



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

**Civil Suit 1588 of 2002**

**MUTHOTHO NGORU & OTHERS.....PLAINTIFFS**

**VERSUS**

**NJOROGE NGORU & ANOTHER.....DEFENDANTS**

**RULING**

The respondents filed this suit by way of Originating Summons for orders that they have become entitled to the suit premises LR NO DAGORETTI/MUTUINI/229 by adverse possession. The Originating Summons was supported by an affidavit sworn by MUTHOTHO NGORU who avers that he has been in possession of the suit premises together with the other applicants who are his grandchildren for over 30 years and therefore they are entitled to the suit land by adverse possession.

The respondents upon being served with the Originating

Summons filed this application by way of Chamber Summons dated 26<sup>th</sup> January 2004 and filed on 30<sup>th</sup> January 2004 seeking orders that the Originating Summons be struck out for being frivolous, vexatious and otherwise an abuse of the court process.

The application is based on the ground that the High Court vide suit No.2143 of 1987 on the 28<sup>th</sup> January 1994 made a declaration that the suit property (LR NO. DAGORETTI/MUTUINI/229) herein belonged to the late NGORU MUTHOTHO, that the Originating Summons taken out is bad in law due to the fact that it is based on an issue that has already been decided by a court of competent jurisdiction and that the orders sought for adverse possession cannot be and are not available to the applicants.

Mr. Thange for the applicants submitted that the Originating Summons should be struck for being resjudicata in that the 1<sup>st</sup> Applicant and 1<sup>st</sup> and 2<sup>nd</sup> Respondents are brothers while the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Applicants are grandchildren of the 1<sup>st</sup> Applicant. The suit properly LR NO. DAGORETTI/MUTUINI/229 was owned by the father of 1<sup>st</sup> Applicant and the 2<sup>nd</sup> Respondents who are brothers. The previous suit HCCC NO. 2143 OF 1987 had been taken out by the Respondents against one NGORU MUTHOTHO who was a son of the 1<sup>st</sup> Applicant in this Originating summons.

He was the father of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Applicants. That suit which was on the same subject matter LR NO.DAGORETTI/MUTUINI/229 was determined by Mwera J on 28<sup>th</sup> January 1994.

The issue of ownership which is the subject matter of this Originating Summons was the same issue in the HCCC NO. 2143 OF 1987 in which Mwera J made a finding on the issue of ownership. That judgment has not been reversed. The dispute was between the same parties and the applicants are entitled to the plea of resjudicata under Section 7 of the Civil Procedure Act.

The application is opposed by Mr. Gachoka counsel for the respondents on the grounds – first that the affidavit in support of the application offends the mandatory provisions of Order XVIII Rules in that the same was sworn by the two applicants jointly with due respect to counsel I do not see anything wrong with this since the two are deponing on the same and similar facts.

Further Mr. Gachoka submitted that the matter is not resjudicata on the grounds that the present applicants were not parties in HCCC NO.2143 OF 1987 that the applicants' claim in this Originating Summons is based on adverse possession which ground was not canvassed in the previous suit HCCC NO.2143 OF 1987. In that earlier suit the plea of adverse possession was not the issue. The issue here is whether or not the applicant has been in possession of the suit land for the statutory period of 12 years. The earlier suit HCCC NO. 2143 OF 1987 was filed in 1987. Filing of a suit for recovery of land would stop time from running for the purposes of Section 38 of the Limitation of Actions Act under which a person may claim to have become entitled to land by adverse possession. Time which starts to run under the Act is stopped either when the owner asserts his right or when his right is admitted by the adverse possessors. Each case depends on its own facts and circumstances. If by the time the owner asserts his right the adverse possessor has acquired title then there is nothing to pass on to the owner since the entitlement to the suit land is by the operation of the law.

The plea of resjudicata cannot apply in this Originating Summons since the filing of the suit would only stop time from running and would also depend on how much time had run before the filing of the suit to stop the same from running.

For the above stated reasons the applicants' application to strike out the Originating Summons herein is dismissed. Costs in the cause.

Dated and delivered at Nairobi this 15<sup>th</sup> day of March 2006.

**J.L.A. OSIEMO**

JUDGE