REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HIGH COURT CIVIL CASE NO. 5310 OF 1993(O.S.)

MURATHE KINORO……...PLAINTIFF

- V E R S U S –

PUBLIC TRUSTEE……...DEFENDANT

R U L I N G

This is a preliminary objection by Mr. Mwangi for the 2nd Respondent on the ground that this suit is **res judicata**. Mr. Wainaina for the Applicant does not contend the matter as it relates to breach of contract for the sale of the suit land but avers that the issue now before the court is for adverse possession. However, looking at the Applicant's Amended originating Summons, there is no such claim and the same cannot, therefore, be granted. In any event even if that prayer had been made, I am of the view that the same would have been res judicata as it was a matter directly and substantially in issue in the former suit, since it was a claim clearly and openly available to the Applicant at the time of the action for breach of contract. The Learned Author of MULLA CODE OF CIVIL PROCEDURE (ABRIDGED) (13th Edition, P.M. Bakshi, Butterworths India, New Delhi) states as follows on the question at p. 66:-

> ***"A matter which might and ought to have been made a ground of attack or defence is a matter which is constructively in issue. In cases where t he matter is ' actually' in issue, they are actually alleged by one party and denied by the other. It often happens, however, that a matter which might and ought to have been made a ground of attack by the plaintiff to substantiate the relief claimed by him in the suit is not alleged by him as a ground of attack; and also, that a matter which might and ought to have been made a ground of defence by the defendant is not set up as a ground of defence. A matter, which might and ought to have been ma de a ground of attack or defence, will be deemed to have been a matter directly and substantially in issue in such a suit (Explanation IV), that is to say, though it has not been actually in issue directly and substantially, it will be regarded as ha ving been constructively in issue, directly and substantially. This section draws no distinction between the claim that was actually made in a suit and the claim that might and ought to have been made. If the parties had an opportunity of controverti ng it, that is the same thing as the matter actually controverted and decided. The plea of res judicata applies, except in special cases, not only to points on which the court was actually required by the parties to form an opinion and to pronounce j udgment, but to every point which properly belonged to the subject of the litigation and which the parties exercising reasonable diligence might have brought forward at the time."***

At the time of the action for breach of contract, the action for adverse possession was open to the Applicant. The subordinate court which heard the suit for breach of contract found as a fact that 28 years had elapsed since the alleged sale of the suit land and the Applicant has admitted in his Affidavit that he had been residing on the suit land since 1965 with the suit being filed by him in 1992. Without saying more, the Applicant cannot be allowed to litigate in instalments and as the maxim goes: It is in the interests of all that there must be an end to litigation.

I, therefore, uphold the 2nd Respondent's preliminary objection and order this suit to be struck out with costs.

DATED and DELIVERED at NAIROBI this 3rd day of April, 2001.

ALNASHIR VISRAM,

J U D G E.