



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT EMBU**

**Civil Appeal 7 of 2002**

**MARY MUTHONI GATHUNGU.....APPELLANT**

**VERSUS**

**JOSEPH KARIUKI KANYORO.....RESPONDENT**

**JUDGMENT**

This appeal is against ruling made by court in P.M CC at Kerugoya on 6/2/2002 by Hon. Senior Resident Magistrate N.M. Kiriba on 6/2/2002.

The ruling is brief;

“The application dated 6<sup>th</sup> October, 2000 is allowed and orders granted as prayed”. One has to look at the application dated 6/10/2000 to know what orders were granted. That application that is heavily amended and seeks orders:-

1. To authorize court Executive officer to execute all documents necessary to effect the transfer of a portion of land 1.0 acre out of Inoi/Thaita/936.
2. To remove all the cautions and restrictions registered against that land to enable subdivision.
3. That OCS Kerugoya be ordered to provide security during the subdivision.
4. That the registrar of land be ordered to dispense with the production of Land Certificate of Inoi/Thaita/936.

These orders were granted by above ruling made on 6/2/2002. The grounds of appeal are set out in the memo of Appeal. The first of which is that the Trial Magistrate failed to record the detailed proceedings and particularly submission by Appellants advocate. The record shows that application came up for hearing before N. Kiriba on 24/7/2001 in presence of the two parties. The record shows both counsel were heard and there was no complaint made. This court can only appreciate what is on record. This ground is dismissed.

Regarding ground number 2 the court has already mentioned the brief ruling delivered on 6/2/2002. Order XX CPC rule 4 sets out the contents of Judgment thus concise statement of the case, the points for determination, the decision thereon and the reasons for such decision in defended suits. In this matter application was defendant and both counsel addressed the court. The reasons for the ruling should have been given. Regarding ground 4 it is said that the transaction of transfer of land was without Land Board Consent. The issue is not clear in the application and the fact that no appeal was filed on that ground

against the Judgment supports the proposition that consent had been obtained.

On ground 3 that the learned Trial Magistrate exercised discretion wrongly there is nothing on record to show how he exercised his discretion. There is no reasons put forward.

I have perused the Judgment in the authority on the file. That decision dwells on the issue of review and I do not see its relevance in this appeal. It is correct to say that Order 41 rule 2 permits High Court deciding an appeal shall not be confirmed to the grounds of objections set forth in the memorandum of appeal or taken by leave. There is a proviso to that rule which demands that the other party must be given a chance to argue on that point.

In this appeal Ms Njeru for Appellant raised the issue of the substitution of Appellant under Order 23 CPC saying it was wrong and that she had no grant of representation of deceased appellant. These issues were not in the list of grounds of appeal. However an application was made on 12/4/2000 and matter argued and Ruling delivered showing that the substitution had been made after husband had admitted the claim. In any case order 23 rule 5 empowers a court to decide whether or not any person is a legal representative for the purpose of that order.

After considering the above I am satisfied that the ruling was to effect the Judgment of court which had already been delivered and no appeal had been made. Money had already been received according to the Judgment it was just that the Judgment should be executed. I find no prejudice was caused to the Respondent in the circumstances of any irregularity in the failure to write a full ruling. The appeal is dismissed.

No order as to costs.

Dated this 17<sup>th</sup> January, 2008.

**J. N. KHAMINWA**

**JUDGE**

**17/1/2008**

**Khaminwa – Judge**

**Njue – Clerk**

**Mr. Kahiga for Respondent**

**M/s Njeru Appellant**

**J. N. KHAMINWA**

**JUDGE**