



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KAKAMEGA**

**CIVIL CASE NO: 150 OF 1994**

**SHADRACK OBADI OMBIMA.....PLAINTIFF**

**VERSUS**

**1. THOMAS MUSOTSI  
2. JAPHETH BULUKU.....DEFENDANTS**

**R U L I N G**

The plaintiff filed the application dated 14/10/2013 seeking to have the defendants punished for being in contempt of court order made on 5/3/2012. The application is supported by the plaintiff's affidavit sworn on 14/10/2013. The defendants responded to that application by a replying affidavit sworn by the 2<sup>nd</sup> defendant on 14/2/2014.

The defendants on their part filed their application dated 13/11/2013 seeking to set aside the ex-parte judgment herein and be allowed to defend the suit. The application is supported by the affidavit of the 2<sup>nd</sup> defendant. The plaintiff filed a replying affidavit sworn on 17/1/2014.

The essence of the plaintiff's application is that the court granted this application sought to have the defendants vacate the suit land namely plot number **NYANGORI/216** and **217** respectively. The court granted the orders but the defendants went on to cultivate the land. The defendants deny that they were served with the court order.

With regard to the defendant's application, it is contended that the defendant's former advocate left the country and did not inform them about the case. They would like to be allowed to defend the suit. The defendants aver that they reside on the suit land and they have erected their houses.

The record herein shows that the main case was heard way back between 1999 and 2001. It is also indicated that two witnesses testified for the plaintiff and were subjected to cross examination. The case was fixed for further hearing several times but the defendants and their advocate did not turn up. The court made its judgment on 23/3/2001 granting the plaintiff's claim for adverse possession for the two properties. The defendants maintain that they were not notified about the hearing or the matter and had filed defence to the claim.

The pleadings show that the parties herein are related. Plot number **KAKAMEGA/GIMARAKWA/216** measuring 2.0 Hectares is registered in the joint names of the plaintiff and the 1<sup>st</sup> defendant, **THOMAS MUSOTSI**. Plot **217** seems to be owned by the 2<sup>nd</sup> defendant. The plaintiff's claim is based on adverse possession. The pleadings show that the defendants were denying that claim. It is also clear to me that even since the judgment was made the same has not been effected. The plaintiff's application dated 1/7/2011 sought to have the defendants vacate the land. The Deputy Registrar signed the transfer forms in favour of the plaintiff.

From the pleadings herein, it is clear that this is a land dispute within the family. Although the judgment was made in 2001, I do find that affecting the Judgment without hearing the defendant's case might lead to injustice. The defendant's response to the originating summons raises triable issues. It has to be proved that a joint registered owner can claim adverse possession against his co- owner. The defendants reside on the suit land and if they are to be ejected from the land, it would be tantamount to being condemned unheard.

Although the plaintiff is entitled to the fruits of his judgment, the same should be seen to be fair to both parties I do believe the defendant's contention that their previous advocate did not notify them about the progress of the matter. In the end, I do allow the defendant's application dated 29/11/2013. The ex-parte judgment is hereby set aside and the defendants are hereby allowed to defend this suit. The effect of this order is that the plaintiff's application for contempt of court order is disallowed. The orders granted on 5/3/2012 is hereby set aside. The matter to be listed before the Land and Environment court for hearing and further directions. Costs shall follow the outcome of the main suit.

Dated, delivered and signed at Kakamega this 8<sup>th</sup> day of October 2014

**SAID J. CHITEMBWE**

**JUDGE**