d) Mesne profits for the loss of use of the suit land to be assessed by the court.
- (e) Costs and interest of the suit.

The defendant filed a defence denying the claim.

But before the suit was heard the defendant raised a Preliminary Objection on a point of law. The same is raised at Paragraph 3 of the Defence:

1. That the defendant herein being sued in the Capacity of a trustee, the plaintiff should have as such commenced this suit with an originating summons under Order XXXVI Rule 1 of the Civil Procedure Rules and not by way of a suit.
2. The second limb of his cause of action is based on an Agreement dated 12th November 1983. This is contained in paragraph 7 of the plaint. This suit having been filed on 24th May 2004, which is over cause of action arose, the same is time barred.

3. This Agreement was over a transfer of Agriculture Land which is subject to Land Control Board Consent and the same was not secured within 6 months after the Agreement was entered into. This violated the provisions of Section 7 of the Land Control Act Cap 302. The said agreement was therefore void for lack of Land Control Board Consent.

For the above reason counsel for the Defendant urged the court to strike out the suit with costs.

The plaintiff conceded that the Agreement between him and the defendant was entered into on 12th November 1983 which is over 20 years before this suit was filed. He also admitted that the agreement involves a transaction over agricultural land and he had not secured a Land Control Board Consent as required under Section 7 of the Act.

For the above reasons, the Preliminary Objection is upheld and the plaintiff's suit is struck out with costs to the defendants.

Dated and delivered at Nairobi this 27th day of June 2006.

J.L.A. OSIEMO

JUDGE