



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**CIVIL APPEAL NO. 130 OF 2007**

MUSA NDALIRO MUCHELULE ..... APPELLANT  
V E R S U S  
MWANAHAWA ANYONA CHITAYI ..... 1<sup>ST</sup> RESPONDENT  
JOEL NAMBANDE CHITAYI ..... 2<sup>ND</sup> RESPONDENT

**J U D G M E N T**

1. This Appeal raises only one issue; whether the Appellant was entitled to orders that the Respondents should be evicted from land parcel no. **S. Wanga/Lureko/2712**. Those were the orders that he had sought in his Complaint dated 13.10.2005 and in the judgment dated 19.10.2007, the learned Resident Magistrate concluded that the Appellant had failed to prove his claim and made the following orders; ***“I order that the District Surveyor to survey the area on which the defendants have lived and buried their deceased in the portion in dispute (sic). The area should be established with the help of the elders and the Chief of the area as it is well known since the defence family has stayed there for over 20 years (sic). That area should be hived off and the Plaintiff should be free to register the portion remaining while the defendants the portion established. (sic)***  
***The land registrar should recall the title deed acquired by the Plaintiff S. Wanga/Lureko/2712. I wonder how the Plaintiff acquired the title without the Land Control Board Consent (consent not produced) if at all there was any I wonder what made them decide to give the same. (sic)***  
***The Plaintiff’s claims are dismissed, no orders as to costs.***  
***Right of Appeal 30 days.***

**B. O. OCHIENG, R.M”**

2. The above orders were not agreeable to the Appellant hence the present Appeal. I note in that regard that in evidence the case for the Plaintiff (now the Appellant) was as follows;

3. That **PW2, John Amukubu** was the originally registered owner of land parcel no. **S. Wanga/Lureko/1690** and he sub-divided it and sold 7½ acres of it to the Appellant and the portion was registered as title no. **2712** aforesaid and the remaining 5 acres were sold to one Martin Sakwa and his portion was registered as title no. **S. Wanga/Lureko/2711**. That according to the Appellant, the Respondents encroached onto 4½ acres of his land although the 1<sup>st</sup> Appellant’s husband’s land neighbored that purchased by him. He sought the intervention of a surveyor and although a sisal boundary was created between his land and that belonging to the Respondents, the sisal plants were uprooted and later when the Respondents took the dispute before the Mumias Land Disputes Tribunal, their complaint was dismissed and on 30.10.2005, title was issued to him. When he attempted to remove the Respondents from the land, they resisted his actions and he filed the suit before the subordinate court for orders of eviction.

4. The case for the Respondents was that they stay on land parcel no. 176 and according to Mwanahawa Chiteri, she was in occupation of 4 ½ acres of land belonging to her husband, Iddi Chitayi (deceased) and that she moved into the land in 1984. She denied interfering with the boundary between her husband’s land and the Appellant’s land and denied knowledge of any case before the Land Disputes Tribunal at Mumias and specifically case no. **2115/2004**. Like DW2, Joel Chitayi, she stated that her husband, Iddi Chitayi and son, Asmini Baraka were all buried on the disputed land. Joel Chitayi however,

added that title no. 176 was registered in the names of one Benedictor Nakhungu who had since died and that “the court to allow [them] to sue Benedictor Nakhungu in whose name our land was registered after which” they could get title to the land they had occupied since 1984. In cross-examination he stated as follows;

**“My father is Iddi Chitayi. He had S. Wanga/Lureko/172 was my father’s (sic). I know 176 is belonging to Benedictor Nakhungu Ondeché. Nakhungu is not my father..... In this map our land lives on 2712 (sic). It is not registered in our names. I do not know in whose names it is registered. 172 is in my father’s land. Nobody stays on it. My mother farms on it. I know I am supposed to stay therein.”**

5. One Mohamed Tongo Nambande and Nicholas Masikana confirmed that the Respondents have been living on the disputed land since 1984 and wondered why they were sued.

6. I have elsewhere above reproduced part of the judgment dated 19.10.2007 and I have said that the only issue to determine was whether the Appellant was entitled to orders of eviction or not. From the evidence, not once did the Respondents plead adverse possession and although they claimed that they had lived on the land since 1984, I see no jurisdiction on the learned magistrate to purport to argue the Respondent’s case and create a cause of action which was never pleaded at all.

7. Further, parties must be held to their pleadings and in the Statement of Defence dated 16.10.2006 by Joel Chitayi and the one dated 16.10.2006 by Mwanahawa Chitayi, the only claim in the nature of a counter-claim was the statement by Mwanahawa that the dispute be referred to the **“Land Tribunal – Butere-Mumias which has jurisdiction over it.”** The learned magistrate obviously went beyond the pleadings when he ordered sub-division of the land, the recalling of title upon resurvey when the Respondents never sought those orders by way of a counter-claim. Dismissal of the Plaintiff’s suit would have been a sufficient order in the circumstances.

8. Having so said, the evidence of the Appellant was largely unchallenged. The seller of the original parcel of land testified and he confirmed that he sub-divided title no. **1690** and the Appellant’s portion was created. It is illustrative that in Mumias Land Disputes Tribunal, Joel Chitayi among others sought to claim titles nos. **1690** and **1691** but their claim was dismissed and the Tribunal ordered that the two parcels of land should *“remain as they are in the names they have now.”* (sic)

9. Similarly, Mohamed Tongo Nambande who testified against the Appellant in the suit before the subordinate court was the claimant in Mumias Land Disputes Tribunal Case no. **35/2004** and in its decision the Tribunal categorically stated that he had no lawful claim to title no. **1690** and added that title no. *“S.Wanga/Lureko/172.....is...for Mwanahawa Anyona Chitayi”*. His claim with regard to title no. **1690** was then dismissed.

10. What I am saying is that the Tribunal at Mumias had already ruled that the Respondents had and have no lawful claim to title no. **1690** and once it was sub-divided and title no. **2712** was registered in the Appellant’s name, they similarly would have no lawful claim to that parcel of land. Registration of land gives a party certain rights which cannot be defeated except where overriding interests can be proved. In this case, the Respondent’s occupation has not been proved to be such an interest as can defeat the Appellant’s registration – see *Gituanja vs Gituanja KLR (E & L) at page 97.*

11. I should say one more thing: the Respondents completely failed to establish how they came to be on the land since 1984. They claimed that the land was registered in the names of Benedictor Nakhungu Ondeché but that was title no. **176** and not **1690** or **2721**. They were also unable to show what connection they had with Benedictor aforesaid but one fact they established was that title no. 172 belonged to their relative, Iddi Chitayi, and that is where they may have a lawful claim to pursue. As for title no. 1272, they had and have no rights over it at all and the Appellant was entitled to vacate possession.

12. In the end, the Appeal must succeed and I will set aside the decree and consequential orders issued in the subordinate court and will instead grant the prayers in the Plaint dated 13.10.2005 which are as follows;

**“(a) An eviction order and an order directing the surveyor to resurvey the suit land.**

**(b) Costs of this suit.”**

13. The Appellant will also have the costs of this Appeal. Orders accordingly.

**Delivered, dated and signed at Kakamega this 16<sup>th</sup> day of November, 2010**

**ISAAC LENAOLA**

**JUDGE**