



REPUBLIC OF KENYA

High Court at Kakamega

Civil Case 26'A' of 2003

MAURICE CLEMENT SHILULI.....PLAINTIFF

V E R S U S

JOHN MBALASI MUGUMBA.....DEFENDANT

J U D G M E N T

By his Originating Summons dated 18.12.2003, the plaintiff is seeking to be declared as the proprietor of plot number **KAKAMEGA/MUGOMARI/92** by way of adverse possession. He is also seeking a declaration to the effect that the defendant has been holding the title deed in trust for the plaintiff. The plaintiff would like to have the land to himself.

Three witnesses testified for the plaintiff. The plaintiff's evidence is that he bought the suit land from the defendant whom he has known since childhood. The agreed price was KShs.66,000/=. Parties signed a sale agreement on 5.1.1990 when a deposit of KShs.9,000/= was made. On 7.4.1990 a further sum of KShs.31,000/= was paid and the balance of KShs.26,000/= on 8.12.1990. On all the three occasions parties signed an agreement. The three agreements were produced as proof of the transaction.

The plaintiff further testified that the parties went to the Shinyalu Land Control Board and consent was issued. The defendant signed a transfer in favour of the plaintiff but it could not be registered since the title had been mortgaged to the Agricultural Finance Corporation. The defendant had used the title to secure a loan and there was a balance of KShs.2,200/= which the plaintiff settled on 7.2.1997. The plaintiff further testified that he took possession of the land in 1990 and has been in occupation since then. The defendant later declined to effect the transfer. When the defendant refused to complete the transaction, he had him charged for obtaining money by false pretence.

PW2, AGGREY SHILULI, was the Assistant Chief, Mukhonje sub-location in 1990 where the land is located. His evidence is that the defendant went to his office indicating the he was selling his land to the plaintiff. He witnessed the signing of the first sale agreement on 5.1.1990 and did put his rubber stamp. According to him, the plaintiff took possession of the land in 1990. He fenced the plot and started planting crops. There was a case before the Shinyalu Land Disputes Tribunal and he was a witness.

GERISHOM ALUBISIA testified as PW3. He witnesses the sale transaction between the parties. He signed the sale agreements. He was present when all the three Agreement s were signed. His further evidence is that the plaintiff took possession of the suit land in 1990 and that the defendant has never utilized the suit land.

In his defence, the defendant testified that the plaintiff is his relative. He agreed to sell the land to the plaintiff for KShs.36,000/=. The plaintiff only paid KShs.66,000/= and did not pay the balance. He continued to use the land and was later charged for obtaining money by false pretence in Kakamega

Criminal Case number 656 of 1997. He was convicted and served the sentence. Parties had a dispute before the Shinyalu Land Dispute Tribunal this being case number 5.1998. He was not satisfied with the decision and filed an appeal before the appeals committee, but also lost. He filed Appeal number 58 of 1999 before the High Court and the decisions of the two Tribunals were overturned. In the year 2001, the plaintiff claimed that he had trespassed on the suit land and he was charged in Criminal Case number 2005 of 2001. He was acquitted. The defendant further testified that the plaintiff has never used the land and that his engagement with the plaintiff has never been peaceful. The title was discharged by the Agricultural Finance Corporation.

Parties agreed to file written submissions but only counsel for the defendant complied. Counsel contends that the relationship between the two parties cannot be held to have been peaceful. Further, initially the land was registered as owned by the Government. It was later charged. The dispute between the parties started in 1997 and by then a period of 12 years had not elapsed. Counsel contends that parties went before the Land Control Board on 31.12.1996 and that meant that the plaintiff still recognized the defendant as the owner. Counsel relied on the cases of **JOSEPH IRIET MUDOGO V HOSEA SHISIKO MANYASA; Kakamega HCCC No. 90 of 2004, Nairobi Civil Appeal No. 213 of 1996 BENJAMIN KAMAU MURIMI & OTHERS V GLADYS NJERI, MBIRA V GACHUKI 2002 E.A., 137 and MBUGUA NJUGUNA V ELIJAH MBURU MWAJUBE & ANOTHER; Civil Appeal No. 72 of 2002.**

The main issues for determination are whether the plaintiff has obtained title by way of adverse possession, whether the defendant has been holding the suit title deed in trust for the plaintiff, whether the defendant sold the land to the plaintiff, whether the defendant sold the land to the plaintiff and if so, what was the purchase price. There is no dispute that the transaction between the parties started in 1990. The process went on smoothly and the defendant applied for consent to transfer the land to the defendant on 31.12.1996. Consent was issued on the same dated. The defendant also signed a transfer in favour of the plaintiff dated 20th January 1997. According to the plaintiff, the transfer could not be registered as the defendant had used the title deed as security. Once the title was discharged, according to the plaintiff, the defendant developed cold feet.

The evidence on record and the exhibits produced show that the defendant was charged in court on 30th April 1997, vide Criminal Case number 656 of 1997. There was also case number 5 of 1998 before the Shinyalu Land Disputes Tribunal, case number 12 of 1999 before the Western Province Appeals Committee, Miscellaneous Civil Application number 193 of 1998 and Appeal number 74 of 1999. It is clear that the parties started litigating since 1997.

During the hearing of the criminal case number 656 of 1997 the defendant testified that the sale price was KShs.136,000/= and that there was a balance of KShs.70,000/=.

From the evidence on record, I do find that parties started having disputes before 12 years had elapsed. Under the Limitation of Actions Act, the minimum period required to prove adverse possession is 212 years. The claimant must have been in continuous and peaceful enjoyment of the suit property. Although the plaintiff was in continuous occupation, that occupation cannot be held to have been peaceful. While he wanted to obtain the title deed to the suit property, the defendant was pulling to the opposite direction.

Has the defendant been holding the title in trust for the plaintiff? Did the defendant sell the land to the plaintiff? In his evidence, the defendant concedes that he was selling the land to the plaintiff. The only point of departure is the purchase price. The proceedings in criminal case number 656 of 1997 show that other than the plaintiff, four other witnesses namely- **GERISHOM ALUVISIA** (PW2 herein), **AGGREY SHIRI LIPEA, PW3 HEREIN, JOSHUA LIPEA** and **TIMOTHY SHIRISIA** testified that they witnessed the sale transaction between the parties herein. According to the plaintiff and his two witnesses in this case, the sale price was KShs.66,000/= and it was paid in three installments.

The defendant testified in the criminal case and stated that the sale price was KShs.136,000/=. He called his son, **DUNSTONE AMBALASI** as a witness and he reiterated that the agreed price was

KShs.136,000/=. He was present when KShs.9,000/= was paid. The defendant's other son, **BENSON MBALASI** also testified in the criminal case. The proceedings before the Shinyalu Land Disputes Tribunal also show a similar trend whereby, whereas the plaintiff contended that the sale price was KShs.66,000/= the defendant maintained that it was KShs.136,000/=. The plaintiff has produced three separate agreements which indicate that the sale price was KShs.66,000/=. The land is approximately 0.9 hectares. The application for consent dated 31.12.1996 indicate that the sale price was KShs.66,000/=. The consent issued to the parties gives the sale price as KShs.66,000/=. Similarly, the transfer form dated 20.1.1997 indicate the sale price as KShs.66,000/=. The defendant did not produce any sale agreement showing that the price was KShs.136,000/=. The first sale agreement of 5.1.1990 was witnessed by the area Assistant Chief who affixed his stamp.

The title was opened on 1.8.1975 as per the official search dated 8.4.2002. A title deed issued on 11.7.1977 to the defendant. On 5.2.1997, a restriction was registered in favour of the plaintiff. The defendant used the land as security to obtain a KShs.10,880/= loan from the Agricultural Finance Corporation on 4.3.1987. This was before the land was sold to the plaintiff.

From the evidence on record, I am satisfied that the purchase price was KShs.66,000/=. Parties executed three agreements and in all the agreements the sum of KShs.66,000/= is indicated. No agreements was produced indicating that the sale price was KShs.136,000/=. I do hold that the price was KShs.66,000/=. I do further find that although the plaintiff has not proved ownership by way of adverse possession, I do find that he lawfully bought the land from the defendant and fully paid the entire purchase price. The defendant has been only adamant and has refused to effect the transfer in favour of the plaintiff. I will grant prayer **(b)** of the Originating Summons dated 18.2.2003 and declare that the defendant has been holding the title to plot number **KAKAMEGA/MUGOMARI/92** in trust for the plaintiff.

The bottom line is that the defendant sold the land to the plaintiff. I am also satisfied that the plaintiff has been in continuous, though not peaceful, occupation of the land since 1990. Article 159 of the Constitution requires court to dispense justice without undue regard to procedural technicalities. Whether declaring the plaintiff as the owner of the suit land will be tantamount to granting an order of specific performance is to me a technical issue. Justice dictates that the defendant having sold the land to the plaintiff and acknowledging that he received KShs.66,000/= in 1990 from the plaintiff, then the plaintiff should enjoy the fruits of his purchase price. There is no balance of KShs.70,000/=. The proceedings before the criminal case indicate that at one time the defendant sent a demand letter to the plaintiff claiming that the transaction was a lease and not a sale.

In the end, I do find that the plaintiff has proved that he lawfully bought the land from the defendant. Prayer **(b)** of the Originating Summons is hereby granted. I do further direct that the Deputy Registrar sign all the fresh transfer documents in favour of the plaintiff. The Kakamega Land Registrar is hereby directed to effect the transfer in favour of the plaintiff. The defendant shall meet the costs of this suit.

DATED AT KAKAMEGA THIS 27TH DAY OF FEBRUARY, 2013

SAID J. CHITEMBWE
J U D G E