

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 1007 OF 1999 (O.S.)

PETER NJOROGE MWARIRI PLAINTIFF

VERSUS

JOHN KIMANI MWARIRI DEFENDANT

RULING

By this originating summons brought under Sections 122 and 126 of the Registered Land Act and O. XXXVI Rule 3F of the Civil Procedure Rules, the plaintiff seeks a declaration that the defendant holds L.R. No. Komothai/Kiratina/148 in trust for the benefit of the late Benjamin Mwariri Kimani's Estate and his beneficiaries. He also seeks an order to determine

(a) that a trust in respect of the suit premises exists and (b) the rightful heirs of the late Benjamin Mwariri Kimani.

When this matter came up for hearing before me on 17.1.2001, Miss Wangari, learned Counsel for the defendant raised a preliminary objection to the whole suit in which she submitted that the suit was improperly brought and therefore incompetent. She submitted that there was no provision either in O. XXXVI of the Civil Procedure Rules or Sections 122 and 126 of the Registered Land Act for bringing an action for the determination of a trust in land.

Mr. Ogeto who represents the plaintiff submitted that the suit had been properly instituted under O. XXXVI of the Civil Procedure Rules and that there was therefore nothing wrong with the suit.

O. XXXVI Rule 3F provides that applications under the Registered Law Act other than under Sections 120, 128, 133, 138, 143 and 150 thereof shall be by originating summons unless there is pending a suit involving the same lands when the application may be made by summons in chambers in that suit.

Sections 122 and 126 of the Registered Land Act under which the instant suit has been brought respectively deal with:-

(a) the effect of transmission on death; and

(b) description of persons acquiring land etc in a fiduciary capacity and provide that particulars of trusts shall not be entered in the register.

Neither section contains any provision for making applications and quite clearly O. XXXVI Rule 3F of the Civil Procedure Rules cannot be invoked to justify an application for the declaration of a trust over land. That position was confirmed by the Court of Appeal in the case of Francis Gitonga Macharia V. Muiruri Waithaka (Court of Appeal, Civil Appeal No. 110 of 1997) where it was stated:-

“As for the appellant's alternative claim that the respondent was holding the suit land in trust for him, to the extent that it was brought by Originating Summons other than by plaint, it was also incompetent.”

The meaning of the above passage is plain. A claim such as we have in the instant case where the plaintiff seeks an order that the defendant is holding the suit land in trust for him (or indeed for any other person) is to the extent that it has been brought by originating summons incompetent. Such a claim has to be brought by plaint.

For those reasons, I uphold Miss Wangari's preliminary point and dismiss the plaintiff's suit with costs.

Dated at Nairobi this 9th day of February, 2001.

T. MBALUTO

JUDGE