



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CIVIL CASE NO. 8 OF 2011 (O.S.)**

**JOSEPH ATETI KACHI ..... 1<sup>ST</sup> APPLICANT/RESPONDENT**

**CORNEL WAMUKOYA OLALI .... 2<sup>ND</sup> APPLICANT/RESPONDENT**

**VERSUS**

**JOSEPH AMBUNYA SHIRUMBA .....RESPONDENT/APPLICANT**

**RULING**

**Joseph Ateti Kachi** and **Cornel Wamukoya Olali** commenced these proceedings by way of Originating Summons on 7th of February, 2011 against **Joseph Ambunya Shirumba**. They asked the court to order that since they had been in uninterrupted, continuous and peaceful occupation of 3 acres on Parcel **S/Wanga/Buchifi/1296**, for a period of more than 12 years, they be declared to be the owners through adverse possession. They filed their proceedings through Namatsi & Company advocates.

Filed also was a supporting affidavit sworn jointly by the applicants.

In response to this application, the respondent filed a replying affidavit sworn by himself on 21st March 2011. It was deponed in the affidavit *inter alia* that title to the subject land was issued to the respondent on 25th October, 2005. In addition to the replying affidavit, the respondent later filed grounds of opposition dated 13th April, 2011 claiming *inter alia*, that it was premature for the applicants to commence these proceedings for adverse possession.

In July 2011, counsel for the applicants requested in writing that the file be placed before the Judge in Chambers by the Deputy Registrar under **Order 37 rule 16** of the Civil Procedure Rules for directions. It does not appear that the file was placed before the judge for directions as requested.

However, on 19th September, 2011 the respondent filed a Chamber Summons requesting the following orders -

1. That the O.S. be struck out and the suit be dismissed.
2. That the costs of the application and the suit be accorded

to the respondent.

It was contended in the said application that the suit was frivolous, vexatious and an abuse of the process of the court. To this Chamber Summons, the applicants filed grounds of opposition contending that the Chamber Summons, was an abuse of the court process and that the respondent did not have a *locus standi*

to bring the Chamber Summons application.

The above Chamber Summons for striking out the suit is the one that is for my decision today.

The Chamber Summons application was fixed for hearing in the registry on a date which appears to have been 15th May, but changed in hand to 16th May, without anybody signing indicating by whom and when the said change was made. Be that as it may, on the hearing day, Joseph Shirumba the respondent who filed the application appeared alone in court and requested that the application be allowed and the suit struck out. He also asked for costs. Nobody appeared for Joseph Ateti Kachi and Cornel Wamukoya Olali. Joseph Shirumba emphasized that the hearing date was taken by consent.

Having considered the application, I am of the view that it lacks merits. Firstly, the hearing date appears to have been changed in hand without any indication as to whom and when the hearing date was changed from 15th to 16th May, 2013. Secondly, this is a serious land matter, and it is clear to me and on record that the advocate for the applicants M/S Namatsi & Co. had asked the Deputy Registrar in July 2011 to place the file before a Judge for directions. The Deputy Registrar had not done so by the time the present application was filed. In my view also, the present application is premature. In my view, substantive justice would require that directions be given in Originating Summons as required by law. It is during directions that parties may raise and subsequently pursue applications such as the present application. The respondent can as a party ensure that the Deputy Registrar places the file before a judge for directions on the Originating Summons. He does not have to wait for the advocate for the applicants.

In consequence therefore, I find no merits in the application and strike out the same. Costs will be in the cause. I order that the Deputy Registrar do place the file before a Judge at an early date for directions on the Originating Summons as requested by M/S Namatsi & Co. advocates for the applicants.

*Dated and delivered at Kakamega this 24<sup>th</sup> day of October, 2013*

**George Dulu**

**JUDGE**