



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 1605 OF 2000**

**GEOFFREY GITUIRIA KIMANI  
(Suing on his own behalf and on  
behalf of his brother's children).....PLAINTIFF/APPLICANT**

**VERSUS**

**KARIUKI KIMANI..... DEFENDANT/RESPONDENT**

**RULING**

This matter arises from a judgement of this Court delivered by the Honourable **Lady Justice Aluoch** on **27th** November, 2003. Judgement was entered in favour of the Plaintiff who had sought

**“a declaration that the change of names in the original title of the parcel of land herein and the subsequent subdivisions and registrations are null and void owing to the fraud and forgery herein.”**

The Plaintiff had also prayed for “proper distribution of the original parcel of land herein, according to the agreed beneficial shares.”

When the decree extracted from the said judgement was prepared, the Defendant refused to sign; and this necessitated the Plaintiff's application by Chamber Summons dated 16th August and filed on 18th August, 2004. Brought under Sections 98 and 3A of the Civil Procedure Act (Cap. 21), the application carried the following prayers:

**(a) that, the Court do authorise the Registrar of the High Court or such other person as it may deem appropriate, to execute all the necessary documents to facilitate the sub-division of land reference No. KIGANJO/NEMBU/1034;**

**(b) that, the Court do authorize the Registrar of the High Court or such other person as it may deem appropriate, to execute the necessary application for Land Control Board consent and for transfers in favour of the Plaintiff's brother's children.**

It is stated as grounds in support of the application that the Defendant failed to comply with the order/decreed of the Court despite having had the opportunity to do so. The Defendant had failed, ignored and/or refused to comply with the said judgement. Consequently the Plaintiff and other interested parties are unable to enjoy the fruits of their judgement.

Evidence in support of the application is set out in the depositions of the Plaintiff, **Geoffrey Gituiria Kimani**. The deponent avers that, on 27th November, 2003 the Court ordered that a change of names in

the original title of the parcel of land No. KIGANJO/NEMBU/1893 and KIGANJO/NEMBU/1894 and the subsequent sub-divisions and registration be declared null and void owing to fraud or forgery. He deposes that the said property requires proper distribution from the original title of land according to the shares already agreed upon. He avers that the Defendant has refused to comply with the terms of the said judgement. Consequently, the deponent avers, the Plaintiff and his brothers have suffered and continue to suffer hardships occasioned by their not being able to enjoy the benefits flowing from the judgement.

On the occasion of hearing this application, on 1st November, 2004 Ms. Githinji represented the Plaintiff/Applicant, whereas the Defendant appeared in person.

The Defendant excused himself for not having turned up in Court on the occasion of the hearing which led to the judgement of 27th November, 2003. He then maintained that the plot of land which is the subject of dispute is his own, and he had purchased it.

**Ms. Githinji** drew the Court's attention to the affidavit of service sworn on 1st September, 2004 and filed on 1st November, 2004. The deponent, **Stephen Waititu Kimani**, states that he is a duly authorised process server, and did serve the Chamber Summons on the Respondent, on 28th August, 2004.

Counsel submitted that the Respondent had a clear period of two months during which he could have instructed an advocate if he had wished to do so. But there was no response to the Applicant's Chamber Summons.

As already noted, the judgement which is the basis of the instant application was given on 27th November, 2003. There was no appeal from that judgement, nor was there an application to set aside the judgement. That judgement carried the specific orders now sought to be enforced by the Plaintiff. That judgement is now *res judicata*, and *it would be wrong in law to allow a party to it to claim, as does the Defendant, that one of the portions of the land in question was personal to him and was not part of the family trust.* That particular window, for the Defendant, is now closed.

Secondly, the Defendant had neither evidence in the form of depositions, nor grounds of opposition to meet the Applicant's case in the instant application. When, therefore, the Defendant let the words fall that he was exclusively the owner of one of the parcels of land, he falls into the error of giving evidence without authority. He has no evidence on record; and he had chosen not to turn in any such evidence after he was properly served with summons.

He is also, apparently, not able to argue any points of law, and he had, I assume, elected not to instruct an advocate to do it for him even when he had about two months during which he could have done so. It has to be concluded that the Respondent is not in a position to meet the Applicant's case, and in fact, he has failed, when he appeared before me, to meet that case even in the most limited way. When I raised some of these points, the Defendant said: "*My advocate failed to take necessary action; and he never kept me informed*". **Lady Justice Aluoch** had indeed recorded in her judgement that: "The Defendant entered appearance through Messrs. Jesse Kariuki & Co. Advocates, but failed to *file a defence* within the prescribed time." I did inform the Respondent when he complained in Court about his advocate: "*That becomes a matter between you and your advocate.*" I think that is the correct position, but I must resolve the application before me in favour of the Applicant.

I therefore make this order granting the prayers in the Chamber Summons application of 16th August, 2004. The Respondent shall bear the costs of this application.

Orders accordingly.

DATED and DELIVERED at Nairobi this 4th day of February, 2005.

**J. B. OJWANG**

**JUDGE**

**Coram: Ojwang, J.**

**Court clerk: Mwangi**

**For the Plaintiff/Applicant: Ms. Githinji, instructed by M/s. Rumba Kinuthia & Co.**

**Advocates.**

**Defendant/Respondent in person.**