



NATHAN CHISAMBO KARUNGANI PLAINTIFF

V E R S U S

AINEA BURUDI MALALU DEFENDANT

J U D G E M E N T

The plaintiff filed the Originating Summons dated 31st October, 2006 seeking orders that he be declared the legal owner of the whole of plot No. **SOUTH KABRAS/CHEMUCHE/940** having acquired title to the whole parcel of land by way of adverse possession. The plaintiff would also wish the court to find that the defendant is holding the property in trust for him and that the defendant acquired the title to the property fraudulently that the title be cancelled and a new title issued to the plaintiff.

In his evidence the plaintiff testified that he was born in 1962 on the suit land. He stays on the land currently and he has been planting maize and sugarcane as well as rearing cattle on the plot since 1980 when his father gave him that specific portion of the ancestral land. He has built a house and he lives there with his family. He turned 18 years old in 1980. The property measures 7.29 Hectares. He has a cane farming contract with West Kenya Sugar Company on the suit property.

The plaintiff further testified that he does not know how the defendant got himself registered. His father died in 1994. The defendant registered himself fraudulently as the owner in 1983. He first became aware that the defendant is the registered owner in 1995.

PW2, JAMES LUMUCHERE'S testimony is that the plaintiff was born in 1962 on the suit property. In 1980 he was given that particular piece of land known as **SOUTH KABRAS/CHEMUCHE/940** by his father. The plaintiff's first born is about 16 years old and was born on that land. No one has laid a claim on the land. The plaintiff has two other brothers who also live on the land. It is in 1980 when the plaintiff's father gave his three sons their respective portions.

PW3, NELSON LUPHANDE testified that the plaintiff has lived on the suit land since 1962 when he was born. He cultivates the farm and plant maize and beans amongst other crops. His first born was born on the plot. When the plaintiff went to do search at the land Registry he found out that the plot was registered in the defendant's name. The plaintiff has lived on the suit land since 1962.

On his part the defendant testified that he bought the suit property from **KARUNGANI CHISAMBANI** and produced a sale agreement dated 2nd May, 1980. He testified that he started using the land between 1981 to 1985. In 1985 the seller came back to the land and he allowed him to occupy a portion of the property. The defendant further testified that he purchased the property lawfully and the Land Control board gave its consent. His son built a house on the plot. He was sued in Kakamega case No.342 of 1984 but the case was referred to the Panel of Elders. The case was dismissed in 2003. The defendant testified that the plaintiff's occupancy of the property has not been peaceful. Parties held

discussion in 1996 but there was no agreement.

DW2, JUSTUS MUKOPI BURUDI is the defendant's son. He testified that he used the land up-to 1985. The seller came back in 1984 and settled on the land claiming he had been chased away by the Kalenjins where he had gone to settle. Civil Case No.342 of 1984 went on up-to 2003. The plaintiff was charged at the Butali Court because of the plot.

The main issues for determination are whether the plaintiff has acquired plot No. **SOUTH KABRAS/CHEMUCHE/940** by way of adverse possession; whether the defendant acquired the property fraudulently and whether the title deed issued to the defendant should be cancelled and a fresh one issued to the plaintiff.

The plaintiff contends that he was born on the plot in 1962. In 1980 he attained the age of 18 years and was allocated that specific portion of the plot by his late father. Since 1980 he has lived on the plot and cultivates crops including sugar cane. He produced a cane farming contract between himself and West Kenya Sugar Co. Ltd. dated 17th March, 1999.

The extract from Kakamega Land Registry popularly known as the Green Card show that plot No. **SOUTH KABRAS/CHEMUCHE/940** was opened on 5th October, 1983 after the sub-division of plot No. 236. It was registered in the name of **KARUNGANI CHISAMBO** on the same date 5th October, 1983. The plot measures 7.29 Hectares. On the same date 5th October, 1983 the plot was transferred to **AINEA BURUDI MALALU** for a consideration of Shs.32,000/= and a title deed was issued to the purchaser.

A Sale Agreement produced by the defendant show that he bought the land. The agreement is dated 2nd May, 1980 and the defendant paid a deposit of **KShs.13,000/=** leaving a balance of **KShs.19,000/=**. Parties applied before the Kabras Land Control Board on 29th September, 1982. This was to sub-divide plot No. **SOUTH KABRAS/CHEMUCHE/236** measuring 40 acres into two portions and thereafter transfer 16 acres for a consideration of **KShs.32,000/=**. Consent was given after a meeting of the Board was held on 28th October, 1982.

The defendant produced proceedings for case No. Kakamega RMCC 342 of 1984. In that suit the plaintiff is **YOHANA KARUNGANI** and the defendant is **AINEA BURUDI** and **JUSTUS MUKOPI**. An order was made by Acting Resident Magistrate C. M. Rinjeu, on 16th December, 1986 referring the matter to the District Officer, Kabras for Arbitration. The Arbitration award was to be filed in court within three months.

The panel of elders met on 25th February, 1987. The plaintiff testified that he sold the property to the defendant for **Shs.32,000/=**. He sold **16** acres. He went and bought five (5) Acres at Moi's Bridge where he lived up-to 1983 when he was chased away by the Nandis and he decided to go back home. When he came back he occupied part of the portion which he had sold to the defendant and built a house. He requested the purchaser to take back his money but he refused. He deposited the money with his Advocate.

The decision of the Panel of Elders was that the land remains in the name of the buyer and Karungani to be evicted from the property. This decision was to be adopted by the Resident Magistrate Court which had referred the case for arbitration.

In his submissions, the plaintiff relied on the cases of **Court of Appeal Civil appeals No.24 of 1979, GITHU –VS- NDEETER and 42 of 1987 KAIRU –VS- GACHERU 1986-1989 E.A. 194**. The plaintiff's testimony is that he was given the land in 1980 by his father when he attained the age of 18 years. At that time the land was still plot No. **SOUTH KABRAS/CHEMUCHE/236**. Before 1980 the plaintiff could not have raised a claim of adverse possession as the land belonged to his father. His father testified before the Panel of Elders that indeed he sold the property to the defendant. The defendant herein was also the defendant before the Panel of Elders.

The Sale Agreement shows that the property was bought by the defendant in 1980. Transfer was effected in 1983. The defendant testified that he used the land from 1980 to 1985. It is the plaintiff's father's testimony that he came back to the land in 1983 and occupied a portion thereof. The plaintiff's father filed RMCC No.342 of 1984. That suit has been pending in court.. I do find that the plaintiff's occupation of the suit property has not been peaceful and without interruption for a period of 12 years. His father sued the defendant in Kakamega RMCC 342 of 1984. This shows that there was a dispute since 1984 and parties were not living peacefully, this was only four years after plaintiff had started occupying the land. The Panel of Elders dismissed the plaintiff's father's claim. DW2 claimed that the plaintiff was charged in court but no evidence was adduced. However, I am satisfied that since 1980 the plaintiff's stay at plot No. **SOUTH KABRAS/CHEMUCHE/940** has not been all rosy.

On the issue as to whether the defendant acquired the suit property fraudulently, the evidence adduced establishes that the defendant bought the land for KShs.32,000/=. The plaintiff in his written submissions alleges that the balance of the purchase price was not paid. However, the seller himself in his testimony before the Panel of Elders testified that he sold the land for KShs.32,000/= and when he returned from Nandi, he wanted to refund the money. He left the money with his lawyer. The parties applied to the Land Control Board and consent was issued. I do not find that the defendant acquired the property fraudulently. This being the case, I find no reason to cancel the defendant's title to the property.

In the end the plaintiff's suit herein lacks merit and is dismissed with costs to the defendant.

Delivered, Dated and Signed at Kakamega this 27th day of October, 2009

SAID J. CHITEMBWE

J U D G E