



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NYERI**  
**Civil Case 18 of 2004**

FATUMA RAMADHAN.....PLAINTIFF

VERSUS

AISHA RAJAB RAMADHAN.....DEFENDANT

**RULING**

**FATUMA RAMADHAN MURINGU** the Plaintiff/Applicant herein took out the originating summons dated 26<sup>th</sup> February 2004 pursuant to the provisions of **Order XXXVI rules 1 and 3 (d) (1)**, of the Civil Procedure Rules in which she posed the following questions for the determination of this court:

1. ***THAT there be a declaration that the Defendant/Respondent holds the suit land TITLE NO. AGUTHI/GATITU/11 in trust of the Plaintiff/Applicant to the extent of half thereof.***
2. ***THAT by reason of breach of trust the Defendant/Respondent be ordered to have the said portion of half of the said suit land registered in the name of the Plaintiff/Applicant.***
3. ***THAT the Defendant/Respondent be ordered to execute all the necessary documents to effect the said transfer failing which the Executive Officer of this Honourable Court be authorized to do so.***
4. ***THAT the costs hereof be granted to the Plaintiff/Applicant.***
5. ***THAT this Honourable Court may be pleased to make such further or better orders as the same may deem fit.***

The Applicant filed an affidavit she swore in support of the summons. **AISHA RAJAB RAMADHANI** was named as the Defendant/Respondent. The Defendant/Respondent filed a statement of defence to oppose the Plaintiff's originating Summons. When the suit came up for hearing the parties consented to have the Originating Summons to be determined on the basis of the pleadings, affidavits and written submissions.

I have considered the questions posed in the Originating Summons and the facts deponed in the affidavit filed in support thereof. I have also taken into account the Defendant's written statement of defence dated 10<sup>th</sup> July 2007. I have further considered the written submissions filed by the learned advocates from both sides. In her affidavit, Fatuma Ramadhan Muringwa (Plaintiff) avers that Rajab Ramadhani Muringwa is her brother. Both the Plaintiff and Rajab Ramadhani are children of one Ramadhani Muringwa, deceased. She avers that their deceased father had acquired Title No. **AGUTHI/GATITU/11** comprising of 0.544 hectares and had it registered in the name of their mother Mariam Binti Makuti, deceased. The Plaintiff alleges that when Mariam Binti Makuti passed on, Rajab Ramadhani Muringwa secretly succeeded the late Mariam Binti Makuti whereupon he got himself registered as the proprietor of Title No. **AGUTHI/GATITU/11**. She said she only discovered in the month of December 2003 that the Defendant had transferred the aforesaid property to himself in the month of March 2003. It is her submission that the Defendant was in breach of their trust to her as a beneficiary of the estate of Mariam Binti Makuti, deceased. She claimed she is entitled to half of title No. **AGUTHI/GATITU/11**. She has now urged this Court to declare a trust in her favour.

In her defence Aisha Rajab Ramadhani averred that she is the registered trustee of four others hence the Plaintiff has no *locus standi* but just a busy body. She denied the existence of any trust between her and the Plaintiff. According to the Plaintiff, the suit land was without her knowledge succeeded in 1991 by her brother Rajab Ramadhan, deceased. The

same was then succeeded by the Defendant as trustee for four others. It is the submission of the Plaintiff that due to her an unmarried status she was entitled to half the land with the other half going to her late brother. It is the submission of Mr. J. Macharia learned advocate for the Plaintiff that a resulting trust was created in favour of the Plaintiff for half the land held by Rajab Ramadhan's succession. For this reason this court should recognize and declare a trust in favour of the Plaintiff.

The Defendant is of the view that the Plaintiff has failed to tender evidence to show that title number **AGUTHI/GATITU/11** was registered in the name of Mariam Binti Makuti, deceased. It is also the submission of the Defendant that the Plaintiff has failed on a balance of probabilities to show how the land came to be registered in the name of the late Rajab Ramadhani Muringwa. The Plaintiff has also been accused of not establishing the trustee relationship between her and the late Rajab Ramadhani Muringwa. The Defendant argued that she was able to prove that upon the death of her husband on 22<sup>nd</sup> September 1997 she obtained letters of administration intestate of all the Estate of Rajab Ramadhani Muringwa, deceased, on 17<sup>th</sup> May 1999. The grant which was confirmed on 24<sup>th</sup> August 2000 enabled the defendant to be registered as the proprietor of Title No. **AGUTHI/GATITU/11** in trust of four others in accordance with the Sharia law.

In brief the Plaintiff is asking this Court to find that Rajab Ramadhani Muringwa, deceased held half of Title No. **AGUTHI/GATITU/11** in trust for her. The Defendant who succeeded Rajab Ramadhani Muringwa, deceased, does not seriously dispute the facts as laid down in the affidavit of the Plaintiff. Her main quarrel is that the Plaintiff has not shown by cogent evidence how the property came to be registered in the name of Rajab Ramadhani Muringwa. The Defendant does not also dispute the fact that the Plaintiff is unmarried and that she and her children have been residing on the suit land for many years.

The suit before me is that brought under **Order XXXVI rules 1 and 3 (d) (1)** of the Civil Procedure Rules. There is no doubt that the Plaintiff was a sister to Rajab Ramadhan Muringwa, deceased. The Defendant is a widow of the late Rajab Ramadhani Muringwa. There is scanty evidence as to how Rajab Ramadhani Muringwa, deceased, acquired title No. **AGUTHI/GATITU/11**. What is clear is that the register relating to title No. **AGUTHI/GATITU/11** was opened on 21<sup>st</sup> February 1979. The Defendant has not also explained how her late husband got himself registered as the proprietor she is now holding as trustee for her four children. There is no doubt the Plaintiff is a heir to the Estate of the late Mariam Binti Makuti. I am convinced by the averments made in the affidavit of Fatuma Ramadhani Muringwa that the property was registered in the name of Mariam Binti Makuti, deceased and that the same was registered in the name of Rajab Ramadhani Muringwa, deceased upon the demise of Mariam Binti Makuti. I am convinced that under the circumstances of this case that a resulting trust should be presumed. The Plaintiff was and is a beneficiary to the Estate of Mariam Binti Makuti, deceased. That constructive trust was carried over by the Defendant who succeeded the late Rajab Ramadhani Muringwa.

**In the end, I am convinced that the Plaintiff is entitled to the following declaratory orders:**

- (i) The Plaintiff is entitled to half the share of title No. AGUTHI/GATITU/11 hence the Defendant is holding the same in trust for the Plaintiff. I do not, however, find the Defendant as being in breach of trust.**
- (ii) Having found that the Plaintiff is entitled to half the share of title No. AGUTHI/GATITU/11 I hereby direct the Defendant to execute the necessary documents to have half of title No. AGUTHI/GATITU/11 transferred to the Plaintiff. In default the Deputy Registrar of this Court shall step into the place of the defendant.**
- (iii) Having found the Defendant not guilty of any breach of trust, I direct each party to meet her own costs.**
- (iv) The Plaintiff and the Defendant to each meet half the expenses to execute order (ii).**

*Dated and delivered this 30<sup>th</sup> day of September 2009.*

**J. K. SERGON**

**JUDGE**

In open Court in the presence of Mr. Mahugu for Defendant and J. M. Macharia for the Plaintiff.