



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 725 of 2003

1. Land & Environmental Division

2. Subject of main suit:- Tenancy in common

- i) Partnership
- ii) Ownership of Land/Property LR 209/2489/21
- iii) Termination of tenancy in common.

3. Originating Summons:- Seeking termination in common property

i) Direction 16th February 2004 Nyamu J. *viva voce*
evidence

- ii) Possible out of court settlement
- iii) Osiemo J.

31st October 2006

28th November 2006

For possible consent

4. Land and Environmental Division

i) 3 advocates in suit suggest only assets is

LR 209/2489/21

ii) To sell building and share proceeds noting partnership NOT equal.

5. Court directions:-

- i) Valuation of building

- ii) Determine actual share held by each party
- iii) Liberty to apply for sale of property.

6. Advocate for Defendant:-

- i) Changed advocate, new
- ii) Prays for review and or setting aside of court

directions.

7. Held

- i) Orders of court just directions not final orders of court.

8. Case law – Nil

9. Advocate:

R.M. Ongegu for Maranga Maosa & Co. Advocates for the plaintiff

J.O. Adera for Anil Joshi & Co. Advocates for the defendant

SHANTABEN RAMNIKLAL PARMAR1st PLAINTIFF

ISAAC GICHAMBA WANGAGE2ND PLAINTIFF

V E R S U S

BEATRICE WARUGURU GITUTUDEFENDANT

R U L I N G

1. An originating summons was filed on 7th July 2003 under the Indian Transfer of Property Act 1882 by Shantabeb Ramnikiklal Parmar and Isaac Gichamba Wangage against Beatrice Waruguru Gituru the respondent herein.
2. The three parties hold ownership of a parcel of land known as LR 209/2498/21 in common tenancy since 1983. They wish to terminate the tenancy in common and alleged that the property in question is not capable of being subdivided into the party's respective shares. Their solution is to sell the whole property and share the proceeds amongst them.
3. Beatrice Waruguru Gituru became a common tenant on the demise of her late husband one Daniel Gituru Ngai where it is alleged that she holds legal representation to his estate as of June 2002.
4. The two applicants attempted to enter into a sale agreement with M/s Wardpa Ltd. The agreement was frustrated when the purchaser was unable to meet the terms of the sale. A second buyer was found known as Michael Mbira. A sale agreement was drawn but the respondent Beatrice Waruguru Gitimu decline to sign the sale agreement. The two applicants filed this originating summons seeking declaration and orders of this court that the tenancy in common be determined and terminated.
5. Michael Maina attempted to be enjoined as an interested party. His application was not prosecuted

and the same was struck out by Visram J. (30th May, 2006). The parties before this court are the two applicants versus the defendant.

6. Directors had been earlier given by Nyamu J on 16th February 2004 that *viva voce* evidence be given.

7. On the two days the matter came up for trial before Osiemo J. the parties attempted to settle this matter. This failed.

8. The Land and Environmental Division was formed. This file was placed before me in this new division. The parties informed the court that as per prayer two of the originating summons, the parties held a common tenancy which according to the applicants is:-

“not capable of such division into the parties respective shares ... [that the] commons tenancy can only be best determined by way of sale of the said parcel of land”.

9. The parties informed this court that the issue is really to dissolve the partnership.

10. This court gave the directions to the parties, which directions one now challenged by the defendant Beatrice Waruguru Githuru and is the subject of this ruling.

11. The direction given by court is that:-

“i) There be a search carried out with the Lands Departments as to the actual share held by each partners.

ii) That a valuation be carried out on the property by two separate values appointed by each party namely, one by defendant and another for plaintiffs 1 and 2 jointly.

iii) That the reports be provided for

iv) Thereafter leave of the court would be reached for any sale or auction of the property.

12. These were the courts directions and were not final. Parties were given to 6th June 2007 to comply with the said directions.

13. The defendant changed advocates under Order III r7 (e) by way of an application and stated that the said orders or final directions be reviewed, varied or set aside.

II Notice of motion 18th May 2007

14. From the onset, the suit before court is not in any way finalized and or compromised. This is the impression that is given by the new advocate on record. All that he required to do was to file a notice of change of advocate to come on record. To date no notice of change has been filed by the said advocate and it is hereby directed that he does so if not already filed.

15. In an application of a review, it concerns the mistake and or error on the face of the record. The disclosure of any new facts that was not in the knowledge of the court.

16. Such error, mistake and or knowledge not before court has not been disclosed. I am asked to vary or set aside my orders. These orders are not final nor is it a judgment of the court. They are directions to facilitate a fair and final conclusion of this matter.

17. The former advocate for the defendant Maina Irungu of M/s L. Maina Irungu and Company Advocates entered into no consent of compromising this suit. His conduct was above reproach and he

acted within the instructions given to him.

III Conclusion

18. I find this application has no merits. I believe if the advocate had kindly paid his archive fees and perused this file and personally conferred with the other side before making this application there would not be the delay in hearing this matter to its conclusion.

19. I dismiss the application of 18th May 2007 with costs to the applicants plaintiffs/respondents. A notice of appointment of advocate to be filed and served under order III r6 and 7 Civil Procedure Rules by defendants new advocate.

Dated this 20th Day of June 2007 at Nairobi.

M. A. ANG'AWA

J U D G E

R.M. Ongegu for Maranga Maosa & Co. Advocates for the plaintiff

J. O. Adera for Anil Joshi & Co. Advocates for the defendant