

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL CASE NO. 122 OF 2010

WAMBUI MATHENGE.....1ST PLAINTIFF
DANIEL GICHUKI MATHENGE.....2ND PLAINTIFF
NANCY WANGARI MATHENGE.....3RD PLAINTIFF
PURITY MUTHONI MWANGI.....4TH PLAINTIFF

VERSUS

RACHAEL KARUNGARI KINGORI.....DEFENDANT

RULING

This ruling is the outcome of the Summons dated 17th May 2011 in which Wambui Mathenge and three others pray for a prohibitory order to be registered against **L.R. NO. THEGENGE/KARIA/38**. The summons is supported by the affidavit of Nancy Wangari Mathenge the 3rd Plaintiff herein. Rachael Karungari Kingori, the Defendant herein, opposed the Summons by filing her replying affidavit.

It is the submission of the Plaintiffs that the registered owner of **L.R. NO. THEGENGE/KARIA/38** intends to sell the land in dispute before this suit is heard and determined. The Defendant urged this Court to reject the Motion because the same lacks in merit. She stated that the Summons is an application unknown in law having been outlawed by the new rules.

I have considered the material placed before this Court plus the oral submissions presented by learned counsels. In the substantive suit, the Plaintiffs herein are seeking to be declared to have acquired the suit land by adverse possession vide the Originating Summons dated 20th September 2010. The suit is yet to be heard and the Plaintiffs are now praying for the title to the land to be preserved pending the hearing and the determination of the case. The Plaintiffs have specifically deponed that the Defendant intends to sell the land. The Defendant has not deemed it fit to controvert the aforesaid allegations. The main ground raised by the Defendant against the Summons is that of want of form. It is argued that the application should have been by way of Motion as opposed to that of Summons. To be fair to the Defendant, the ground appears to be valid. The new rules outlawed the use of Chamber summons in applications. Basically the Defendant has urged this Court to dismiss the summons for want of form. I do not think I should do so. If I do so I will be going against the overriding principle under *Section 1A* of the Civil Procedure Act. Disputes should be determined on its merits and not on the basis of technicalities which do not go to the root of the case.

In the end I am convinced the Summons has merit. It is allowed with costs abiding the outcome of the suit.

Dated and delivered at Nyeri this 21st day of October 2011.

J. K. SERGON
JUDGE

In open court in the presence of Mrs. Mung'athia holding brief Nyaanga for the Plaintiff. No appearance Mindo for Defendant.