



**REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI**

**MILI
MAN
I
LAW
COURTS**

**Civil
Case
3542
of
1989**

**JACKAN
MAINA.....1st
PLAINTIFF**

JOSPHAT KUMU GATHI.....2nd PLAINTIFF

VERSUS

MAINA MWANGI DEFENDANT

RULING

Counsel for the Defendant, Mr. K.M. Maini, has raised a preliminary objection praying that this suit should be dismissed at this stage without proceeding into the calling of evidence because it is not a proper case before the court.

Mr. Kaai for the plaintiff's does not agree insisting that the case should proceed to hearing.

The main contention is that the plaintiff's case is based on the allegation of a breach of a trust by a culprit who has died and cannot therefore be brought to the court. Mr. Maini argues that the defendant cannot be held responsible for a breach alleged to have been committed by the deceased. Mr. Kaai argues that the court can invoke the Equitable Doctrine of Tracing and make the Defendant responsible.^f

From the submissions in the light of the pleadings in the case file, the plaintiffs belong to a clan known as Mbari Ya Ngari while the defendant belongs to a clan known as Mbari Ya Njagi. The plaintiffs are Jackan Maina and Josephat Kumu Gathi. The defendant who transferred the suit parcel of land to the defendant is Mugeru

Nyangio, a member of the plaintiff's clan. He died on 20th August 1977 having had the transfer of the suit parcel of land to the defendant registered on 20th July 1977.

The suit parcel of land was registered in the name of Mugeru Nyangio, now deceased, under the Registered Land Act (cap.300 Laws of Kenya) on a first registration on 7th July 1960. Particulars of that parcel of land are KIINE/NYANGIO/90 and the relevant copy of the land register produced from the Land registry shows that the title the deceased held was freehold.

There is no indication of a trust on that register in terms of the proviso to section 28 as read with section 126(1) of the Registered Land Act whose end result is to the effect that a trust must be indicated on the register with the words "as trustee" although particulars of that trust should not be entered on the register. But the relevant documents will be filed or kept in the Land Registry.

Thus after the deceased has been registered on 7th July 1960 as a free holder instead of a trustee, the plaintiff must have been aware of it. If they genuinely claim the deceased was a trustee, they ought to have seen he was wrongly registered as a free holder and should therefore have taken steps, during the 17 years the deceased lived after that registration and before he died, against the deceased to see that the deceased's title was changed from being freehold to a trust. The plaintiffs never took any such steps. Died on the way.

Appellants No. 3 and 4 denied being implicated in the stealing of PW 1's cattle. PW4 had seen thorn on the night of 4th July at Muchugi's bar. They drove together to Molo River from where they loaded 31 head of cattle,. They left there early in the morning and they were together all the time on the 5th and 6th July until they drove to Narok after the sale of cattle where Appellants 2, 3 and 4 were left. PW5 the turnboy had been with them from 4th July to the 6th July until they departed at Narok. Again their identification by Pw4 and PW5 is by recognition and does not require an identification parade.

PW7 and 8 recognised them as the persons who were with appellant No. 2 whose undisputed particulars were recorded.

PW 13 and PW 15 recognised appellant Nos. 2 and 3 as having sold one cow to each of them. That identification is sound and does not require an identification parade.

Regarding Appellant No. 1 the evidence implicating him is that of PW4, PW5 and Pw6. PW6 saw him on the farm near the water pump in the company of Appellant No. 4. This was during day time. Although no time of observation is given, but because of the rude reply the witness received from Appellant No. 4 there clearly was some conversation during which time the witness saw the Appellant. Pw4 and PW5 were with the Appellant at Muchugi's bar and they drove together to Molo river when the Appellant No. 1 together with appellant No. 2 went to fetch the cattle. They together loaded the livestock into the lorry. At 6 am they Set off together for Molo where the first Appellant and the unidentified person alighted from the vehicle. By this time the Appellant No. 1 had been with P.W.4 and P.W.5 from 9 p.m. the night before in the bar. It is not stated in evidence what sources of light there were during this time but

In 1977 the deceased transferred the land, he saw was his as freehold, to the defendant. That was on 20th July. The title transferred was an indefeasible title in terms of and safeguarded by sections 27 and 28 of the Registered Land Act which Act has no provisions for the application of customary law.

One month after that transfer the deceased died. The plaintiff's must have been aware of all these, yet they let the transaction for the transfer pass through the Land Control Board where they had the opportunity to raise objection to the transfer as consent of Land Control Board was necessary before such a transfer could be effected.

The plaintiffs waited for 12 years after that transfer to bring this suit in this court relying on the alleged breach of a trust by the deceased who cannot come to this court to testify as to the alleged breach.

It is the Defendants and plaintiffs case that there is no fraud alleged in this suit and that it was not the defendant who breached the trust. But Mr. Kaai submits that the defendant is responsible for the breach upon the doctrine of tracing. He says that doctrine will be brought out in the evidence on the side of the plaintiffs.

Mr. Maini opposes that saying that if such a doctrine exists, it is a matter of law and Mr. Kaai should have produced it as a question of law is not proved by evidence of parties.

I think Mr. Maini is stating the correct position on that issue.

On the whole therefore, I find that Mr. Maini has succeeded in persuading me to agree with him.

I find that there is no reasonable cause of action against the defendant in this suit. The suit is frivolous and the same should be dismissed on this preliminary objection as prayed by Mr. Maini.

Accordingly the suit is hereby dismissed with costs to the defendant.

Dated this 26th day of June 1997.

J.M. KHAMONI

JUDGE