



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL CASE NO. 36 OF 2008 (OS)

ZABLON UGUKU KEYA PLAINTIFF

V E R S U S

ZABION OZENGO OKEYO DEFENDANT

J U D G M E N T

In his originating summons dated 6.6.2008 the plaintiff is seeking to be declared as having acquired title to ½ an acre of land from plot number **BUTSOTSO/SHIKOTI/1483** by way of adverse possession. Two witnesses testified for the plaintiff. The plaintiff's evidence is that he has lived on the suit land for over 25 years and he has buried two of his dead children on the land. He bought ½ an acre from the defendant and moved on to the land in 1987. He paid the purchase price by installments and fully completed. In 1996 he made a further payment of the purchase price and in 2000 he completed the purchase price. In 2006 he filed a suit before the Land Disputes Tribunal and he won. His interest was to be given his title for the portion of the land he occupies. When he buried his children the defendant did not stop him. The entire land is about 4 acres.

PW2, CHRISANTUS MUKALE SERETE testified that on the 3.6.2000 the plaintiff informed him that he wanted to pay the defendant KShs.30,000/=. PW2 met the defendant together with the plaintiff and he drafted an agreement. The defendant informed him that he already received a sum of KShs.20,000/= from the plaintiff and on the 3.6.2000 a further sum of KShs.30,000/= was paid to the defendant. There was a balance of KShs.5,000/= due from the plaintiff and was to facilitate the transfer process.

The defendant's evidence is that he is a teacher by profession. He bought the land in 1974 from one **PETRO ODUOR**. He built a house in 1978. The plaintiff is his distant cousin and asked him if he could live in the house the defendant built in 1978. The defendant allowed the plaintiff to occupy the house. The defendant acknowledges that between 1996 to 1999 he received Kshs.20,000/= from the plaintiff. In the year 2000 he got 30,000/= from the plaintiff as per the agreement. He denied that the plaintiff started living on the land in 1987. He intended to survey the land and thereafter give the plaintiff his portion. He told the plaintiff to move out of the house and showed him a place to build but the plaintiff refused. The defendant's son has built a house on the plot and the plaintiff has been interfering with that house. The defendant appealed against the decision of the Lurambi Land Disputes Tribunal to the Appeals Committee but the appeal has not been heard. The defendant is ready to refund the plaintiff his money.

DW2, is JOHAM KISUMBA. His evidence is that in 1978 he was employed by the defendant to build for him a semi-permanent house on the suit land. **DW3, STANLEY MWARIGI OZENGO** is the defendant's son. His evidence is that he built his house on the suit land in 2000 and moved in in 2001.

Since 2002 the plaintiff has been claiming part of the land at one time the plaintiff threatened him with a panga.

Parties filed written submissions. The plaintiff contends that he has acquired title by way of adverse possession having lived on the land quietly since 1987. The defendant's argument that he wanted to give the plaintiff an alternative portion should not be entertained.

On his part, counsel for the defendant submits that there was no sale agreement signed in 1987. The agreement that was produced is dated 3.6.2000. The parties have been litigating and there has been no quiet possession by the plaintiff.

The background of the dispute shows that the parties appeared before the Lurambi Land Disputes Tribunal vide case number 67 of 2006. The plaintiff herein sued the defendant seeking to be given his title to $\frac{1}{2}$ an acre portion of the land. The evidence before that tribunal is more or less similar to what has been adduced before this court. In 2006 the plaintiff informed the court that he had lived on the suit land for 19 years and by then he had buried two of his deceased children on the suit land. The plaintiff informed the court that he paid two installments of KShs.10,000/= each. One installment was made in 1987 and another one in 1996. When the defendant wanted the balance the plaintiff insisted on signing a sale agreement. This was done in the year 2000 when the sum of KShs.30,000/= was paid. A balance of KShs.5,000/= remained for purposes of survey but the defendant also claimed it and the plaintiff paid.

The defendant informed the tribunal that he received money from the plaintiff. According to him he received first installment of KShs.5,000/= and a second one of KShs.10,000/=. The transaction begun in 1996. In 2000 the plaintiff called him to Kakamega and paid him KShs.30,000/=. The defendant informed the tribunal that the plaintiff had resided in his house and converted part of the money to rent at the rate of KShs.2,000/= per year and another sum of KShs.4,000/= per year for the use of the land.

The court visited the suit property on the 22.11.2012. The plaintiff was able to show the court the houses located on the land as well as the graves where he buried his son and daughter. The plaintiff also showed the court a house belonging to his son. The defendant also showed the court his boundary for the plot and his son's house. He also showed the court a section of the land where he had shown the plaintiff to build.

The main issue for determination is whether the plaintiff is entitled to $\frac{1}{2}$ an acre of land from plot number **BUTSOTSO/SHIKOTI/1483** by way of adverse possession. From the evidence on record it is established that the parties herein entered into a sale transaction whereby the plaintiff was to buy $\frac{1}{2}$ an acre of land from the defendant. It is also established that the transaction was initially oral and was later reduced into writing. The plaintiff produced a letter dated 19.8.1996 whereby the defendant acknowledged receipt of KShs.10,000/= from the plaintiff. It is indicated in the same letter that the defendant had earlier received another sum of KShs.10,000/=- although the date is not indicated. There is a letter dated 11.10.1993 whereby the defendant wrote to his cousin, the plaintiff asking him to give him some money as he was in financial problem. There is an inscription on the letter that a sum of KShs.7,800/= was paid on 13.10.1993. The evidence shows that the parties have been dealing with each other without any problem and the plaintiff occupied the land. The only dispute that was recorded was the case before the Lurambi Land Disputes Tribunal in 2006 and this was a claim by the plaintiff to be given title to his land. The defendant informed the tribunal that he had received a total of KShs.45,000/= from the plaintiff. The letter dated 11.10.1993 seems to imply that the defendant was to travel from Maragoli to Kakamega the following Wednesday so that the plaintiff could give him some money.

I am satisfied that the plaintiff has been living on the suit land before the year 1993. By the year 2006 when the plaintiff went to the tribunal a period of over 12 years had elapsed and had acquired title by way of adverse possession. The defendant's only contention is that the plaintiff should move from the portion he is occupying to a different area within the land. This was the position of the defendant before the tribunal and the tribunal found that that option was quite expensive and ruled that the plaintiff should occupy where he stays and the defendant subdivide the land and give him his portion. I visited the suit land and I am in agreement with the decision of the Land Disputes Tribunal that it will be expensive to relocate the plaintiff from his current location. I do agree with the tribunal that the defendant is an

educated person and could not have allowed the plaintiff to develop his homestead for all these years without raising any official complaint only to come later and say that he would like to relocate the plaintiff to another portion or refund his money.

In the end I am satisfied that the plaintiff has proved his case on a balance of probabilities. He bought land from the defendant and fully paid the purchase price of KShs.55,000/=. He lived on the land for a period of over 12 years before 2006 and therefore acquired title to ½ an acre out of plot number **BUTSOTSO/SHIKOTI/1483** by way of adverse possession. The defendant is hereby directed to subdivide the land and transfer ½ an acre within the locality occupied by the plaintiff. Should the defendant fail to do so within sixty (60) days hereof, the Deputy Registrar is hereby authorized to execute all the necessary documents to enable the plaintiff obtain title to his land. Each party to meet his own costs.

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

SAID J. CHITEMBWE

J U D G E