

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL CASE NO. 49 OF 2012

SULEIMAN AMUKOYA SHIKHAYA PLAINTIFF

V E R S U S

SHABAN TABU SHIKHAYA RESPONDENT

J U D G M E N T

In his plaint dated 22.2.2012 the plaintiff is seeking an order of eviction against the defendant from land parcel number **S.WANGA/EKERO/2491**. He is also seeking a permanent injunction restraining the defendant from interfering with the suit land and to have the restriction filed against the title removed. The plaintiff's evidence is that he is the registered owner of that suit land. The defendant is his step brother and entered into his land without his authority. He would like to have him evicted and never to return to the land. The two parties share the same father but different mothers.

It is the plaintiff's further evidence that the defendant came to the homestead when he was already an adult and they welcomed him. Their father was still alive then. He further testified that the defendant was given another land but he has refused to move there. He got registered as the owner during adjudication. He denied that he took over the land from his brother. The defendant was only given a plot to build while waiting to move to another land owned by their father. The defendant moved into the land in 1997. To prove his case the plaintiff produced his title deed, search for plot number **S.WANGA/LUREKO/636** owned by their father measuring 16.8 acres and a search for his plot number 2491 dated 6.8.2010.

On his part the defendant testified that the plaintiff is his elder brother. Their father died in September 2001. The plaintiff changed the title deed in 2002 as it was registered in the name of their other brother who is deceased. The deceased brother was called **AMUKOYA SHIKAYA** and the plaintiff is called **SULEIMAN AMUKOYA SHIKAYA**. According to the defendant the plaintiff only added the name Suleiman to the title and got himself registered as the owner. Their deceased father two wives and he is from the second wife. They are six brothers but one is deceased. It is his further evidence that the plaintiff took him to the Land Disputes Tribunal and Appeals Committee but he lost to him. He has lived in his plot for over 15 years and has built his house. The land is 9 ½ acres and he is only seeking the one acre portion he has been occupying. He lives on the plot with his five children but the plaintiff started removing the fence and destroying his crops. The land belonged to their father. It was registered in the names of the deceased elder brother **AMUKOYA SHIKAYA** who died in the 1970s.

The main issue for determination is whether the defendant should be evicted from the land. The court visited the suit land on the 27.11.2013 and was able to see the land. The court noted that the plaintiff has his houses on the land and has also built rental houses thereon. The land is just a few meters behind Mumias Town and is actually part of the town. The court also saw the defendant's house which is located about 250 meters from the plaintiff's house. The house of the parties' late father is also located near the defendant's house. The parties informed the court that their father died on the plot but was buried on his other plot. The court also saw the crops planted by the defendant. There are other brothers and a sister by the name **FATUMA MUMIA** who have also built on the plot.

The pleadings show that the parties litigated before the Mumias Land Disputes Tribunal vide case number 2 of 2009 where the defendant was the claimant. The tribunal ruled that the defendant was entitled to live on the suit land. The plaintiff appealed to the Appeals Committee at Kakamega, vide case

number 45 of 2009 but the appeal was dismissed. The plaintiff filed Civil Appeal No. 16 of 2010 before the Kakamega High Court and the decisions of the two tribunals were set aside for lack of jurisdiction. That prompted the filing of the current suit.

I have gone through the evidence before the Mumias tribunal. The defendant was claiming to occupy part of the land and he maintained that he was given that portion by his father. According to the defendant the plaintiff maintains that he was born out of wedlock. The plaintiff had threatened to evict him and that is why he filed the claim before the tribunal. According to the evidence before the tribunal the plaintiff conceded that the land belonged to their father and it was registered in the plaintiff's name in 1967. It is also clear that the parties' father lived with his sons on the suit land before he died. Ground 3 of the grounds of appeal before the appeals committee is that the parties' father died in the year 2002 and he had given the suit land to the plaintiff in 1967. Their father was called **SHIUNDU SHIKHAYA**.

The current evidence is not different from the evidence before the two tribunals. It is clear that although the land was registered in the names of the plaintiff it was originally owned by their late father. It is also established that the defendant has been living on the suit land since 1997. There is no evidence that between 1997 and 2001 or 2002 when their father died the defendant was being asked to move out of the suit land. I do find that the plaintiff is only asking the defendant to move out of the suit land as a result of the death of their father. The plaintiff should not be dictating where the defendant should reside. It is clear that plot number 636 is a bit far from Mumias town. Having lived on the suit land for 15 years and having developed the one acre portion I do find that the defendant cannot be evicted from the land. The land belonged to his father and the plaintiff was only a trustee on behalf of the other family members. The plaintiff concedes that he did not buy the land but got it from his father. The land is big enough to cater for everyone.

In the end I do find that although the plaintiff is registered as the proprietor of **S.WANGA/EKERO/2491**, the defendant is equally entitled to reside on the suit land. The defendant has been asking for the one acre portion he has been occupying as per paragraph 4 of his defence and I will grant him that one acre. I do order that the suit land plot number **S.WANGA/EKERO/2491** be subdivided and a portion measuring one acre to be transferred to the defendant **SHABAN TAABU SHIKHAYA**. The defendant to meet the costs of the subdivision and transfer. Each party shall meet his own costs of this suit.

Delivered, dated and signed at Kakamega this 18th day of September 2014

SAID J. CHITEMBWE

J U D G E