

REPUBLIC OF KENYA

High Court at Kakamega

Civil Case 55 of 2004

ROSE LWAKOSA PLAINTIFF

V E R S U S

KEITH GOGO ASAVA DEFENDANT

J U D G M E N T

In her plaint dated 13.7.2004 the plaintiff is seeking an order of vacant possession and eviction of the defendant from plot numbers **KAKAMEGA/LUMAKANDA/3 & 6** respectively. The plaintiff testified that the above two plots were allocated to her late father **JASON MULINYA SHIRUSA** by the Settlement Fund Trustees. After the death of her father she paid the loan to the Settlement Fund Trustees and produced receipts for those payments. Thereafter she filed Succession Cause Number 103 of 2001 and a grant was issued to her. The grant was confirmed on the 9.6.2003 and the two plots were divided amongst the four sisters who were the beneficiaries of the deceased's estate.

Upon receipt of the confirmed grant the plaintiff testified that she distributed the estate and filed this suit so that the defendant could vacate from the land. She gave notice to the defendant to vacate. Her father used to live at Waitaluk and he was buried there. The family had a property at Waitaluk. The plaintiff's father did not stay on the two plots. She became aware that the defendant was occupying the plots and her late father told her that the defendant had leased the plots. The defendant built a permanent house on the property in 2007. She denied that her father had sold the land to the defendant.

The defendant testified that he bought the two plots from Jason Mulinya in April 1975. The transaction was done before an advocate. The seller told him that the plots had an outstanding loan from the Settlement Fund Trustees totaling KShs.2000/= and he paid that amount. The purchase price was KShs.22,000/= and he paid in three installments. A sum of KShs.10,000/= was paid through the firm of Mbito Wafula & Kapten Advocates. By April 1976 he had fully paid the loan and he was given vacant possession. He produced receipts for the payments as well as the sale agreement dated 14.4.1975. After the seller sold the plots he went to live at Kapkoi in Trans Nzoia District. He died and was buried there. The defendant has been in occupation for 36 years and he had put up his residence there. The seller's daughter by the name Florence resides about ½ a kilometer from the suit land and she has never claimed the land. The plaintiff's husband Mr. Awako used to work with the Settlement Fund Trustees. He was not aware that there was any amount outstanding and did not send the plaintiff to pay the debt. He was not informed about the succession cause and when he became aware he filed his objection. He paid the purchase price to the plaintiff's father and took possession of the land. When the seller died he cited one of the daughters so that she could file a succession cause.

Parties agreed to file written submission but only the plaintiff did so. Mr. Amasakha for the plaintiff submitted that despite having been served with a demand notice the defendant took no action until when the suit was filed. The sale agreement between the defendant and the deceased is null and void as the land was belonging to the Settlement Fund Trustees when the agreement was signed. That means that the land belonged to the Government. Section 41 of the Limitation of Actions Act excludes claims by any person for a title of land owned by the Government. The defendant did not pay the loan and the Settlement Land Trustees were not involved in the transaction. The land now belongs to the plaintiff and her sisters as they succeeded their late father.

The evidence on record shows that the plaintiff filed succession cause number 103 of 2001 and was issued with a grant. She subsequently succeeded the suit land and had it distributed amongst herself and

her sisters. The main issue to be determined is whether the plaintiff is entitled to an order of vacant possession and eviction. It is the defendant's position that he bought the land from the original owner who is the plaintiff's father. He took possession of the land since 1976 and that is where he resides. The plaintiff and her sisters have never resided on the land or utilized it. From the evidence on record it is clear that while the plaintiff was pursuing the succession cause she was aware that the defendant was residing on the suit land. Whereas the plaintiff testified that her late father told her that the defendant was a mere leasee the evidence on record shows that the defendant bought the suit land from the original owner. The sale agreement dated 14.4.1975 shows that the deceased sold his land to the defendant for KShs.22,000/=. A sum of KShs.10,000/= was paid on the 14.4.1975 through the Firm of Mbito Wafula & Kapten. Another sum of KShs.5,000/= was paid on 15.12.1975 through the same firm of advocates and a final balance of KShs.7,000/= was paid through Mr. R. L. Aggrawal Advocate who was based in Eldoret on the 15.3.1976. The defendant testified that when they went to the firm of Ombito Wafula & Kapten in March 1976 they found that the said advocates had moved to Kitale and they went to another lawyer.

Although the land was still registered in the name of the Settlement Fund Trustees when it was being sold by the plaintiff's father I do find that the land belonged to the plaintiff's father and he was competent to sell it. It was not government land as the seller had a lawful claim over it. All what the seller had to do was to pay off the loan and take over title to the land. Before that was done he had the right to utilize the land. I do not agree with the submissions by counsel for the plaintiff that the deceased lacked the capacity to sell the land. All along the plaintiff has been aware that the defendant has been occupying the land since 1976. Her father explained to her that it was a lease arrangement. However, the truth of the matter is that her father sold the land. The defence evidence is that after selling the land the deceased moved out and gave the defendant vacant possession. It is the plaintiff's case that her late father never resided on the two plots. Despite the fact that the plaintiff obtained letters of administration intestate and got herself registered as the proprietor of the two plots together with her two sisters, I do find that the suit land belongs to the defendant. He bought it from the plaintiff's father and has been in occupation since 1976.

In the end, I do find that the plaintiff has not proved her case to warrant an order of vacant possession and eviction. The defendant is hereby ordered to refund to the plaintiff all the monies the plaintiff paid to the Settlement Fund Trustees in settlement of the loan for the two plots. The registration of the plaintiff and her sisters as the proprietors of plot numbers **KAKAMEGA/LUMAKANDA/3 & 6** is hereby nullified. The defendant's counter-claim is granted as prayed and the two plots shall be registered in the names of the defendant. Each party shall meet his/her costs of this suit.

Delivered, dated and signed at Kakamega this 2nd day of May 2013

SAID J. CHITEMBWE
J U D G E