



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT KAKAMEGA**

**Civil Case 122 of 2001**

**AGGREY J. B. LUVUTSE ----- PLAINTIFF**

**VERSUS**

**ALEXANDER MUSA LIMISI ----- DEFENDANT**

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**JUDGEMENT**

The Plaintiff brought this suit by way of Originating Summons seeking among other orders that he be declared as the owner of Plot number **KAKAMEGA/LUKOSE/773** by way of adverse possession.

The Plaintiff's testimony is that he bought half of Plot No. Kakamega/Lukose/773 from the original registered owner, **CLEMENT SHITANDAYI KUSINJIRU** in 1972. He bought the remaining half in 1979. A sale Agreement was signed in 1979 when he bought the second half. The entire plot measures 2.4 Hectares. The Plaintiff contends that he moved to the plot in 1972 and established his homestead there. He produced a Sale Agreement dated 2<sup>nd</sup> June, 1979 that was drawn by the Assistant Chief, Lukose Sub-location. The purchase price was Kshs.7,600/= . The plaintiff also produced receipts for advertising the vendor's death from the Kenya Broadcasting Corporation dated 27<sup>th</sup> August, 1982. He contends that he is the one who paid for the advertisements and met all the funeral expenses.

The Plaintiff filed succession cause No. 31 of 1987 and was thereafter duly registered as the owner. However, the defendant later objected to the grant and the same was annulled. He contends that since 1972 he has not moved out of the land. He concedes that by 1979 he was not occupying the entire plot but from 1979 he took over the entire land.

PW2, **SHEM NZAYUA** is a neighbour who lives on plot number **ISUKHA/LUKOSE/774**. He testified that the Plaintiff lives on plot No.773 which borders his plot number 774. The Plaintiff bought the plot in 1979. By then he was living at his mother's place while utilizing the plot before occupying it. His mother's home is about 150 metres from the suit property. The plaintiff bought one half in 1972 and another half in 1979. PW2 was present in 1979 when the plaintiff was buying the second half although only two witnesses were recorded in the sale Agreement. PW2 further testified that the plaintiff has been utilizing the land and has never been evicted from the property. He witnessed the plaintiff providing food for those who attended the burial of Clement in 1982.

The defendant on his part testified that he works in Nairobi. The suit property belonged to his late uncle, Clement Shitandayi. He did Succession Cause 1436 of 1995 and he was registered as the owner. The defendant contends that the plaintiff has not been using the property since 1972 and that he entered on the plot in 1993 and built a house. The Plaintiff did Succession Cause No. 31 of 1987 for the late Clement Shitandayi. The defendant objected to the proceedings.

The defendant further testified that he got the title deed in 2001 in his name. He acknowledged that currently it is the plaintiff who is using the whole plot. He filed suit No. HCCC. 122 of 2001 to have the plaintiff evicted from the property. He was in Nairobi in 1987 when the plaintiff filed Succession Cause No. 31 of 1987. At no time did the defendant stop the plaintiff from using the plot as the matter was pending in court. He denied that his uncle sold the plot to the Plaintiff. He is the one who took care of his uncle's burial and did not see the plaintiff at the burial.

DW2, **JOSEPH JEREMIAH DIMISI** is the defendant's brother. He testified that the defendant did the Succession Cause when he realized that part of their deceased uncle's estate had been taken by the plaintiff. He could not recall when the plaintiff entered into the plot. The plaintiff is a neighbour and has inherited his father's plot nearby.

DW2 further testified that his brother by the name Bernard used to utilize the suit property but he left it and it is now being utilized by the plaintiff. The plaintiff built on the plot after Clement Shitandayi died.

The record shows that the Originating Summons was consolidated with High Court Civil Case No. 129 of 2001. The Plaintiff's Originating Summons and defence and counter claim for case No. 129 of 2001 are to be deemed as the Plaintiff while the defendant's Plaintiff in Suit No. 129 of 2001 and replying affidavit for this Summons are to be deemed as the defence.

The Plaintiff filed his own list of issues dated 30<sup>th</sup> January 2006. The defendant did not file any issues. These issues are quite similar with the prayers in the Originating Summons. The main issues are whether the Plaintiff has obtained title of Plot No. Kakamega/Lukose/773 by way of adverse possession and if so whether the property should be transferred to him.

It is the Plaintiff's evidence that he bought the suit property in 1972. In 1972 he bought half of the suit property and took possession thereof and in 1979 he bought the remaining half. The agreement was reduced into writing in 1979. He paid the full purchase price of Kshs.7,600 and has been in occupation since 1972. He has three semi permanent houses on the plot and mature trees among other crops. He lives on the plot with his family. His evidence is supported by that of PW2 Shem Nzayua.

In his affidavit in support of the Originating Summons, the plaintiff avers that he did Succession Cause in 1987 and was issued with a grant of Letters of Administration. He later got registered as the owner of the land. However, in 1997 the defendant applied to have the grant revoked which he managed and the defendant was registered as the owner of the property in March, 2001. The original owner, Clement Shitandayi never lived on the property. The Plaintiff contends that his occupation has been open, continuous, notorious and exclusive of the defendant or the original owner.

The defendant on his part maintains that the Plaintiff invaded the land after the death of his uncle. In 1987 the plaintiff fraudulently obtained a grant of letters of Administration for his uncle and had himself registered as the owner. The defendant applied to have the grant annulled and this was done by an order of the court issued on 11<sup>th</sup> June, 2000.

In his Replying affidavit to the Originating Summons sworn on 7<sup>th</sup> December, 2001 the defendant contends that many meetings were held through the Chief and other village elders. However, when testifying he did not adduce evidence on this averment. DW2, Joseph Jeremiah Dimisi's testimony is similar to that of the defendant. He confirmed that currently it is the plaintiff who is using the land but contends that his occupation is unlawful.

The extract from the Kakamega Land Registry show that the title was opened on 7<sup>th</sup> August 1973 and registered in the name of **CLEMENT SHITANDAYI KUSINJURU**. On 2<sup>nd</sup> December, 1987 the Plaintiff, **AGGREY J. B. LUVUTSE** was registered as the owner as the Administrator of the original owner. On 22<sup>nd</sup> March, 2001, the defendant was registered as the owner through Succession Cause No. Nairobi 1436/95.

From the evidence adduced, I am satisfied that the plaintiff occupied part of Plot No. **Kakamega/Lukose/773** since 1972. He took possession of the entire plot in 1979. In 1987 he was registered as the owner through transmission. The defendant objected to the Plaintiff's title in 1995 and managed to have the grant that had enabled the plaintiff to own the property nullified in the year 2000.

Did the Plaintiff occupy the land peacefully, openly and exclusively for a period of 12 years? For the half of the land which the plaintiff occupied in 1972 I do find he acquired title thereon by 1985. Although the register for the plot was opened in 1973, it does not mean that there was no land to be occupied in 1972. There is no evidence that prior to 1972 the land belonged to the Government. The defendant in his evidence and the pleadings does not claim that he started raising issues with the Plaintiff's occupation by 1985. The original owner died in 1982. The plaintiff claims that the original owner did not live on the land. There is no evidence that he was buried on the plot or that he had a house or crops on the land. The plaintiff contends that the original owner never utilized the property. I do agree with the plaintiff that both the defendant and the original owner have never utilized the land.

The defendant herein raised objection to the issue of the grant to the plaintiff. It can therefore be positively stated that from 1979 the plaintiff's occupation of the whole property has been peaceful upto 1995. Assuming that the plaintiff's first occupation date of the land is taken as 1979 when the sale agreement was reduced into writing, by 1995 when the defendant applied to be the deceased's administrator, it is 16 years. I have had the advantage of seeing the proceedings in Kakamega Succession Cause No. 31 of 1987. The defendant's application for the annulment of the grant is dated 19<sup>th</sup> June, 1997. The application was filed on the same date. Justice B. K. Tanui annulled the Grant on 26<sup>th</sup> June, 2000.

By the time the defendant filed Succession Cause No. 1436 of 1995 in Nairobi, the Plaintiff had occupied the whole land for over 16 years from 1979. There is no evidence that prior to the filing of the Nairobi Succession Cause, the defendant had disturbed the plaintiff's occupation of the land. The transfer of the property to the defendant does not affect the Plaintiff's contention that he had occupied the property for over 12 years before the transfer was effected. The defendant was aware of the plaintiff's occupation.

**Section 7** of the limitation of Actions Act provides that an action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him, or if it first accrued to some person through whom he claims.

The original owner sold the land in 1979. He died in 1982. There is no evidence that the deceased had any dispute with the plaintiff. The plaintiff's entry to the land was not forceful as alleged. I do therefore find that the plaintiff has proved his case. I do declare that the deceased and the defendant's rights over plot No. Kakamega/Lukose/773 got extinguished by way of adverse possession upon expiry of 12 years when the applicant was in possession and the said property is currently being held in trust for the plaintiff.

The suit property has vested in the plaintiff and he should be registered as the owner under Section 38 of the limitation of Actions Act. The defendant is hereby ordered to transfer the suit property to the Plaintiff within 30 days hereof failing which the Deputy Registrar, Kakamega, to sign the transfer in favour of the plaintiff. The plaintiff shall meet the costs of the transfer. There shall be no orders as to costs.

***Delivered, Dated and signed at Kakamega, this 12<sup>th</sup> day of November, 2009.***

**SAID J. CHITEMBWE**

**J U D G E**