



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT BUNGOMA**  
**CIVIL SUIT NO.101 OF 2004 (O.S)**

**JAMES KIKECHI.....APPLICANT**

~VRS~

**SEPSITIANO WAFULA.....1<sup>ST</sup> RESPONDENT**  
**DAVID MWECHER CHONGONY.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

The Plaintiff in his originating summons dated 23/8/2004 and filed on 8/9/2004 claims ownership of land reference number ELGON/CHEMOGE/188 through adverse possession. The Defendant was served with summons to enter appearance but failed to defend the suit. The case was then heard by way of formal proof by my sister Hon. Lady Justice W. Karanja before she was transferred out of the station. When I took over the case the Plaintiff closed his evidence. My task was reduced to writing and delivering this judgment.

The Plaintiff testified that in 1968, he bought land reference number ELGON/CHEMOGE/188 measuring 14.8 acres from one Joseph Kutukhulu at a consideration of Ksh.4,200/=. He produced a handwritten agreement for sale of the land executed by both parties and countersigned by witnesses. The Plaintiff took occupation of the land in the same year until 1992 when he was driven out and his home burnt down due to land clashes in Mt. Elgon District. The Plaintiff then moved out to reside in another area. He leased out his land to other people including the 2<sup>nd</sup> Defendant David Mwecher Chongony. In the year 2002, the Plaintiff learnt that the second Defendant was the registered owner of the land the same having been sold to him by the first Defendant Sepsitiano Wafula Kilwake the son of the vendor Joseph Kilwake Kutukhulu.

The Plaintiff sued the Defendants before the Mt. Elgon Land Disputes Tribunal. The case was decided in favour of the Plaintiff. However, the Defendants filed judicial review proceedings whose result was the quashing of the tribunal's award as adopted by Kimilili Court LDT 29 of 2002. The Plaintiff sought legal counsel and therefore instituted this suit.

It is the Plaintiff's case that having occupied and used the land for over twenty years, he acquired title through adverse possession. The Plaintiff explained that the vendor Joseph Kutukhulu fell sick and died before he transferred the land to him.

The evidence of the Plaintiff was fortified by documentary evidence. He produced a sale agreement to show that he bought the land from the deceased in 1968. He stayed in peaceful, quiet and uninterrupted possession of the land for 24 years. He was driven out of the land during clashes in 1992 when his houses were burnt down.

Section 38 of the Limitations of Actions Act is the basis of claims of title based on adverse

possession. The law requires that an adverse possessor be in possession of the land for a period of twelve years. In the case before me the Plaintiff had occupied the land and cultivated the same for 24 years before he was forced out due to tribal clashes. The occupation was no doubt quiet, uninterrupted and continuous since 1968. When the Plaintiff moved out of the land, he leased it to the 2<sup>nd</sup> Defendant. Lease agreements signed by both parties were produced in evidence. After the vendor died in 1977, the Plaintiff continued in possession of the land. The 2<sup>nd</sup> Defendant only came into the scene when he leased the land from the Plaintiff. It is not known how he got registered as the proprietor of the land when he was a lessee. It is hinted in the proceedings before the tribunal that the first Defendant a son to the deceased vendor sold the land to the 2<sup>nd</sup> Defendant. The land was still in the name of the deceased at that time. Except a gazette notice of the deceased, there is no evidence that the first Defendant was appointed an administrator of the deceased's estate. Even assuming that the 1<sup>st</sup> Defendant had gone through the whole succession cause and had the grant confirmed, he could not legally own the land. The reason being that the Plaintiff had already acquired prescriptive rights on the land he had occupied for 24 years before the death of the deceased. The 1<sup>st</sup> Defendant had no capacity to sell the land to a 3<sup>rd</sup> party. For the 2<sup>nd</sup> Defendant to lease the land from the Plaintiff from 1992 onwards was an acknowledgment that the Plaintiff was the legal owner of the land. He was therefore not genuine when he purported to buy the land from another person who had no legal right over the land. Such a transaction is tainted with illegality and cannot be legally enforced.

For the Plaintiff, the time for adverse possession began to run in 1968 and continued till 1977 when the deceased died. The possession went on even beyond the disturbance of the tribal clashes. The Plaintiff was in occupation of the land with the knowledge of the registered owner. He used the land for his own benefit for all that period. The owner did not sue the Plaintiff for eviction. It was indeed the Plaintiff who sued the Defendants before the Land Disputes Tribunal.

The cause of action arose in the year 2002 when the Plaintiff learnt that the Defendant had caused himself to be registered proprietor of the land. The Plaintiff moved to the Land Disputes Tribunal to claim his rights which forum was not possessed of jurisdiction to determine the dispute. The 2<sup>nd</sup> Defendant moved the High Court to quash the decision in favour of the Plaintiff. The claim of the Plaintiff was within time. In the case of **KIRITU VRS KABURA CIVIL APPEAL NO.20 OF 1993** it was held:

***“Time which has began to run under the Act is stopped either when the owner asserts his rights or when his right is admitted by the adverse possessor.”***

In the instant case the owner never asserted his rights and the adverse possessor never admitted the rights of the owner or any other person on the land. Assertion of rights occurs when the owner takes legal proceedings or makes an effective entry into the land. The second Defendant herein entered the land with the consent of the Plaintiff in his capacity as a lessor.

The Plaintiff has satisfied the court that he occupied the land as an adverse possessor for over twelve years. All the actions he did in relation to the use of the land were adverse to the interests of the deceased vendor. The occupation was quiet, continuous and uninterrupted which gives him a right to get the title to the land as a proprietor.

On the other hand, the actions of the first Defendant to sell and the second Defendant to buy the land was fraudulent. The 2<sup>nd</sup> Defendant obtained the title to the land fraudulently. For the time he has held the title, I hereby declare that the second Defendant held the land in trust for the Plaintiff.

I enter judgment in favour of the Plaintiff against the Defendants jointly and severally. The Land Registrar is hereby ordered to rectify the register by deleting the name of the second Defendant and substituting it with that of the Plaintiff.

The Defendants to meet the costs of the suit.

**F. N. MUCHEMI**  
**JUDGE**

Judgment delivered on 13<sup>th</sup> day of July, 2011 in the presence of Mr. Ocharo for the Plaintiff.

**F. N. MUCHEMI**  
**JUDGE**