

REPUBLIC OF KENYA

High Court at Kakamega

Civil Case 54 of 1998

FRANCIS MUKOYA PLAINTIFF

V E R S U S

ANDREW CHIRISWA MASHISIA DEFENDANT

J U D G M E N T

In the Originating Summons herein the plaintiff is seeking to be declared as having acquired title to plot number **BUTSOTSO/ESUMEYIA/229** by way of adverse possession. Would also like to be declared as the legal owner of the land and be registered as the proprietor. The plaintiff testified that the defendant is his uncle. On the 21.11.1976 the defendant sold to the plaintiff's late father the suit land which is about three acres. The plaintiff's father and the defendant asked the plaintiff to go and settle on the land. The plaintiff settled on the land in 1978 and he has built four houses and does cultivate the land. He lives on the land with his two wives. Since 1978 the defendant moved out and has never gone back. He produced the sale agreement for the plot. According to the plaintiff although the sale agreement reads plot number **BUTSOTSO/ESUMEYIA/235**, that was a mistake as plot number 235 belongs to somebody else. He settled on plot 229 and it is that plot he is claiming ownership through adverse possession. The purchase price was paid by his father by installments. His late father reported the defendant to the District Officer and the defendant was asked to surrender the plot. His father had another plot number 233 and his two brothers live on that plot while he and another brother live on plot number 229.

PW2, MATAYO MANYASA, testified that the parties are his relatives. He witnessed the sale of the land between **DAVID NANDI**, the plaintiff's father and the defendant. The plaintiff was allowed to go to the suit land in 1978. The defendant bought another land and since 1979 the plaintiff has been utilizing the suit land. He lives on the land and has four houses thereon. **PW2**, witnessed the sale agreement and he signed it. The sale price was KShs.5,500/=.

The defendant's evidence was that the plaintiff is his brother's son. Their late father gave them their respective land. His brother David was given plot number **BUTSOTSO/ESUMEYIA/233** while he was given plot number 229. The two plots are separated by one plot in between. In 1979 he leased his plot to his brother who was to use it up to 1983. After the expiry of the lease he stopped him but he refused. He took him to the District Officer and his brother informed the District Officer that he wanted the defendant to transfer the land to him. His brother David died in 1995. He denied that he sold the land to his brother and did not receive the purported price of KShs.5,500/=. He only received money for the lease. There was a dispute before the D.O. and he produced the proceedings. The plaintiff built his house on the land in 1993. He has children and he cannot sell the land.

Parties agreed to file written submissions and only the plaintiff's counsel did so. It is contended by those submissions that the plaintiff has acquired title to the suit land having lived there since 1978. Counsel submitted that the description of the suit land in the sale agreement was a common mistake and does not affect the fact that the plaintiff has been utilizing plot number 229.

The main issue for determination is whether the plaintiff has acquired title to the suit land. The sale agreement produced by the plaintiff shows that parties entered into an agreement on the 21.11.1976. The agreement was in Kiswahili but a certified translation was provided. On the material day there were two witnesses mainly **FRANCIS MUKOYA (PW2)** and one **MATAYO**. A deposit of KShs.500/= was made. Another agreement dated 14.6.1979 shows that another sum of KShs.1000/= was paid but there

were no witnesses. On the 9.5.1980 another sum of KShs.1000/= was made and also it was between the plaintiff's father and the defendant and there were no witnesses. On the 29.8.1984 another sum of KShs.1000/= was paid and it is indicated that the entire purchase price of KShs.5,500/= had been fully paid. In the first agreement of 1976 it is indicated that the purchaser was free to begin farming or build on the land. In the last agreement of 1984 it is indicated that the parties were from the same parents and the defendant had left the land to his brother as per the translated version of the agreement.

The defendant produced a lease agreement written in Kiswahili dated 28.11.1978. It is indicated in that document that his brother **DAUDI NANDI** was leasing the land from January 1979 to January 1983 for KShs.1500/=. A deposit of KShs.1000/= was made. The defendant also produced proceedings before the panel of elders. In those proceedings the late David Nandi testified that he heard his brother wanted to sell his land and he decided to buy it. It was in 1978 and he gave him a down payment of KShs.500/=: he then paid the balance. Since 1978 he started using the land and he had built a house thereon. He had taken the case to the elders so that the defendant could transfer the land to him. He testified that he had no problem with his brother. Before elders Francis Mukoya testified for the claimant and stated that he witnessed the sale on the land. He signed the sale agreement and saw payment of KShs.500/=. Similarly Matayo Manyasi testified for the claimant and stated that he witnesses the sale of the land in 1978 and a payment of KShs.500/= was made. The defendant also testified and stated that it was a lease and not sale. In 1983 his brother told the plaintiff to build a house on the land and he reported the matter to the assistant chief. He insisted that he had only leased the land to him.

From the evidence on record it is clear that whereas the plaintiff contends that the transaction was a sale, the defendant maintains that it was a lease. The plaintiff produced four separate agreements with several dates when payment for the sale was done. One of the witnesses who was present during the sale testified. The proceedings before the Lurambi Division Panel of elders shows that it was the defendant who had taken the plaintiff's father to the elders. It is also clear from the evidence on record that the plaintiff started occupying the land since 1978. Although the defendant puts the period as 1983, it is clear that upon the agreement between the plaintiff's father and the defendant the plaintiff went to settle on the land. The letter forwarding the proceedings is dated 17.8.1993 by the Lurambi Division District Officer. The letter indicates that the case was done on 25.5.1993. It is clear from the evidence that before 1993 already the plaintiff was in occupation of the land. There is some confusion as to whether the first agreement was on 21.11.1976 or 1978. This is because the document produced is a copy and not the original. The document seems to have been signed under a carbon paper but it appears that it was done in 1978. The lease agreement provided by the defendant gives a date of 28.11.1978.

From the proceedings before the panel of elders it is established that PW2 and one Matayo witnesses the transaction between the plaintiff's father and the defendant. According to the two witnesses it was a sale transaction and not a lease. The defendant was asked to produce witnesses before the elders but he did not have as according to him the agreement was between the two brothers. I have looked at the lease agreement and the four separate agreements produced by the plaintiff. I am satisfied that the lease agreement was an afterthought. The manner in which the late David Nandi signed in the four sale agreements is consistent and it is totally different from the signatures on the lease agreement. I am satisfied that the defendant sold his land to his brother and allowed him to occupy the land. The defendant was fully paid the purchase price and moved out of the land since 1978. I am also satisfied that the plaintiff has resided on the suit land peacefully since 1978. The dispute that was handled by the panel of elders in 1993 just arose as the plaintiff's father wanted to get his title. By 1993 the plaintiff had already occupied the land for almost 15 years.

I am therefore satisfied that the plaintiff has acquired title to plot number **BUTSOTSO/ESUMEYIA/229** by way of adverse possession. The proceedings before the elders and the sale agreement described the property as **BUTSOTSO/ESUMEYIA/235**. I do find that it was a common mistake between the parties. The lease agreement which was done later gave the proper description of the land as 229. There were witnesses during the sale transaction and it is clear that the defendant declined to effect the transfer in favour of the plaintiff's father. The plaintiff on his own has acquired title to the suit land and it cannot be said that he ought to have obtained letters of administration to inherit the land. He has been occupying the land since 1978 and he could not have acquired title without filing the suit as the defendant was not

willing to transfer the to him.

In the end the plaintiff has proved his case on a balance of probabilities and I do find that he has acquired title to the entire plot number **BUTSOTSO/ESUMEYIA/229** measuring 3 acres. The plaintiff shall be registered as the proprietor of that land. Each party shall meet his own cost.

Delivered, dated and signed at Kakamega this 7th day of February, 2013

SAID J. CHITEMBWE
J U D G E