



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA A**

**T E M B U**

**Civil Appeal 92 of 2007**

**KINYUA NUNU.....APPELLANT**

**VERSUS**

**VIRGINIA WAMURUA KINYUA.....1<sup>ST</sup> RESPONDENT**

**JANE WAMWORI KINYUA.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

The appellant filed a *Civil Suit No. 179/2001 before the Senior Resident Magistrate at Kerugoya* against the two defendants who are his wives. He said that sometime in 1988, the defendants jointly lodged a caution against his land parcel **No. INOI/KARIKO/420**. They have refused to withdraw the caution and so he filed that suit seeking orders of removal of the caution. The defendants filed no defence and did not even appear in court for the hearing. The defendant testified alone and only stated that the land in question belonged to him and he wanted to share it out. In his short Judgment, the learned trial magistrate held and rightly so that the plaintiff failed to produce and documents to prove ownership of the said land or even a certificate of the said land or even a certificate of search to show that the land had actually been cautioned. Consequently, he went on to find that the appellant had failed to prove his case on a balance of probability and he dismissed the suit. Being dissatisfied with that order, the appellant filed this appeal. He had cited 3 grounds of appeal which are not very clear but which seem to mean that the learned trial magistrate erred in not ordering the appellant to take the said documents to court. I have considered these grounds along with the proceedings before the trial court.

My finding first and foremost is that it is not the duty of the court to direct the parties to bring to court any documents in support of their case- or to dictate to the parties the nature of the evidence they should adduce in court nor is it the duty of the court to give gratuitous advise to the parties on how to conduct their matter. The learned trial Magistrate did not therefore err at all in not demanding that the appellant produce the documents of title in court. It is also correct to say that it is the duty of a plaintiff to prove his case on a balance of probability even where a suit is not defended. That onus is on the plaintiff

and it is not lessened by the fact that the suit is not defended. The learned trial magistrate considered the evidence before him and the he arrived at the only decision any competent tribunal or court could have arrived at with that kind of evidence. I cannot find fault with that Judgment. This appeal has no merit and it must therefore fail. Let the appellant sort out the caution issue with his wives amicably- otherwise this appeal is hereby dismissed with no order as to costs as the same was not defended.

**W. KARANJA**

**JUDGE**

**14/10/2008**

Delivered today in open court in presence of the appellant.

**W. KARANJA**

**JUDGE**

**14/10/2008**



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