



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NYERI**  
**Civil Case 122 of 1995**

TERESIA KAGONDU ELASTU.....PLAINTIFF/APPLICANT

VERSUS

MWOBE GATHUTE.....1<sup>ST</sup> DEFENDANT/RESPONDENT

LAND REGISTRAR KIRINYAGA.....2<sup>ND</sup> DEFENDANT/RESPONDENT

**RULING**

MWOBE GATHUTE, the 1<sup>st</sup> Defendant herein, took out the Motion dated 10<sup>th</sup> September 2009 in which he applied to have the judgment delivered on 17<sup>th</sup> March 1999 to be set aside by an order of review. The motion is supported by the affidavit sworn by the applicant. TERESIA KAGONDU ELASTO, the Plaintiff herein, opposed the motion by filing grounds of opposition.

When the motion came up for interpartes hearing, the Plaintiff and her advocate failed to turn up hence the motion proceeded for hearing *ex parte*. The law, however, enjoins this Court to consider the grounds already filed despite the absence of the Respondent and her counsel. The grounds of opposition dated 2<sup>nd</sup> April 2009 raised two preliminary points which I think I should consider before taking into account the merits of the motion. First it is said that the Applicant did not cite the provisions under which the motion is brought. Secondly, it is argued that the motion is *resjudicata*. I have perused the motion and it is apparent that the Applicant did not cite the provision the motion is based. It is trite law that the failure to cite the provisions under which an application is brought is not fatal. A careful perusal of the provisions of *Order L rule 12* of the Civil Procedure Rules indicates that the defect should be overlooked.

The more serious allegation is the averment that the motion is *resjudicata*. It is said a similar application dated 29<sup>th</sup> August 2005 was filed, heard and dismissed on 9<sup>th</sup> October 2007. This contention is not controverted. It is true that Mwobe Gathute through the firm of Macharia Muraguri Advocates filed the Notice of Motion dated 29<sup>th</sup> August 2005 in which he sought for an order to set aside the judgment of 17<sup>th</sup> March 1999 by an order of review. The motion was heard by Lady Justice Mary Kasango who dismissed the motion on merits on 9<sup>th</sup> October 2007. No appeal has been preferred against the dismissal order. I am convinced that the motion before Court is *resjudicata*.

In any case the motion does not contain the grounds it is based contrary to the express requirements of *Order L rule 3* of the Civil Procedure Rules. It is obvious that the motion is for dismissal on the basis of the above reasons. Consequently the motion is hereby struck out and dismissed with no order as to costs.

***Dated and delivered this 1<sup>st</sup> day of December 2009.***

**J. K. SERGON**

**JUDGE**

In open court in the absence of the parties with notice.