



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

Civil Case 1120 of 2006

1. Land & Environmental Law Division
2. Subject of main suit: Adverse Possession
3. Civil Practice and Procedure
 - i) Preliminary Objection
 - ii) Application of 10 May 2007 is Res judicata.
4. Back ground
 - i) Original Summons filed against defendant of
27 October 2006
 - ii) Injunction application 27 October 2006
 - iii) Defendant served. Does not attend or file papers
 - iv) Injunction granted Aluoch J (14 November 2006)
 - v) Defendant files review applicant 15 December 2006.
 - vi) Application dismissed Aluoch 20 December 2006
 - vii) New application 10 May 2007 – discharge injunction
5. Res judicata Application of 10 May 2007
6. In reply: Not res judicata – former application was for review
7. Held: Preliminary Objection up held.

Application of 10 May 2007 to plaintiff jurisdiction
8. Case law - Nil

9. Advocates:

1. J.K. Nyaga for Z.N. Gathaara & Co. Advocates for the plaintiff
2. E.K. Gitonga for Kibunja & Co. Advocates for the defendant

IRENE WAMBUI MUCHAI PLAINTIFF/RESPONDENT

VERSUS

SAMUEL MBURU MUNGEMWE DEFENDANT/APPLICANT

RULING

1: Background

1. The subject of the main suit concerns land. It is a claim by Irene Wambui Muchai for adverse Possession for title No.1 LOC/Kinyona/2077.
2. The suit was filed on 27 October 2006 together with a certificate of urgency to restrain the defendant, one Samuel Mburu Mungeme from interfering with her rightful possession of land.
3. On the day called out for the hearing inter parties of the application before Aluoch J (on 14 November 06) the defendant being duly served was absent. The inter-parties hearing continued in the defendants absence. Injunction orders were issued.
4. The defendant filed an application for a review dated 15 December 06 seeking courts orders to review and set aside the injunction orders. The Hon. Judge Aluoch J declined and dismissed the review application as being irregularly filed.
5. The defendant changed lawyers and filed yet another application this time being order XXXVI r2 (2) (3) (4) Civil Procedure Rules seeking to discharge the injunction orders.
6. A preliminary objection was raised to state that the said application was res judicata having been heard and dismissed by
Aluoch J.
7. Aluoch J has left the civil division and transferred to the Family Division. This file involving land was placed before the new Land and Environmental Law Division.
8. Is the application of 10 May 2007 res judicata.

II Res Judicata

9. Res judicata a Latin word that means “ a thing decided.” “It is a common law doctrine meaning to bar relitigation of cases between the same parties.”
10. The advocate for plaintiff states that the application to discharge the injunction had already been caused by the defendant and thus it should not be relitigated again.
11. The defendant in reply stated the former application was for a review and thus not the same as this current one.

III: Finding

12. This matter is res judicata. The defendant was told as much that he could not come to court by way of review. He now comes seeking to discharge the court's orders under order XXXIX r 4 Civil Procedure Rules. This too is not available to him simply due to the procedural law not followed by the defendant.

13. It is essential to note that the advocate requires to read the file and note ruling the original orders were given in the first place.

14. The application before court is not a "claim preclusion." But "issue preclusion". A claim preclusion "forecasts on having a suit from being brought again or a legal cause of action that has already been finally decided between the parties".

"An issue preclusion has the relitigation of factual issues that have already been necessary determined . . . as part of an earlier claim".

15. The application for injunction dealt with a specific issue granted. It is to the said original order that the defendant requires to "move" the court as informed by Aluoch J.

IV Conclusion

16. As to this Preliminary Objection, I hereby uphold the same. The application of 10 May 2007 be and is hereby dismissed with costs to the plaintiff/respondents.

Dated this 19th day of June 2007 at Nairobi

M.A. ANG'AWA

JUDGE

J.K. Nyaga for Z.N. Gathaara & Co. Advocates for the plaintiff

E.K. Gitonga for Kibunja & Co. Advocates for the defendant