

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL CASE NO. 50 OF 2008

SAMMY LIKUYI ADIEMA PLAINTIFF

V E R S U S

CHARLES SHAMWATI SHISIKANI DEFENDANT

J U D G M E N T

In his plaint dated 7.8.2008 the plaintiff is seeking an order of eviction against the defendant together with costs and interest. The plaintiff testified in his favour. His evidence is that he is the registered owner of plot number **S/KABRAS/SHAMBERERE/2650**. He got the land in 2002 through succession that had been filed by his mother **FRIDA ADIEMA**. The defendant is occupying 3 acres of his land and has planted trees. The defendant has also built houses on the plot. According to the plaintiff the defendant is claiming to have bought the 3 acres from the plaintiff's late father **JOHANA**. There was a case before the Kabras Land Disputes Tribunal and the Appeals Committee but the decisions of the two tribunals were overturned in Kakamega High Court Civil Appeal No. 144 of 2003. It is the plaintiff's further evidence that the defendant went to live on the land in 1984 when the plaintiff was 18 years old. No Land Control Board Consent was obtained. The plaintiff's father died in the year 1992. The plaintiff's mother filed Civil Suit No. Kakamega RMCC 124 of 1989 against the defendant. When he got his title deed the plaintiff was already living on the land claiming to have bought 3 acres out of plot number **S/KABRAS/SHAMBERERE/1172** which is different from the suit land.

The defendant testified as DW1 and called two more witnesses. His evidence is that he bought the suit land in 1984 and it was originally plot number **S/KABRAS/SHAMBERERE/1172**. He bought 3 acres at a price of KShs.26,000/=. He started using the land in 1984. He has four semi-permanent houses and crops on the land. He was not given title deed as the vendor told him that there was a court case and he was to wait until it was finalized. In 1989 the plaintiff's father sued him seeking vacant possession vide case number Kakamega CMCC 124 of 1989. That suit is still pending. In 1991 the plaintiff's father took the defendant to the Malava District officer seeking to refund the defendant his purchase price. The defendant was told to value his property and the valuation was done which gave the value as KShs.183,137.50. The plaintiff's father could not repay him and died in 1992. In 1996 the plaintiff's mother was substituted in the court case and she asked the matter to be referred to the tribunal. Parties went to the Land Disputes tribunal in 2002 and the tribunal and the Appeals Committee ruled in the defendant's favour.

The defendant further testified that while the case was before the tribunal he discovered that the plaintiff's mother had done succession and left the matter with the plaintiff. It is his evidence that the entire plot was 23 acres and his portion lies in plot number **S/KABRAS/SHAMBERERE/2650** which was created from the original plot. Plot number 2650 is about 12 ½ acres. He is claiming that he be given the land where he occupies. It is his further evidence that he paid the full purchase price to the plaintiff's father.

DW2, MARK ANYULA SHISIGALI is the defendant's brother. His evidence is that in 1984 he was on leave from his work at the Ministry of Public Works when his sister informed him that the defendant was buying a plot from the plaintiff's father. There was a balance of KShs.500/= that was pending and he witnessed the payment of that amount and signed the sale agreement. The defendant moved on to the land in 1985. **DW3, HENRY SHITOTE** was present when the land was sold to the defendant. According to him a sum of KShs.8,000/= was paid as the first installment and a further sum of KShs.17,000/= was the second installment while the balance of KShs.500/= was paid as the third installment. He was present when all the three installments were paid. The defendant took possession

and he lives on the land with his children. During the sale transaction the vendor was with his wife and first born son.

Parties agreed to file written submissions. Mr. Ombaye, counsel for the plaintiff submitted that the plaintiff has proved his case as he is the registered owner of the suit land this being plot number **S/KABRAS/SHAMBERERE/2650**. The defendant in his counterclaim is claiming 2 acres out of that land while his evidence in court is a claim for 3 acres. Although the defendant has been on the land it is not proved that he has continuously stayed on the land for a period of over 12 years peacefully and openly. Parties have litigated in different forums. The Consent of the Land Control Board was not obtained and this is a requirement under **section 8(1)** of the now repealed Land Control Act Cap 302 Laws of Kenya. This makes the agreements between the defendant and the plaintiff's father to void as per the provisions of **section 7** of the said Act. The defendant ought to have pursued his claim through the succession cause.

On her part, Mrs. Muleshe for the defendant submitted that the plaintiff obtained his title 18 years after the defendant had started occupying the land. The suit property is a subdivision of the original plot number 1172 and therefore the plaintiff cannot claim that the defendant is a trespasser.

The evidence on record shows that the plaintiff is the registered owner of the suit property that is plot number **S/KABRAS/SHAMBERERE/2650** measuring 5.0 HA. The title deed was issued to the plaintiff on the 22.1.2002 and the title indicates that it is a subdivision of plot number **1172**. It is also clear from the evidence that the defendant bought a portion of land from the plaintiff's father in 1984. According to the agreements as well as the judgment of Justice Fred Ochieng delivered on the 26.6.2008 in Civil Appeal No. 144 of 2003 the defendant has been claiming 3 acres of land from the suit property. According to the sale agreements a sum of KShs.8,000/= was paid to **FESTO ADIEMA** on the 28.7.1984 when the said transaction was signed. The sale price was 26,000/=. On the 10.8.1984 a further sum of KShs.17,500/= was paid leaving a balance of KShs.500/=. The balance of 500/= was paid on the 8.8.1984. In all the three agreements the names of the witnesses are given. It is also established that a valuation report was done by **MUMALI & COMPANY** (Registered Valuers and Estate agents) and in its report dated 16.6.1991 the defendant's property including the land was valued at KShs.183,137.50.

The main issue for consideration is whether the defendant without any colour of right as pleaded in the plaint entered into and took possession of the plaintiff's 3 acres out of his land. If that is in the affirmative the next issue will be whether the defendant should be evicted from the suit land. As herein above stated it is clear that the defendant went into the suit land after signing a sale agreement with the plaintiff's father. The defendant has been on the suit land since 1985. When the plaintiff obtained his title deed he was aware of the defendant's claim. It is the defendant's position that he was not made aware of the succession cause filed by the plaintiff's mother. This being the case the plaintiff cannot submit that the defendant should follow his claim in that succession cause. The defendant was sued in this matter and he was entitled to defend the suit.

Although the plaintiff contends that his land is not plot number 1172 which the defendant claims to have bought his 3 acres, it is clear that plot number 2650 was created from plot number 1172. The subdivision was done sometime in the year 2002 after the death of **FESTO ADIEMA** who had sold 3 acres of plot number 1172 to the defendant. The land remains the same and it is the same place where the defendant resides. From the evidence on record it is clear that parties have litigated in different forums. The valuation report by Mumali valuers is proof that at one time the plaintiff's father wanted to refund the defendant his money. This aspect is captured in the judgment of Justice Fred Ochieng herein referred to. I am satisfied that the plaintiff's father was not able to refund the defendant his value as per the valuation report and the defendant continued to reside on the suit land.

Counsel for the plaintiff submits that no Consent from the Land Control Board was obtained and therefore the sale agreements are void. Although that argument sounds attractive I do find that it was upon the vendor to seek the consent of the Land Control Board. The evidence shows that he was not willing to do so and even sought to refund the defendant the purchase price. The vendor failed to refund the defendant. The plaintiff and his family are therefore estopped from seeking to evict the defendant

from the suit land. Substantive justice requires that the defendants' right to occupy the suit land be recognized. The defendant did not encroach on the suit land. parties agreed in the presence of witnesses and I am quite certain by then they were all aware of what they were doing. The plaintiff cannot turn around and claim that the defendant without any colour of right has encroached on his land. The issue of refund only comes about when the development by the purchaser is considerably low. I believe the same argument that the consent of the Land Control Board was not sought is normally advanced when the developments on the suit land is of low value. I am sure that no such contentions can be adversed if a purchaser is allowed to put up substantive developments such as a hotel or commercial property worth billions of shillings while the vendor is present and does not object to the development only to turn up a few years later to claim that the consent of the Land Control Board was not obtained and would therefore wish to refund the purchaser his purchase price. This is an afterthought and parties should be estopped from blowing hot and cold. By entering into the sale agreement the vendors do encourage the purchasers to develop the sold properties. To rely on the lack of consent of the Land Control Board is to introduce technicalities even though such technicalities were provided for under the law. The vendor should stick to his promise that he was selling the land to the purchaser and should he turn around and claim that he did not take the purchaser to the Land Control Board, the court should find that such a vendor is estopped from relying on that contention.

In the end, I do find that the plaintiff has not proved his case as required. The suit is hereby dismissed. Since parties have litigated for long I do find that the defendant has proved that he bought 3 acres from the plaintiff's father **FESTO ADIEMA**. That purchase became a liability on plot number **S/KABRAS/SHAMBERERE/1172**. The plaintiff and his mother ought to have taken that claim into account in the succession cause. The cases were transferred to the Land Disputes Tribunals by the plaintiff's mother and the judgment of Justice Fred Ochieng that reversed the decisions of the tribunals does not affect the defendant's claim as the judgment was based on the issue of lack of jurisdiction by the tribunals since the dispute was based on contract. The counter claim herein is for 2 acres but the defendant informed the court that he bought 3 acres. Paragraph 5 of the plaint recognizes that the plaintiff is using 3 acres of the suit land. The valuation report dated 16.6.1991 indicated that the defendant was using 3 acres. The sale agreement dated 10.8.1984 indicate that what was being sold was 3 acres. From all the above, I am satisfied that the defendant is utilizing 3 acres and is entitled to that portion of land. this was a contractual arrangement with the plaintiff's father and I do find that it is not a claim of adverse possession to warrant the filing of an originating summons by the defendant. Indeed the amended defence does not claim that the defendant is seeking the 3 acres by way of adverse possession.

The plaintiff's suit is hereby dismissed with no orders as to costs. The plaintiff is hereby directed to subdivide plot number **S/KABRAS/SHAMBERE/2650** and transfer 3 acres to the defendant within 90 days hereof failing which the Deputy Registrar shall execute all the relevant documents that would enable the defendant obtain his rightful share of the suit land, that is 3 acres. Those shall be the orders of the court.

Delivered, dated and signed at Kakamega this 14th day of November 2013

SAID J. CHITEMBWE

J U D G E