



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT KISUMU

Civil Appeal 180 of 1995

HEZBON PANDE NYAIDHOAPPELLANT

AND

ROBERT ONDU WAMBIA..... RESPONDENT

(Appeal from the Order and Decree of the High Court of Kenya at Kisumu (Justice

Kuloba) dated 21st day of June, 1995.

IN

H.C.C.C. NO. 339 OF 1994)

JUDGMENT OF THE COURT

This is an appeal by the unsuccessful plaintiff from the decree of the superior court (Kuloba, J.) given on June 21 1995 dismissing the plaintiff's claim.

By his plaint dated and filed on August 11, 1994 the plaintiff claims a declaration that the defendant holds a portion of about 2 hectares of land NO. WEST KISUMU/MARERA/2469 (the property) in trust for him. The plaintiff specifically pleaded fraud on the part of the defendant in getting registered as the sole proprietor of the property.

The hearing commenced on January 30, 1995 when the plaintiff gave evidence and he called four witnesses. He informed the learned judge that he wanted the assistant chief and the chief also to come and give evidence on his side. He asked for an adjournment to call them. Accordingly, the case was adjourned for the purpose. When it came up on February 7, 1995 it was adjourned as the defendant was not present and further hearing was ordered to take place on March 23, 1995. On that day the learned Judge adjourned it once again to June 21, 1995 as the defendant was for the second time not present. On that day the learned judge without hearing the further witnesses or any submissions dismissed the plaintiff's suit on his own accord.

The appellant complains that in the circumstances the learned judge erred. It is unfortunate that such a

complaint can be made against a Judge of the superior court. But with great respect we find that it is well founded. It is elementary but fundamental that no cause is won or lost until all the evidence is heard, particularly so when parties, as in this case, are unrepresented. It was clearly a travesty of justice to dismiss the plaintiff's case without hearing his witnesses. We have no alternative but to allow the appeal and order that the case be remitted to the superior court with a direction that the same be heard in accordance with law by another judge. There will be no order as to costs.

Dated and delivered at Kisumu this 23rd day of November, 1995.

A. M. AKIWUMI

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

A.A. LAKHA

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JUDGE OF APPEAL

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