

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Case 68 of 2005

RISHAD ABDULREHMAN KHATOR

AKRAM AMRAN MOHAMEDPLAINTIFFS

VERSUS

RUKIA BINTI SOUDDEFENDANT

R U L I N G

Pursuant to the provisions of Section 3A of the Civil Procedure Act, the plaintiffs/applicants herein took out the motion dated 17th July 2008 in which they prayed for the following orders:

- a) That this Honourable Court be pleased to vary in terms item (2) of the Decree herein made on 27th December 2007 by directing that a reputable Private Surveyor do carry out a Survey of the Suit Premises herein and cave out the $\frac{2}{3}$ share entitlement of the Estate of Fatuma Ali Bashir – Deceased and Tima Ali Bashir – Deceased from herein.*
- b) That this Honourable court be pleased to vary in terms item (3) of the Decree herein by directing that the Private Surveyor Fees and Charges be met by the Estates of Fatuma Ali Bashir – Deceased and Tima Ali Bashir – Deceased respectively.*
- c) That the costs of this application be borne by the Estate of Fatuma Ali Bashir – deceased and Tima Ali Bashir – Deceased.*

The motion is buttressed by the affidavit of Rishad Abdulrehman Khator sworn on 17.7.2008. The application was served but the same did not attract any response hence it proceeded for hearing exparte.

It is the submission of the plaintiffs that the District surveyor has failed to diligently act with promptitude in carrying out the necessary partition of title numbers 10863 – 10873 to carve out the $\frac{2}{3}$ of undivided share of the estates of Tima Ali Bashir deceased and Fatuma Ali Bashir, deceased. It is the view of the plaintiffs that the District Surveyor may not carry out the survey work in good time. In the circumstances it is said that it is only fair and just that a reputable private licenced Surveyor be given the job at the expense of the aforestated estates.

I have taken into account the material placed before me. It is clear that this court issued an order directing the District Surveyor, Mombasa to carry out survey work on the suit premises. There was an order directing that the Surveyor's fees shall be met by the estates of Tima Ali Bashir deceased and Fatuma Ali Bashir deceased. The affidavit evidence show that the District Surveyor has failed to comply with the order. There is evidence that the plaintiffs advocate visited the District Surveyors office and what he received are mere promises which were not actualized. That inertia exhibited by the Surveyor's conduct is what prompted the plaintiffs to take out these proceedings.

In the motion, the plaintiffs have urged this court to exercise its inherent power to vary the terms of a court order. It is said the Government Surveyor has blatantly refused to effect the court order. It is said the court order was forwarded to the District Surveyor by the letter dated 4th June 2008. In my view I am

not satisfied that the court order was properly served upon the District Surveyor. There are well known methods of effecting service of court orders and other documents. I am not convinced the District Surveyor has neglected nor refused to carry out the directive of the court expressed in the order. Courts do not issue orders in vain. They must be served and complied with. Where there is no compliance, the party cited for breach must be punished for contempt of court orders. The law does not allow the court to vary the court order simply because someday has refused to comply with it. If such an application was allowed dangerous precedents will be set. I must restate that a court cannot exercise its inherent power where the applicant has a remedy provided elsewhere in the Civil Procedure Act and the rules therein and has neglected to avail himself. If well advised there are remedies ranging from taking out contempt proceedings or review etc. In the end I am not satisfied the motion should be allowed. It is dismissed with no order as to costs.

Dated and delivered at Mombasa this 28th day of May 2009.

J. K. SERGON

J U D G E