



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Civil Suit 153 of 2003[OS]**

**IN THE MATTER OF S.38 OF THE LIMITATIONS OF ACTIONS ACT, CAP 22
OF THE LAW OF KENYA AND/OR IN THE MATTER OF A DECLARATION
OF TRUST.**

BETWEEN

DAVID TOROITICH.....1ST PLAINTIFF

**CHELELGO CHERUTICH.....2ND
PLAINTIFF**

**SAMSON SONGOL.....3RD
PLAINTIFF**

**FRANCIS NGUKWO.....4TH
PLAINTIFF**

**JACKSON RONO.....5TH
PLAINTIFF**

**TOLO CHEBOLE.....6TH
PLAINTIFF**

VERSUS

**COUNTY COUNCIL OF KOIBATEK.....1ST
DEFENDANT BOARD OF TRUSTEES, LIVESTOCK**

**IMPROVEMENT CENTRE, MOGOTIO.....2ND
DEFENDANT**

RULING

The first defendant applied by way of a chamber summons dated 5th August, 2004 for striking out of the originating summons filed by the Plaintiffs and dated 22nd September, 2003. The application was brought under the provisions of order *VI Rules 13 (1) (a) of the Civil Procedure Rules* and was made on grounds as shown on the face thereof. The plaintiffs' advocates were duly served with the said application and a hearing notice which clearly showed that the same was listed for hearing on 14th July, 2005. They even acknowledged receipt of the said notice by stamping and initialing the original thereof but they did not attend Court. The first defendant's application was therefore unopposed. The respondents' advocates had

filed grounds of opposition to the said application but the same were not argued.

I have carefully perused the originating summons and I am satisfied that it does not disclose any cause of action against the first defendant. The Plaintiff's cause of action, if any, seems to be as against the second defendant only. There is no complaint made as against the first defendant at all.

The originating summons as filed does not comply with the mandatory requirements of order XXXVI rule 3D (2) which states that;-

“The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.”

This is a mandatory requirement – see **KWEYU V OMUTO [1990] KLR 709**. The land in question is Trust land and *Section 115 (1) of the constitution vests all Trust land in the respective county councils within whose area of jurisdiction the land is situated.*

The County Council holds the land – for the benefit of the persons ordinarily resident on the same. In the circumstances, the plaintiffs' claim based on adverse possession cannot be sustained. As per *section 117 of the constitution*, only an Act of Parliament can empower a county council to set apart an area of Trust land vested in that County Council for use and occupation.

The plaintiffs cannot therefore claim that they are entitled to be registered as the owners of the (11) Acre piece of land which they have been occupying since 1970 by way of adverse possession.

The plaintiffs' suit is unsustainable and I dismiss the originating summons with costs to the first defendant.

DATED, SIGNED and DELIVERED at Nakuru this 26th day of

August, 2005

D. MUSINGA

JUDGE