



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**CIVIL SUIT NO. 45 OF 2009**

**DINAH NALIAKA SAHANI ..... PLAINTIFF**

**V E R S U S**

**KENNEDY MUCHWANDA SHIKUKU ..... 1<sup>ST</sup> DEFENDANT**

**BURTON BURUDI SHIKUKU ..... 2<sup>ND</sup> DEFENDANT**

**TADAYO MMASI SHIKUKU ..... 3<sup>RD</sup> DEFENDANT**

**PHILIP SHIUNDU SHIKUKU ..... 4<sup>TH</sup> DEFENDANT**

**WILLIAM SASAKA SHIKUKU ..... 5<sup>TH</sup> DEFENDANT**

**JUMA SHIKUKU MMASI ..... 6<sup>TH</sup> DEFENDANT**

**SETH SIMIYU MMASI..... 7<sup>TH</sup> DEFENDANT**

**PETER SHIKUKU MMASI ..... 8<sup>TH</sup> DEFENDANT**

**J U D G M E N T**

In the plaint dated 1.4.2009 the plaintiff would like to be declared as the rightful owner of plot number **S/KABRAS/SAMITSI/1428** and a permanent injunction to restrain the defendant from dealing with the suit property. Three witnesses testified for the plaintiff's case. The plaintiff was PW1. Her evidence is that the defendants are the children of her co-wife. She was given plot number **S/KABRAS/SAMITSI/1428** measuring **1.8 Ha.** by her husband in 1991. The defendants and their mother were given plot number **S/KABRAS/SAMITSI/1427**. The property was transferred to her and she got her title deed on the 7.1.2009. Her husband divided the land into two and each wife was given her land.

The plaintiff further testified that she has been using her land since 199

1 but in March 2009 the defendants invaded her land and started cultivating it. She reported the matter to the Malava police station and the defendants were arrested and charged at the Butali law courts. The plaintiff denied that the land was divided amongst the children. She has five children with her husband. The defendant's mother is the 1<sup>st</sup> wife and she is the 2<sup>nd</sup> wife. She also testified that her father in-law did

not give the defendant the land. Due to the threats from the defendants she has moved from the land and now lives at Shipala market with her children and her husband.

**PW2, FESTUS NEWTON MASI** testified that he is a brother to PW1's husband **JAPHETH SHIKUKU MASI**. His evidence is that in 1990 their late father divided his land for his four sons. The original plot was **S/KABRAS/SAMITSI/294**. PW1's husband was given plot number 824 while PW2 was given plot number 827. In 1992 the defendants' mother wanted to get her portion of land. His brother called a meeting and subdivided his land into two. By then their father was still alive. PW2 planted the trees to divide the two plots. His brother took his 1<sup>st</sup> wife to the Land Control Board and she was given plot number 1427 while the plaintiff was given plot number 1428. Each of the two wives and their respective children were cultivating their own plots. In 2009 the children of the 1<sup>st</sup> wife removed the sisal plants that divided the two plots and started cultivating the plot meant for the plaintiff. Up to this moment they are still cultivating the land. PW2 further testified that he tried to talk to the defendants but they have refused to vacate and have even threatened him. He denied that the land was subdivided by his late father and given to the defendants.

**PW3, JAPHETH SHIKUKU MMASI** is the husband of PW1 and the defendants' father. His evidence is that all the nine defendants are his children and their mother is **ANNA SHIKUKU** who is his first wife. His evidence is that he was given plot number 824 measuring 10 ½ acres by his father. He divided his plot into two and gave his first wife plot number 1427 measuring 2.2 Ha. while he gave the plaintiff plot number 1428 measuring 1.8 Ha. He gave the first wife a bigger portion and planted the boundary. He directed each wife and her children to live on her own plot. The defendant forcefully entered into plot number 1428 using pangas and jembes. He tried to stop them several times but they threatened to kill him. He has educated the defendants up to Form Four and some have postsecondary courses. The first wife has ten children with him while the second one has five children. He has 13 sons from his two wives. He would like the defendant to live on the land allocated to their mother. He has a commercial building at Shipala market where he lives.

**KENNEDY BARASA MMASI**, the 1<sup>st</sup> defendant testified as DW1. His evidence is that the plaintiff is his stepmother. His grandfather Mmasi Wechale died in 2003 and was buried on the suit land. In 1999 his grandfather divided his land amongst his grandchildren. The land was divided into 13 portions and they are 13 sons in their family. Since 1999 they have lived peacefully. In 2009 the plaintiff had them arrested and they were taken to Malava police station. He is aware that his father owns a commercial building at Shipala market and he lives there. His father has also bought another plot measuring 2 acres for his second wife. His further evidence is that his grandfather had four sons including his father. His father was given plot number 824 measuring 12 acres.

**DW2, PHILIP SHIUNDU SHIKUKU**, the fourth defendant adopted the evidence of his brother. He further testified that some of the defendants work in several places. The 2<sup>nd</sup> defendant works at Nzoia. The 3<sup>rd</sup> defendant Tadayo works in Nairobi, the 6<sup>th</sup> defendant Juma works at Kilgoris while the 9<sup>th</sup> defendant Peter works in Niarobi. They were not aware that the land was subdivided. **DW3, ANNA SHIKUKU** is the defendants' mother. The plaintiff is her co-wife. Her evidence is that she is not aware that she was given plot number **1427**. She was not taken to the Land Control Board. The land was divided in 1999 by her father in law. The children have built houses on the land and have planted cane. **DW4, MOSES NEWTON MMASI** is the brother of PW3. His evidence is that his father died in 2003 and is not aware that the land was divided into two. His father had four sons namely – **JAPHETH SHIKUKU, FESTUS MMASI, MOSES MMASI** and **GABRIEL MASINDE**. His father divided his land into four portions and DW4 was given plot number **826**. Festus got plot number **825**, PW3 got number **824** while Gabriel got plot number **827**.

Parties agreed to file written submissions but no submissions were filed. Counsel for the plaintiff filed a list of statement of issues dated 24.2.2010 listing 12 issues. The bottom line is whether the plaintiff is the lawful owner of the suit land. The evidence on record shows that the suit land was initially owned by the father-in-law of the plaintiff. It was registered as plot number **S/KABRAS/SAMITSI/294**. On 17.9.1990 the original plot was subdivided and plot numbers **824, 825, 826** and **827** were created.

The original owner gave the four plots to his four sons. PW3 was given plot number **824**. The extract from the land registry shows that plot number 824 was opened on the 17.9.1990 and registered in the names of **ELIJAH MMASI WACHALA**. On the 10.7.2008 the plot was transferred to **JAPHETH SHIKUKU MMASI**. On the 31.12.2008 the plot was subdivided into two and created plot number 1427 and 1428 respectively. The mutation of plot number 824 shows that plot number **1427** is **1.80 Ha.** while plot number **1428** is also **1.80 Ha.** The original plot **824** is indicated to be **4.0 Ha.** and it is not clear why the mutation forms give a total of **3.6 Ha.** The title deed for plot number **1428** gives an arrearage of **1.80 Ha.** The title deed was issued on 7.1.2009 and is registered in the names of the plaintiff.

From the evidence on record it is clear that PW3 divided his land for his two wives. The claims by the defendants that the land was divided into 13 portions is not true. The defendants' father gave one portion to his first wife while the other portion was given to his second wife. According to PW2 it is the defendants' mother (DW3) who wanted to be given her own portion of land. The land belonged to PW3 and he was within his rights to give it to his two wives. Although the first wife has 10 children while the second wife has five children, it is PW3 who owned the land and he was entitled to divide it the way he wanted. The allegations that he has bought another two acres for his second wife cannot be the reason not to give his second wife the suit land. The defendants should obey their father's wish and should not forcefully take their step mother's land. As per the evidence of their father, the defendants are educated and should look for their own wealth.

The evidence on record does prove that the plaintiff was given the suit land lawfully. The evidence also establishes that boundaries were fixed on the land and the defendants were aware of that fact. Their act of taking possession of the suit land and threatening their father and step mother borders on criminality and will not help them. Their father is still alive and has the right to deal with his property in the manner he so wishes.

In the end I do find that the plaintiff has proved her case as required by the law and the same is granted. The defendants shall meet the costs of the suit. PW3 is advised to ensure that his first wife, **Anna Shikuku** gets her own title deed for plot number **S.KABRAS/SAMITSI/1427** so as to enable the defendants settle on their mother's land.

*Delivered, dated and signed at Kakamega this 14<sup>th</sup> days of November 2013*

**SAID J. CHITEMBWE**

**J U D G E**