

REPUBLIC OF KENYA

High Court at Kakamega

Civil Case 136 of 2010

SIMON MUSEBE SHIBWA alias SIMEON MUSEBE SHIBWA PLAINTIFF

V E R S U S

CHRISTIANO LONDANGA SHAMI DEFENDANT

J U D G M E N T

The plaintiff in his plaint dated 1.9.2010 is seeking an order of specific performance directing the County Council of Kakamega or any other authority to remove the defendant's name from the relevant register and insert the plaintiff's name presumably to be the registered owner of plot number **4 LUKUME MARKET**. The plaintiff's evidence was that on the 2.11.1979 the defendant went to his home and informed him that he wanted to sell to him his plot at Lukume market. They agreed at a price of KShs.11,000/=. He paid a deposit of KShs.7,000/= and after two months he paid a balance of KShs.4,000/=. They wrote a sale agreement in a black book and LUKA (PW2) is the one who wrote the agreement. The balance of the purchase was not recorded in the black book. The defendant kept on promising that he would transfer the plot to him but he failed to do so. The plaintiff further testified that he had been paying rates to the County Council and produced receipts. Currently he is the one using the plot. He would like the defendant's name be removed so that he can be registered as the owner. The defendant had complete house on the plot which was being used as a shop. He has not built anything on the plot.

PW2, LUKA ATIRA ANYONJE, testified that he is the one who wrote the agreement on the 2.11.1979. He saw the plaintiff paying KShs.7,000/- but did not witness the payment of the balance of KShs.4,000/=. The plaintiff told him that he had paid the balance. He signed the sale agreement. **PW3, RESA LUTONYE TSISINDU**, testified that he witnessed the sale agreement on the 2.11.1979. The plot that was being sold was at Lukume market being plot number 4. KShs.7,000/= was paid and the purchase price was KShs.11,000/=. The plaintiff told him that he had paid the balance. The defendant was alone when he signed the agreement.

The defendant testified that he is a bishop in Pentecostal Church. The plaintiff is his relative. He denied that he signed any agreement with him, but the ID number on the agreement is his. Plot number 4 Lukume market is his. He built a permanent shop on the plot which he used to rent out. In 1979 the plaintiff went to his home and was looking for a shop as he had been chased out of the shop he was using. The defendant had a loan which had been given for the plot owners totaling KShs.11,000/=. The initial loan was KShs.6,000/= but had accrued to KShs.11,000/=. He went with the plaintiff to the traders' office where the plaintiff was supposed to pay the loan. The plaintiff paid the loan but the receipts were made in the defendant's name. The payment was made to the Traders' office and there was no sale agreement. He produced receipts for the payment of the loan. He told the plaintiff to pay the rates from time he took over the shop and the plaintiff has been paying the rates. The monthly rent was to be KShs.2,500/= and the plaintiff was to use the shop until his money gets finished. He went and informed the plaintiff that his money was over and the plaintiff decided to take the matter to court. He denied that he was paid KShs.7,000/=. The defendant admits that the entire loan was fully paid by the plaintiff.

The main issue for determination is whether the plaintiff bought the suit premises from the defendant. The plaintiff produced a sale agreement dated 2.11.1979. The original is in vernacular language. The defendant produced receipts that show that a sum of KShs.2,000/= was paid to the Ministry of Commerce and Industry as part of the Traders' Loans Scheme. The payment was done on the 15.12.1979. A further sum of KShs.1,500/= was made on 27.12.1979 and another one of KShs.1,340.40

was made on the 14.1.1980. The receipt indicate that that payment completed the loan. From the evidence on record I am not satisfied that the defendant sold his property to the plaintiff. The plaintiff's evidence is that there was no witness on the side of the defendant. Although PW2 and PW3 contend that they witnessed the sale, I do find that the defence evidence is more credible. The receipts for the loan payment are dated 1979 the same time the plaintiff purports to have bought the plot. There is no evidence in documentary form that the plaintiff has been calling for the transfer of the plot to his name. I am satisfied that the transaction was purely a lease and not a sale. Since the plaintiff dealt with the defendant it is possible that he got hold of hid ID number and he prepared the sale agreement. Indeed the defendant testified that it was PW2 who informed him that the plaintiff was alleging that he had bought the plot from him. He denied ever signing the sale agreement.

The sale agreement produced cannot be of any assistant to the court. The fact that the plaintiff has been paying the land rates and collecting the demand notices does not make him to be the owner of the plot. The plot is still registered in the defendant's name and I do find that the same is lawfully his. I do find that the plaintiff has failed to prove his case on a balance of probabilities and the claim fails. Each party shall meet his own costs.

Delivered, dated and signed at Kakamega this 13th day of February, 2013

SAID J. CHITEMBWE
J U D G E