



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**CIVIL CASE NO. 68 OF 2008**

ERNEST SAKWA OFISI .....APPLICANT

VERSUS

SELIPHERA A. RAPANDO .....1<sup>ST</sup> RESPONDENT

BELTINA AYIELA AMBALE .....2<sup>ND</sup> RESPONDENT

**JUDGEMENT**

[1] The applicant herein filed this Originating Summons claiming to have acquired adverse possession over Butsotso/Esumeyia/1090 and raises various questions to be answered by the court. The Originating Summons was against the respondents herein.

[2] The respondents herein filed a replying affidavit on 31<sup>st</sup> October 2008 and swore that L.R. Butsotso/1090 was their father's land and was for them and their brother Noah Mutiti and Johana Muluro. They said that they are rightful beneficiaries. They however knew that their late brother had sold 3 acres to the applicant and a boundary was fixed and that he had been cultivating that portion openly. They alleged that the applicant had not finished paying the purchase price and that is why the land was not transferred to him.

[3] When this case came for hearing on 3/3/16 M/s Kulenyi appeared for the firm of Amasakha for the applicant. The second respondent also appeared. The court was told that the 2<sup>nd</sup> respondent never appears in court.

The counsel for the applicant told the court that though the case was for hearing, the 2<sup>nd</sup> respondent was accepting that the applicant can have three (3) acres that he occupies. I asked the second defendant and he confirmed that, that was so. I however did ask the applicant to state his case.

[4] In his evidence the applicant said that he lives at Butsotso/Esumeyia. That he has lived there since 1976. He told the court that he paid Kshs.2450. He said he settled therein 1976. He said he went to Malava Land Control Board and obtained the Land Board's consent on 8/8/1980. He produced a copy of that consent. He said that he has lived there for 49 years.

He told the court that the one who sold the land to him is dead. That the respondents thereafter filed a Succession cause and obtained the title without including him. He told the court that the land is 12 acres and that his three (3) acres are inside. He produced a search of Butsotso/Esumeyia/1090 dated 21/3/12 showing the same is 12.0 acres and in the names of the respondents and their respective shares thereof. He also produced the affidavit Beltina Ayiela Ambale saying that she had no objection to the applicant being awarded three acres dated 1<sup>st</sup> November 2013 duly sworn before Momanyi Birundu Commissioner

of Oaths.

[5] Beltina Ayiela Ambale gave evidence and said that she came from Shamoni sub location and that Butso/Esameya/1090 belonged to them. That it previously belonged to their father. That they got it through a Succession Cause of her late brother who was by then the registered proprietor. She said that the applicant occupies 3 acres and that she had no objection to the applicant getting three(3) acres. She told the court that her sister the first respondent is in her land at home and she knew the case was for hearing on that day. That she has been served several times and she never comes to court. She admitted having written the affidavit dated 14/11/2013 and said that she would like it to be produced in court as defence exhibit No. 1.

[6] Having heard the applicant and also having heard the 2<sup>nd</sup> respondent, and being satisfied that the 1<sup>st</sup> respondent was duly served and was aware the case is for hearing, and having perused all the documents produced herein, I am satisfied that the applicant is entitled to 3 acres out of the suit land.

The applicant shall get a surveyor and have three acres exised from the suit land and those three acres shall be curved out from the site he now occupies. The respondents shall sign all the necessary transfer documents in favour of the applicant failing which the Executive Officer of this court shall do so on their behalf.

Since the respondents have conceded the 3 acres in their joint affidavit aforesaid and since the 2<sup>nd</sup> respondent has admitted the claim in court, each party shall bear their own costs.

It is so ordered.

**Dated at Bungoma this 11<sup>th</sup> day of May 2016**

**S.MUKUNYA - JUDGE**

**Judgement read in open court in presence of**

C.A Nyongesa,

Rauto for Amasakha for the applicant

Respondent absent

**S.MUKUNYA - JUDGE**

11/5/2016