

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CIVIL CASE NO: 4 OF 2003 (OS)

LAWRENCE KWATSIMAPLAINTIFF

VRS

TARIA MUTAKALE SHILAMA.....1ST DEFENDANT

PHILIP CHUKUYU SHILAMA.....2ND DEFENDANT

JUDGMENT

The plaintiff is seeking to be declared as having acquired title to plot No. **IDAKHO/SHISESO/822** by way of adverse possession. He would like to be declared as the legal owner and be registered as the proprietor. The plaintiff testified that on 11/7/1977 he was approached by the defendants to take a portion of the suit land as they were indebted. He bought a plot measuring 65ft by 109ft. An agreement was prepared between the two parties he gave Ksh 2500/= to the defendants and started cultivating the land. In 1986 he made another payment and another agreement was drawn. He has planted maize, beans, potatoes and vegetables on the land which borders his own land. According to him the land was sold by TARIA, JOHN and PHILIP. The land belonged to the husband of TARIA who is the father of the other sellers by the name SHIRAMA who was deceased. He was told that a succession cause would be filed and he would be given the land. Succession cause No. 44 of 2011 was subsequently filed. He made the last payment on 2/10/1990.

It is the evidence of the plaintiff that currently the farm has cane belonging to the 2nd defendant PHILIP CHUKUYU. Philip went to the land in 2003 after the suit had been filed. The assistant chief was aware that he bought the land.

PW2 THOMAS ALPHONCE IMBOBA testified that on 24/12/1986 he saw TARIA, JOHN and PHILIP who informed him that there were court brokers who wanted to sell their land because they had failed to refund some money to a claimant. They agreed to sell another portion of land to the plaintiff who had already bought another plot out of the suit land. The 2nd portion was 88 ft by 39 ft. It is his evidence that the plaintiff had bought another portion in 1977. He witnessed the 2nd agreement. The plaintiff used the land until 2003 when PHILIP CHUKUYU cultivated the plot. It is the evidence of PW2 that he was the area assistant chief that time and he witnessed the agreement.

PW3 JOSEPH SHIROKO SHIJIKO testified that on 27/12/1986 he prepared a sale agreement between the plaintiff and Philip. He is the one who drafted the agreement in Luhya language. Philip signed the agreement while his brother John used his thumb print the assistant chief was present. The seller's mother was also present. The plaintiff used the land but was later stopped. PW4 JOHN ANIKA SHIRA MUKAGAI testified that he is a brother to PHILIP CHUKUYU. He sold the land to the plaintiff and the plaintiff used it for 10 years. It is his evidence that he witnessed the sale agreement and put his thumb print. They were young at that time and their father had already died. Their mother TARIA was alive. They used the sale proceeds to pay auctioneers who had attached their property. Currently it is Philip who is using the land.

The 2nd defendant PHILIP CHUKUYU SHIRAMALA testified that the plaintiff is his neighbor owning Plot No. 812. TARIA is his mother who is deceased. He is not aware that the plot was sold to the plaintiff. He used to work in Nairobi and denied signing the sale agreement. He asked the plaintiff why he was using the land but the plaintiff had no answers. His position is that if PW3 sold his portion then

the plaintiff should take that portion as the land is supposed to be distributed between himself and PW4-JOHN ANYIKA equally. He is the one using the land. The plaintiff is using a portion of the suit land near the river which is about ¼ acre. He started using that ¼ acre in 1996. He reported the matter to the assistant chief but he was not assisted. Succession was done and finalized.

Parties filed written submissions. Counsel for the plaintiff maintains that the defendant concedes that the plaintiff is using ¼ acre of the land. It is admitted that the plaintiff filed citation No. 122/2000 which led to the filing of the succession cause No. 44/2001. It is further submitted that the plaintiff took possession of the land in 1977 and had occupied it for 26 years when he filed this suit in 2003. On their part, counsels for the 2nd defendant contend that the plaintiff has not used the land for a period of over 12 years. The occupation has not been peaceful and uninterrupted. The evidence only points to a claim of 1 acre but the pleadings are claiming the entire land. The plaintiff should claim the land through the succession cause and not through this claim. When the land was sold it was in the name of a deceased person and therefore the sellers lacked capacity to enter into the contract.

The suit land plot No. **IDAKHO/SHISESO/822** is 2.2 hectares. It was registered on 3/4/1973 in the names of SHILAMA KAKAYI who is the defendant's father. The plaintiff produced a sale agreement showing that he bought a portion of the land. The 1st agreement is dated 11/7/1977 and the purchase price is Ksh 2,500/=. The agreement shows that a deposit of Ksh 1,100/= was paid and the balance was completed on 30/10/1977. The plaintiff was buying a portion of the land which is described as "**A piece of their land downwards upto the road**". The second agreement was done on 27/12/1986. It was also for a portion of the suit land and the consideration is Ksh 11,500/=. A sum of Ksh 11,000/= was paid on that date and the balance was Ksh 500/=. The agreement shows that the defendant herein signed it using a blue pen. The balance of Ksh 500/= was paid on 2/10/1990.

Given evidence on record I do find that the plaintiff bought a portion of the suit land instead of the entire land. It is also established that the plaintiff started using the land since 1977. By the year 2003 when this suit was filed the plaintiff had been in occupation for a period of over 12 years and had therefore acquired title to part of the land. According to PW4 he is not aware that he had been given part of the land after succession had been done. He claims no part of the land. Although the defence maintains that the plaintiff ought to pursue his claim through the succession cause, I do find that the plaintiff was entitled to file this suit. It is the plaintiff who triggered the filing of the succession cause by filing **Citation No. 122/2000**. It is the plaintiff's evidence that he was promised to be given the land upon the finalization of the succession cause. The contention by the defence that the sellers lacked capacity to sell the land cannot stand. From the evidence on record it is proved that at one time the defendant and his family had a debt to settle and the plaintiff came to their rescue. PW4 is a brother to the plaintiff and he confirmed to the court that the land was sold to the plaintiff. The defendant's denial that he did not sign the 1986 sale agreement is an afterthought as witnesses were present when he signed. His own brother confirms to the court that they sold the land with the defendant.

Having found that the plaintiff bought part of the land as opposed to the entire land and since the defendant is not opposed to the plaintiff's taking the portion meant for PW4, I do find that the plaintiff has acquired a title to half of the suit land plot No. **IDAKHO/SHISESO/822** by way of adverse possession. The plaintiff to be registered as a proprietor of ½ of the suit land while the defendant PHILIP CHUKUYU SHILAMA to be registered as the proprietor of the other half. Each party shall meet his own costs.

Dated, signed and Delivered at Kakamega this 3rd day of July 2014.

SAID J. CHITEMBWE

JUDGE