



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT KERICHO**

**CIVIL CASE NO. 39 OF 2009**

**AVTAR SINGH BACHU.....1<sup>ST</sup> PLAINTIFF**  
**JAGJEET VIRDEE .....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**HENRY TAITA TUM .....DEFENDANT**

**RULING**

This is a Ruling in respect of the Notice of Motion dated 19<sup>th</sup> May, 2010 filed by the two Plaintiffs seeking summary judgment in this suit. The Plaintiffs seek in the suit an order for eviction of the Defendant from the land known as **KERICHO/RORET/646** (“the suit land”) and an order for permanent injunction to restrain the Defendant, his servants or agents from occupying the suit land which the Plaintiffs claim is registered in their names.

The copy of the green card attached as exhibit No. “ASBA” to the affidavit of **AVTAR SINGH BACHU** in support of the application shows that the land is registered in the names of the two Plaintiffs.

The Defendant filed defence to the suit as well as a counter-claim. In the defence, the Defendant contends that the Plaintiffs are statutorily barred under the **Limitation of Actions Act** from bringing the suit as more than 12 years have elapsed since the cause of action accrued to them. The relevant section is **Section 7** and not **section 37** referred to. Further, the Defendant contends that he has acquired the suit land by adverse possession by reason of his occupation of it for more than 12 years (**Section 38** of the **Limitation of Actions Act**).

There is no doubt that the land is registered in the names of the Plaintiffs as the proprietors. In their affidavit in support of the application, the Plaintiffs contend that the Defendant has no defence, hence their prayer for summary judgment. In his grounds of opposition to the application, the Defendant contends that res judicata relied on by the Plaintiffs in the application to show that the Defendant has no defence was not pleaded in the Plaint. In paragraph 7 of their supporting affidavit, the Plaintiffs state that the Defendant had instituted by way of Originating Summons in Kericho High Court, suit No. 49 of 2009 against the Plaintiffs in which he had claimed that he had acquired the suit land by virtue of adverse possession but that the suit had been dismissed on 24<sup>th</sup> February, 2010 with costs. The Plaintiffs now

contend that the counter-claim in which the Defendant seeks an order that he has acquired that land by adverse possession has no merit or basis and the defence is a sham. But in the defence to the counter-claim and in the reply to defence, the Plaintiffs kept mum about res judicata. Can they introduce it in the application to reinforce their claim for summary judgment without having pleaded it? Why did they not include it in their defence to the counter-claim?

It is said that res judicata can be waived and that if a party does not raise the plea of res judicata it will be deemed to be a matter directly and substantially in issue and decided against him. It is not open to me to decide the issue of res judicata in this application in absence of a plea of res judicata in the suit. But the pleadings can be amended. The issue of when time for the purpose of adverse possession claimed by the Defendant started to run was not pleaded nor did the Plaintiffs show in their defence to counter-claim when they became registered as proprietors so as to put paid the Defendant's claim that twelve years of his adverse occupation of the suit land had elapsed from the time when the Plaintiffs got registered. Yet it is clear from the annexures in the application that the claim by the Defendant may not hold good and may eventually be dismissed.

By not pleading res judicata as a defence to the counter-claim, and by not pleading as to when they became registered as proprietors of the suit land, the Plaintiffs have left open for determination at the trial the issue of adverse possession. The issue of res judicata has been introduced in the application, yet all along the Plaintiffs were in a position to plead it but did not. It is my view that where, as here, res judicata is not pleaded either in the Plaint or in the defence to counter-claim or in the reply to defence, the Plaintiffs can not rely on it for the purpose of obtaining summary judgment. To have regard to it when it only surfaces as a new issue in the application for summary judgment is to seek to determine the suit prematurely. I decline to do so. I dismiss the application on this account.

**DATED at KERICHO** this 17<sup>th</sup> day of November, 2010

**G.B.M. KARIUKI, sc**

**RESIDENT JUDGE**

**Advocates**

Mr. W.R. Kiprono advocate for the Applicant.

Mr. Migiro advocate for the Respondent

Court Clerk – Mr. Koech