



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 108 of 2004

1. Land and Environmental Law Division
2. Civil Practice & Procedure
3. Main suit – adverse possession
4. Preliminary Objection – Suit Res Judicata

No legal representative substituted for the 1st Defendant

5. In reply – matters raised are of facts.

6. Held

i) Preliminary Objection dismissed.

The Preliminary Objection of 28.10.2004 on Respondent Judicator ought to have been brought by way of an application.

ii) The issue of 1st defendant being deceased no longer exists as suit against 1st defendant has been withdrawn..

7. Case Law - Nil

8. Advocates

C. Goi instructed by Gichuki Kingara & Co. Advocates for the plaintiff

P. Nganga instructed Kamau Kuria & Co. Advocates for the defendant

ANDREW MUNYINYI1ST PLAINTIFF

EDWARD NJENGA.....2ND PLAINTIFF

ALLAN MBUGUA.....3RD PLAINTIFF

VERSUS

KINUTHIA MUNYINYI IGOGO.....1ST DEFENDANT

KIBERI MUNYINYI IGOGO.....2ND DEFENDANT

RULING

On Preliminary Objection

I. Background of Preliminary Objection.

1. On 9 February 2004 the three plaintiffs filed suit for adverse possession for land parcel Kiambaa Ruaka/221 originally registered in the name of Munyinyi Igo in the alternative, this titles be held in their favour are so held in the amount of 2 acres only.
2. On being served the advocate for the defendant entered appearance on 17 June 2004. A preliminary objection notice was filed on 4 November 2004. The main objection being that the 1st defendant herein is deceased. No legal representative has since been substituted to come on the file.
3. The Plaintiff/applicant at once filed a notice of withdrawal of suit against the 1st defendant (who is now deceased).
4. The defendant filed a chamber summons that was struck out by this court. This application having been filed on direction by Ransley J. (6 April 2005) were taken that the matter proceeds to trial parties appeared to have taken dates four times but did not proceed to hearing.
5. On the day the matter was fixed for hearing; the advocate for the defendant raised preliminary objection based on the same objection that the 1st defendant was in fact now deceased. The limb of res judicator was thus taken up and prayed the main suit be dismissed.

II. Findings

6. The respondent/plaintiff objected to the application on grounds that issue of facts had been raised and not of law. I nonetheless note that the defendant has not field an affidavit in reply to the Originating summons. If one has been filed it is not on the courts record and it is therefore difficult to know whether these are the same claim raised in the replying affidavit.
7. I hereby rule that the issue before me as per the preliminary notice of objection of 28 October 2004 was on two issues – Res judicata and substitution of deceased person. The latter has been overtaken by the event the former ought to have been specified in an application and detailed facts deponed therein. Any proposed application has since been withdrawn and or struck out by the court. The preliminary objection 28 October 2004 is hereby overruled with costs to the Plaintiff parties to proceed to the main suit.

Dated this 22nd day of May, 2007 at Nairobi.

M.A. Ang'awa

JUDGE

C. Goi for Gichuki Kingara & Co. Advocates for the plaintiff

R. Nganga for Kamau Kuria & Co. Advocates for the defendant