



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 2233 of 1999**

**GATI KAGO.....PLAINTIFF**

**VERSUS**

**STEPHEN NJOROGE KIGOCHI.....DEFENDANT**

**RULING**

The plaintiff brought this claim by way of an Originating Summons under Sections 17, 18 and 38 of the Limitation of Actions Act and Order XXXIV Rule 3 of the Civil Procedure Rules seeking orders of declaration that the plaintiff has become entitled by adverse possession to 0.5 acres out of land parcels Nos. GATAMAIYU/KAMUCHEGE/1233 and GATAMAIYU/KAMUCHEGE/1234 and a further order that the defendant as the person who presently has title to the suit lands do execute transfer of the said 0.5 acres to the plaintiff.

The defendant on being served with summons filed a Preliminary Objection to the plaintiff's suit on the ground that the plaintiff's suit is an abuse of the process of the court having been brought after KIAMBU CMCC NO.134 OF 1994 between the same parties litigating over the same subject matter was heard and determined. This suit is therefore resjudicata and wrong in law.

Mr. Mbigi for the defendant submitted that the dispute on the same subject matter and by the same parties was heard and determined in Kiambu SPMCC NO. 134 OF 1994. The dispute was of trespass over the suit land and the parties recorded a consent order before the Kiambu District Land Registrar and the same order was adopted by the court and has been executed. Eviction order was issued on 29<sup>th</sup> August 1997 and the plaintiff had been evicted.

The Preliminary Objection was opposed by Miss Manegeni counsel for the plaintiff who submitted that the suit is not res judicata as the dispute in the Kiambu Court though over the same subject matter was over a boundary dispute between the parties. The dispute in the instant suit is over a claim for adverse possession and therefore the claim is not res judicata.

Section 7 of the Civil Procedure Act provides that no court shall try any suit or 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 or between 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 issue has been subsequently raised, and has been heard and finally decided by such court. An any matter which might arise ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

In the Kiambu case the defendant in the instant suit was the plaintiff and the plaintiff was the defendant. The dispute was over trespass on land. The Land Registrar at the request of the court visited the disputed land and identified the proper boundary. The parties concurred with him and they recorded a Consent Order before the Land Registrar and the said Consent Order was adopted by the court.

I am in agreement with the submissions of counsel for the defendant that the issues in dispute having been resolved by way of the Consent Order recorded before the Kiambu Court in SPM CC NO.134 OF

1994 and that Consent Order having been executed and the plaintiff having been evicted from the suit land, this suit is res judicata and it is for striking out and it is so ordered.

The defendant is entitled to the costs of this application as well as the entire suit.

It is so ordered.

Dated and delivered at Nairobi this 30<sup>th</sup> day of November 2006.

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**J.L.A. OSIEMO**

**JUDGE**