REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

Ciivil Case 60 of 2005

HARRIET KANANA KABERIA …….....…….. PLAINTIFF

VERSUS

DANIEL M'IKIUGU M'ITONGA ……. DEFENDANT

RULING

On 9th November 2007 this court delivered a judgment dismissing the respondent's suit against the applicant under the Married Women Property Act, 1882. In dismissing the suit, the court also ordered that the inhibition on Meru Municipality Block 1/277 be discharged.

The applicant in the present application who was the defendant in the suit now seeks that the court reviews its said judgment by substituting the word '*inhibition'* with the word '*caution'*. The applicant avers that no inhibition subsists over the said parcel of land. That in fact it is a caution which was lodged by the respondent on 23rd November, 2003. The order by the court that the inhibition be discharged when infact it is a caution constitute a mistake or error apparent on the face of the record, hence this application.

The respondent has opposed the application arguing that there was no prayer or a counter-claim for the removal of the caution and the court cannot (should not have) ordered for its (inhibition) discharged. Order 44 Rule 1 of the Civil Procedure Rules under which this application is anchored donates to the court the power to review its judgment if any person is aggrieved thereby. Such a person must first show that the decree or order that has aggrieved him is one where an appeal is allowed as of right but no appeal has been preferred, or that it is a decree or order which no appeal is allowed.

An application for review will be granted where it is demonstrated by the applicant that he has discovered a new and an important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time of the decree or order; or the applicant must show that there is an error or mistake apparent on the face of the record. The court can also review its judgment for any other sufficient reason.

Finally, it is a requirement that an application for review must be brought without unreasonable delay. I find that all the other conditions have been satisfied; only leaving the question whether there is an error or mistake apparent on the face of the record.

I have noted that in the applicant's view the court ought to have ordered the removal of a caution and not an inhibition. I have since gone over the pleadings and the proceedings and I am satisfied that it is a caution which was lodged in respect of the suit land. It therefore follows that if any restrictions were to be removed it ought to have been a caution.

But the other more fundamental question is whether the court had jurisdiction to order the removal – or whether at this stage the court can order the removal of the caution.

The respondent argues that the court lacked jurisdiction because it was not prayed for. That is, with respect, not a persuasive proposition. The issue of the caution was raised in both the pleadings and in the proceedings. It was, in that regard, a matter in issue and the court was not or would not be precluded

from making a decision in respect of the same.

I am, the above not withstanding, satisfied that there is an error on the face of the record. The issue of the caution is a subject in Nkubu SRMCC No. 36 of 2005 in which the applicant seeks, among other things, the removal of the caution on the subject property. By dint of section 6 of the Civil Procedure Act this court was precluded from trying and deciding on the matter of the caution when such matter is the subject of Nkubu SRMCC 36 of 2005 pending before a competent court.

To that extent, therefore, I find that there is an error on the face of the record. The judgment of this court delivered on 9th November, 2007 is review to the extent that the last sentence stating that the inhibition on Meru Municipality Block 1/277 is discharged is deleted. I make no orders as to costs.

Dated and delivered at Meru this 18th.day of April.. 2008.

W. OUKO

JUDGE