



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Case 462 of 2005**

Land and Environmental Law Division

1. Subject of main suit – Adverse Possession
2. Preliminary objection: Suit is Res judicata

Section 7 Civil Procedure Act

Court calls up all files

- i. Cr case Thika CM's court 5804/95
- ii. Hccc849/01 Nairobi
- iii. Hccc479/05 Nairobi
- iv. Hccc 3209//91 Nairobi
- v. Succession cause 2807/98 Nairobi
- vi. Succession Cause 983/95 Nairobi
- vii. Hccc 462/05 chamber summons Nairobi

3. Held:

Suit Res judicata

4. Case law - Nil

5. Advocates:

G. Kamonde for G. Kamonde & Co. Advocates for the plaintiff

Kamau for Kamau & Co. Advocates for the defendant

SERAH WANJIKU MUTU.....1<sup>ST</sup> PLAINTIFF

SAMUEL KIMANI .....2<sup>ND</sup> PLAINTIFF

ABRAHIM MWANGI MUTU .....3<sup>RD</sup> PLAINTIFF

VERSUS

PHILOMENA NJAMBI MUTU ..... DEFENDANT

RULING

**PRELIMINARY OBJECTION**

**1) BACKGROUND**

1. The estate of Gathina Kungu concerns land Ndarugu/Gacharage/490. A dispute arose during his life time over the parcel of land amongst his heirs. He died without solving this problem. The land was purportedly and fraudulently transferred. Two persons George Mutu and James Mangare Maugo were charged before the Thika Magistrates Criminal courts in case No.5804/1995. They were acquitted of being involved in fraudulent acts concerning the land title.

2. Several parties began to file suits in court. It is not denied that cases had been heard in the DO's office, the High Court and or Magistrates Courts (on the criminal case). It thus transpired that the following cases were filed (in no particular order):-

I) Nairobi Hccc 3209/91 – to restrain the defendants from claiming land. It was never finalized

ii) Nairobi Hccc849/01 - plaintiff seeking Adverse Possession

Suit never heard or set down for hearing

iii) Succession Cause - Hccc2807/98

For amendment of grant

iv) Hccc 4791/05 OS - Adverse possession

v) Succession case 983/95

Grant of Probate of administration intestate finalized

Confirmation of grant given

iv) Criminal case 5804/95

Two accused acquitted of fraudulent acts.

3. From the records of these files the Succession Cause 983/95 had in effect finalised most of the disputes them and distributed the estate of Gathui Kungu. Nothing is therefore left.

Is the suit Res Judicata?

4. This suit must be one that the issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties under whom they or any

of them claim litigating under the same title in a court competent to try such subsequent suit or the suit in which such issues has been subsequently raised, and has heard and finally decided by such court.

5. This case has been finalised in the P & A Succession Cause 983/95. There is nothing left.

6. I up hold the Preliminary Objection and accordingly dismiss this suit

Dated this 6<sup>th</sup> day of June 2007 at Nairobi.

**M.A. ANG'AWA**

**JUDGE**

G. Kamonde for G. Kamonde & Co. Advocates for the plaintiff

Kamau for Kamau & Co. Advocates for the defendant