



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

**Civil Case 1301 of 2004**

1. Land and Environmental Law Division

2. Subject of main suit: Land ownership

Trespass

Mandatory injunction

3. Civil Practices and Procedure: Application chamber summons 10 May.05 by defendant to strike out plaintiff's suit on grounds of being res judicata.

4. Background

i) Defendant/applicant filed Hccc1182/79 for Adverse Possession against Stanley Gatei Nganga (filed April 1979).

ii) The suit referred to arbitration

iii) Award confirmed judgment of court

iv) Plaintiff/respondent in Hccc1182/79 files appeal to court of appeal on behalf of the estate of original defendant (now deceased)

v) Court of appeal dismiss appeal Chesoni, CJ, Gicheru JA – A.B. Shah decents.

a) Issue extension of time when elders award would be made.

b) Held in court of appeal and in High court parties conceded to continue with suit despite there being no extension of time.

c) Arbitration finding upheld defendant/applicant (original plaintiff to get 3.6 acres)

d) Plaintiff/respondent files Hccc1301/04 referring to succession cause 1775/93 apportioned 0.923 not 3.6 acres

5. Held

Suit Res judicata

6. Case law - nil

7. Advocate

P.M. Kahuthu for Kahuthia & Co. advocate for the plaintiff

G.M. Muhoro for Muhoro & Co. Advocates for the defendant

**JUDITH WAMBUI GATEI .....PLAINTIFF**

**VERSUS**

**NGUGI MUIRURI .....DEFENDANT**

**RULING**

1: Background of application 10 May 2005 by defendant seeking to strike out the plaintiff suit on grounds that it is res judicata.

1. The plaintiff 1 and 2 herein are mother and son. The 1<sup>st</sup> plaintiff Judith Wambui Gatei is the administrator of the estate of Stanley Gatei Ngangira who held 9.537 acres of land known as LR No Githunguri/Ikinu/76.

2. She and her son filed this suit stating that in the succession cause 1775/93, the defendant Ngugi Muiruri was entitled only to 0.923 acres of land but has instead claimed 3.6 acres of land. The two plaintiffs prayed that there be a mandatory injunction to evict the defendant as a trespasser from the said land.

3. The defendant filed defence stating that this suit was res-judicata and as such the whole suit be struck out. That this suit was finalized through Hccc1187/79 being Ngugi Muiruri (the defendant herein) v Stanley Getei Nganga (the plaintiff, original defendant in Hccc1182/79 and now deceased).

4. I did request the files in question be brought up. I did not have sight of the succession case 1775/93 from the Family Division but I do note that it was a much later case that was filed.

5. It appears that Ngugi Muiruri had entered into a sale agreement to purchase 3.6 acres of land from Stanley Getei Nganga. (Now deceased) The issue of the sale agreement is not in question but what Ngugi Muiruru did on 18 April 1979 was to file a claim under adverse possession. This dispute was referred to a panel of six elders. It is quite clear that the issue of extension of time of when the award was to be filed arose. This was most certainly out of time and therefore a nullity. The High court held otherwise. There was an attempt to review the orders of the High court and when this was declined an appeal to the court of appeal was made.

6. In a detailed judgment by Chesoni CJ whom in his finding of 13 November 1998 gave a detailed background of the orders made by several judges of the High Court and concluded that the appeal be dismissed. This was supported by Gicheru JA. Shah JA dissented to the decision holding that the award by the elders be set aside on grounds that the extension of time granted to the elders to file their award was not adhered to.

7. This court of appeal decision brought an end to this matter. The succession cause on the other hand is alleged to have been decided in 1993.

8. The plaintiff 1 and 2 now wish to evict the defendant from the suit land on basis of the succession

cause but do not make mention in their plaint of the court of appeal decision.

9. The defendant /applicant prays that this suit be struck out as being res judicata.

## II: Application 10 May 2003

11. This matter was litigated in Hccc 1182/79. It has been concluded and finalized by the decision of the court of appeal. Despite, this the defendant sought a review of the High Court judges orders despite the court of appeal having dealt with this matter in 1999 in Hcccc 1182/79.

12. The High Court is bound by the decision of the Court of Appeal. It cannot overturn such decision made.

13. The plaintiffs herein have most certainly filed this suit when the same matter in issues has been litigated on. They seek to follow the letter of the law and had consistently dwelt on technicalities. This was overruled and they cannot be seen to resurrect this matter again.

14. I do not agree that the issues herein is different nor that the parties are different.

## II Conclusion

15. This suit is res judicata. I hereby struck it out with costs to the defendant/applicant. The succession cause 1779/93 to be adopted to reflect the finding of Hccc 1182/79.

Dated this 18<sup>th</sup> day of June 2007 at Nairobi.

**M.A. ANG'AWA**

### **JUDGE**

P.M. Kahuthu for Kahuthu & Co. Advocates for the plaintiff

G.M. Muhoro for Muhoro & Co. Advocates for the defendant