**Mucheru v Mucheru**

**Division:** Court of Appeal of Kenya at Nairobi

**Date of judgment:** 1 December 2000

**Case Number:** 212/96

**Before:** Akiwumi, Tunoi and O’Kubasu JJA

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**Summarised by:** W Amoko

*[1] Civil procedure – Originating summons – Observations on the procedure – Issues of adverse*

*possession and trust – Additional question of burial and succession – Whether*

*appropriate to deal with complex matters on originating summons – Order XXXVI – Civil Procedure*

*Rules.*

*[2] Land – Trust – Declaration of trust in agricultural land – Whether subject to Land Control Board*

*consent – Statute Law (Repeal and Miscellaneous Amendments) Act 1980*

**Editor’s Summary**

In 1984 the Respondent filed originating summons seeking an order which would allow her to bury her deceased husband on the property which was the subject of the appeal, which property was in the control of the Appellant, the widow of the registered proprietor. It was said on the Respondent’s behalf that her deceased husband was entitled to a portion of the property under Kikuyu customary law, and that the same devolved to the Respondent on the demise of the deceased. With the originating summons was filed an interlocutory chamber summons seeking to bury the deceased on the subject property. The trial Judge held that the questions raised in the application were complex and required the taking of oral evidence. She then proceeded to so order and entertain hearing in order to dispose of the whole suit. She held that a trust under Kikuyu customary law had been proved, and ordered that the deceased be buried on a portion of the subject property. Sixteen years later, in 2000, an appeal against the judge’s decision came up for hearing in the Court of Appeal. The court considered the propriety of the proceedings and whether it was proper to deal with complex issues in an action commenced by originating summons.

**Held** – The procedure by originating summons is intended to enable simple matters to be dealt with in a quick and summary manner. *Bhari v Khan* [1965] EA 94, *Kibutiri v Kibutiri* [1982–88] 1 KAR 60 followed; *Kenya Commercial Bank v James Osebe* [1982–88] 1 KAR 48 considered. Declaration of a trust in agricultural land is a dealing in the land requiring Land Control Board consent, following the Statute Law (Repeal and Miscellaneous Amendments) Act 1980. Hence any such trust declared without the relevant consent is void for all purposes. *Gatimu Kinguru v Muya Gathangi* [1976] KLR 253 distinguished. *Per curiam*: If the Learned Judge thought that a matter begun by originating summons should have continued by plaint, she should have invoked the provisions of Rule 10(1) of Order XXXVI and made a specific order to that effect. Appeal allowed.

**Cases referred to in judgment**

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means

considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means

explained; “**F**” means followed; “**O**” means overruled)

*Bhari v Khan* [1965] EA 94 – **F**

*Francis Munene Paul Muthuita v Milka Wanie Muthuita* [1982–88] 1 KAR 42

*Gatimu Kinguru v Muya Gathangi* [1976] KLR 253 – **D**

*Kenya Commercial Bank Ltd v James Osebe* [1982–88] 1 KAR 48 – **C**

*Kibutiri v Kibutiri* [1982–88] 1 KAR 60 – **F**

*Kuslum Bhai v Abdulhussein* [1957] EA 699

*Official Receiver v Sukhdev* [1970] EA

*Salehmohamed Mohamed VPH Saldanha 3 (Mombasa)* civil case number 243 of 1953 (UR)