



**REPUBLIC OF KENYA**

**High Court at Kakamega**

**Civil Case 33 of 2010**

**MUSA INJIRA CHEKUK ..... PLAINTIFF**

**VERSUS**

**FRANCIS KHATERA CHIMASIA ..... DEFENDANT**

**JUDGMENT**

By way of the Originating Summons dated 9.3.10, the plaintiff, **MUSA INJIRA CHEKUKU** has sought the following orders:

“i) A declaration that the defendant/respondent’s rights over a portion measuring 0.08 Ha. out of the suit parcel of land got extinguished by adverse possession.

ii) A declaration that the plaintiff/applicant has acquired title over a portion measuring 0.08 Ha. out of the parcel of land known as BUTSOTSO/INDANGALASIA/3442 by virtue of adverse possession and the parcel of land be transferred and registered in the name of the plaintiff/applicant.

iii) That the costs of this proceedings be provided for.”

In his affidavit sworn on 9.3.10 and in his evidence before court, the plaintiff’s/applicant’s case is that the defendant/respondent, **FRANCIS KHATERA CHIMASIA** sold a portion of land measuring approximately 0.08 Ha. out of land parcel No. BUTSOTSO.INDANGALASIA/3442 to the plaintiff’s father. That the plaintiff moved into the said portion of land in the year 1983 and established a home there. That he farms on the said land and has openly, continuously and peacefully occupied the land without any dispute or interruption. That the land was previously occupied by the plaintiff’s late father who died and was buried on the said portion of land.

It is the plaintiff’s case that the defendant has not been in occupation of the suit portion of land and the plaintiff has therefore acquired rights over the said portion of land by virtue of adverse possession. That the defendant holds the title to the said portion of land in trust for the plaintiff. The plaintiff’s prayer is for the cancellation of the registration of the suit land and that the portion of land in question be registered in the plaintiff’s name.

In the replying affidavit sworn on 23.3.10 and in his evidence in court, the defendant stated that in the year 1982, he sold a quarter portion of his land LR BUTSOTSO/INDANGALASIA/307 to the plaintiff’s father for a sum of Kshs.6,000/=. That the applicant’s mother, **TINAH ASANULA CHEKUNE** and her children **Moni, Elizabeth and Thomas** lived on the land but the applicant had no land there. Long after the death of **MUSA INJIRA CHEKUKU**, the plaintiff’s father, the plaintiff’s mother and the other aforesaid children on 2.8.2009 sold the same portion of land back to the defendant together with the

developments thereon at an agreed price of Kshs.85,000/=. That the defendant paid the said purchase price and TINA ASANULA CHEKUKU bought L.P. NO. NANDI/KAMOBO/211 and moved there with her children.

One week after the sale, the plaintiff went to the defendant claiming the same parcel of land. The dispute was heard by the assistant chief and by the District Officer who decided that the defendant should be refunded his money. The defendant was then arrested by the police and beaten and remanded in police custody and was only released after the District Officer intervened. The defendant stated that bad blood has developed between the parties and that he has not yet been refunded his money. He stated that the plaintiff's family cannot keep his money and also keep the land. He urged the court to dismiss the plaintiff's case.

It is not in dispute that the plaintiff's father bought the portion of land in question from the defendant. Both parties are also in agreement that the plaintiff's mother sold the same parcel of land back to the defendant at the price of Kshs.85,000/=. According to the plaintiff, he was ready to refund the purchase price but the defendant demanded Kshs.250,000/=. The defendant has not objected to a refund as long as the same was with interest.

The plaintiff during cross-examination stated that he lives and works in Mombasa where he moved in the year 1984 but that he was annoyed because the mother had sold the land without involving him.

According to the evidence of the brother PW2, **THOMAS CHEKUKU**, he is the one who lives on the portion of land in question while his other brother, Moni lives in Kapsabet. It was the evidence of PW2 that the plaintiff sleeps in the mother's house when he visits the land in question.

The evidence of DW2 **FANUEL LUMUMBA**, a Senior village elder and that of a neighbour DW3 **JOHN SHIKOMBE** further confirms that the plaintiff has no house on the portion of land in question.

From the evidence on record, it comes out clearly that the plaintiff has not been continuously and peacefully in occupation of the land in question. The Plaintiff has not proved his case on a balance of probabilities to enable this court to declare that he has acquired the title to the land in question by way of adverse possession.

Consequently, the plaintiff's case fails with costs to the defendant.

*Delivered, dated and signed at Kakamega this 8<sup>th</sup> day of November, 2012*

**B. THURANIRA JADEN**

**J U D G E**