



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE 5703 OF 1990

VITALIS MBUGUA WAINAINA PLAINTIFF

VERSUS

DANIEL NDURE WAINAINA DEFENDANT

JUDGMENT

By his Pleint the Plaintiff alleges that he bought the suit premises before demarcation and that the Defendant his brother (since deceased) registered the suit premises in his name in trust for the Plaintiff. In his prayers he asked that the suit premises, which he claims is 0.25 of a hectare, should be transferred to him.

The Defendant denies a trust.

The Plaintiff gave evidence that his brother had bought a piece of land at Wangige in 1937 from one Kienje Wabaiya. His mother had paid three goats and one cow for the same. During demarcation the suit premises were registered in the name of his brother. He was away at Kitale in the Kenya Police. He stated that in 1958 he called his brother and mother and one elder and someone called J. W. Mungai also his brother's widow. His mother told his brother to give him a plot of land from the plot in his name.

In 1969 he discovered his brother was about to sell the plot and put a caution on the title to the land. He produced a copy of the minutes of meeting held on the 28.7.89.

The Defendant had been substituted by his son Godfrey Wainaina Ndure. He produced the Green Card, which shows that his father was first registered as owner of the suit premises on 28.12.1956 and that a certificate of title was issued on 17.7.1969.

The onus is on the Plaintiff on a balance of probabilities to show that the suit premises were held by his father in trust for him.

In his affidavit in support of the application to substitute the Defendant's son as his representative of the 18.7.1995 in paragraph 9 he states that the defendant refused to sub-divide land parcel No.372/A and let him have a separate title thereto.

The Plaintiff produced no written evidence of a trust. The only evidence he alluded to was the statement of his mother now deceased that she had told his brother that he should register the land in the name of the Plaintiff. This was in 1956. The Plaintiff alleged that the three goats and one cow was paid by his mother and although registered in the name of his brother the land was for both of them.

This is not consistent with the allegation in the plaint that he had purchased the land before

demarcation.

Neither the Plaintiff's mother nor his brother are alive and neither were able to give evidence and say if the version put forward by the Plaintiff was true.

The Plaintiff also claims 0.25 hectares whereas the suit premises measures 0.244 hectares.

Even on his own evidence the Plaintiff would only be entitled to one half as he stated in evidence that the land was for both of them.

Had the Plaintiff a valid claim to a trust in respect of either the whole or half of it he had from 1956, when he was aware that the land was registered in his brother's name, to bring a claim.

Even if the proceedings before the Chief were competent, which they were not, it was not until 1989 that the Plaintiff took any steps to assert his claim. This is 33 years after he was aware of the registration of the title to the suit premises in his father's name.

In my view the lack of any diligence by the plaintiff militates against him together with the fact that there is no credible evidence of a trust. In the result the Plaintiff having failed to discharge the onus of proof upon him, his suit fails. I therefore dismiss the same with costs to the Defendant.

Dated and delivered at Nairobi this 19th day of July, 2005

P.J. RANSLEY

JUDGE