



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**Civil Case 155 of 200**

**ROSE N. KAIZA.....PLAINTIFF**

**VERSUS**

**ANGELO MPANJU KAIZA .....DEFENDANT**

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**RULING**

The basis of the application before me in this Originating Summons is a strange phenomenon. A document examiner has opined that the signature of the District Land Registrar on the Transfer Exhibit 3 is not that of the Registrar who purported to have registered the Transfer and is therefore a forgery. The District Land Registrar himself has asserted on oath that the signature is his and is not a forgery. The document examiner says he has not, in his over 15 years working life, come across such a situation. Neither have I in now close to thirty years in the legal profession. This is how this situation has arisen.

In my judgment delivered in this matter on 29<sup>th</sup> September 2006 I dismissed the plaintiff's claims herein which were hinged on the assertion that her late mother's signatures on the Transfer EX 3 and Will EX 4 were forgeries. On the basis of the evidence of witnesses, two of whom are Advocates of this court, who witnessed the execution by the plaintiff's mother of that Will and Transfer I rejected that of two document examiners who opined that those signatures were forgeries. On 28<sup>th</sup> November 2007 the plaintiff filed this application under Order 49 Rule 15 (which should be Order 44) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking a review of the decree arising from that judgment on the grounds that the signature on the Transfer EX3 of the Land Registrar who purportedly registered the Transfer is a forgery and that the Transfer itself was not on the prescribed form.

In her affidavit in support of the application the plaintiff averred while obtaining from court documents to prepare a record of appeal which she has filed against my said judgement she met one Mwashena, whom she described as a conveyancing clerk, who being familiar with the signature of the Land Registrar, Mr. Kenneth Kariuki Githii, confirmed to her that Mr. Githii's purported signature on the Transfer EX.3 is a forgery. Armed with that information she went to police who obtained Mr. Githii's specimen signatures which upon examination and comparison the document examiner opined that the questioned signature is a forgery hence this application. She also deposed that during the same period she discovered that the Transfer EX 3 is not on the prescribed form.

Upon being served with the application the defendant's advocates got in touch with Mr. Githii, the Land Registrar, who swore an affidavit confirming the questioned signature as his.

After hearing counsel's submissions on the application, I decided to have both the Land Registrar and the document examiner give *viva voce* evidence and be cross-examined on their contentions. That has been done and their evidence is on record.

I would like to start with the plaintiff's second ground that the Transfer EX 3 is not on the prescribed form. Besides the fact that there is no prayer in the Originating Summons to impugn the validity of the Transfer, I cannot entertain that ground at this stage. This is because Order 44 Rule 1 of the Civil Procedure Rules is very clear. A review like the one in this application can only be based on **“the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his [Applicant's] knowledge or could not be produced by him at the time when the decree was passed or order made.”**

The Transfer EX. 3 was with the plaintiff long before she filed this case. She should have therefore noticed that it was not on the prescribed form. That apart the Land Registrar whose evidence I believe confirmed that that form of transfer had been approved by the Chief Land Registrar under Section 108 of the Registered Land Act (Cap 300). The application cannot therefore succeed on that ground.

The Application is also for dismissal even on the first ground. As I have said both the Land Registrar and the document examiner testified before me and were cross-examined at length. Though I have no reason to doubt the honesty of the document examiner, his opinion is clearly erroneous. The Land Registrar who registered the Transfer was categorical that on the material date he was on duty and he is the one who assessed the stamp duty on the transaction and after the same had been paid he registered the Transfer. Apart from signing on the Transfer signifying its registration he also signed against the entries in the Register relating to that Transfer as well as the Certificate of Lease issued to the defendant.

The Land Registrar went as far as showing the court documents relating to other pieces of land that he signed on the same day. I believe his evidence and accept the explanation he gave that his signature may have appeared different from his usual one due to the accidental injury to his right hand shortly before appending the disputed signature to the Transfer.

On the authorities cited in my judgment of 29<sup>th</sup> September 2006 in this Originating Summons, I prefer the evidence of the Land Registrar to that of the document examiner. Consequently I dismiss this application with costs to the defendant.

**DATED and delivered this 16<sup>th</sup> day of January 2008.**

**D.K. MARAGA**

JUDGE