



**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL  
AT NAIROBI  
(CORAM: TUNOI, LAKHA & OWUOR, J.J.A.)  
CIVIL APPLICATION NO. NAI. 286 OF 1999  
BETWEEN**

**GITHURAI TING'ANG'A CO. LTD. ....APPLICANT**

**AND**

**MOKI SAVINGS CO-OPERATIVE SOCIETY LTD. ....  
1STRESPONDENT**

**HANNAH MUKAMI KIRUHI ..... 2NDRESPONDENT**

**(Application for injunction in an intended appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Hon. Justice Khamoni) dated and delivered on 5th October, 1999  
in  
H.C.C.C. NO. 2526 OF 1991)**

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**RULING OF THE COURT**

This is an application by the unsuccessful plaintiff seeking an order for an injunction in terms somewhat similar to that sought in the superior court which by its ruling (Khamoni, J.) given on 5 October, 1999 dismissed the plaintiff's suit with costs. The application is brought under rule 5(2)(b) of the Rules of this Court, the plaintiff having duly lodged a notice of appeal on 6 October, 1999.

The basis for the plaintiff's application for the injunction is that the plaintiff has acquired title by way of adverse possession in respect of **72 acres** portion of land known as L.R. 5964/1.

Mr. Machira who argued this application before us for the issue of injunction, raised several points but none of them arise if the claim by the plaintiff to the title of the property by adverse possession is bad in law. We do all agree that such a claim for adverse possession cannot be raised or made, as in the instant case, by way of a plaint. It must be commenced by way of an Originating Summons. So it is not strictly necessary to go into the various points although advocates on both parties have done much research on them.

They presented their arguments in full before us and with great ability. They invited us to express our views, whatever the outcome. We do not propose to do so. Of course, it would be a pity if the work of advocates is lost and forgotten. But if, as we think, it is not necessary for us to consider these points, we will not do so unless there are compelling reasons and there are none. That being the position in the matter, we say at the outset that a claim for adverse possession can only be made or raised if the provisions of Order 36 rule 3D of the Civil Procedure Rules are complied with. As was said by Omolo, Acting J.A. (as he then was) in BWANA VS. SAID 1991 2 KAR 262 at 268:-

"..... The respondents being the registered owners, the appellant could only claim

from them that 'minor portion' of their plot by adverse possession. An order for adverse possession could only be made in his favour if he complied with Order 36, rule 3D. I agree with the Chief Justice that this appeal should be dismissed in the terms proposed by him."

Mr. Machira, however, persisted in his submission that a claim for adverse possession may be made by way of a plaint where there is fraud or any complexity. Reliance was placed by him on **KIBUTIRI V. KIBUTIRI (1982-88) 1 KAR 60**. With respect, that case is no authority for any such proposition.

As was said by Hancox, C.J. (as he then was) in **BWANA VS. SAID, ante**, at page 265:-

"..... As Githinji J observed in the course of his ruling on the injunction application, the suit was not brought on the basis of a claim of entitlement to the land in Plot No. 161, on which the house stands, by way of adverse possession under the Limitation of Actions Act, Cap 22. If it had the appropriate procedure would have been by an originating summons as directed by **Order 36, rule 3D** of the Civil Procedure Rules. .... As I said, there appears to be no authority or provision for the reverse procedure, that is to say for an action begun by plaint to be continued as an originating summons. But, even if that could be done, there was no application on that behalf made in the High Court and the appellant is faced with the difficulty that, under **Order 36, rule 3D**, a claim based on adverse possession under the Limitation Act must mandatorily be commenced by an originating summons. As this course was not adopted, I take the view that Githinji J was perfectly right in the decision he gave and in his reasons for it."

In the light of the above, the plaintiff's claim to the title of the suit property by adverse possession clearly cannot succeed and the plaintiff's claim in respect thereof is hopeless and bound to fail.

Accordingly, the very first condition for the grant of an injunction in this case is not satisfied as the claim is not likely to succeed. The application must, therefore, fail. It is for that reason alone and without considering any other point that this application is dismissed with costs.

**Dated and delivered at Nairobi this 5th day of November, 1999.**

**P.K. TUNOI**

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**JUDGE OF APPEAL**

**A.A. LAKHA**

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**JUDGE OF APPEAL**

**E. OWUOR**

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**JUDGE OF APPEAL**

**I certify that this is a true copy of the original.**

**DEPUTY REGISTRAR**