



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**H. C. CIVIL CASE NO.5992 OF 1992**

EQUITY BUILDING SOCIETY .....PLAINTIFF

VERSUS

MWIHOKO HOUSING COMPANY LTD .....DEFENDANT

**RULING**

Mwihoko Housing Company Ltd. defendant at in HCCC No.5992 of 1992 and Plaintiff in HCCC No.4686/92, which were consolidated, pray that the decree given on 29/9/1999 be reviewed. The application is made under Order XLIV Rule 12 and 3 Civil Procedure rules. The application is made on two grounds Viz:

1. Discovery of importance matters or evidence – that discovery of the ruling in HCCC No, 5992 of 1992 dated 24/2/1993 which was missing from the file at the time the Judgment was delivered on 29/9/1999. 2. There are errors or mistakes on the record, which states.

(a) There was a valid rescission sale agreement dated 10/5/1989.

(b) That Plaintiff had obtained absolute and indefeasible

(c) That the orders issued on 25/7/1991. 25/9/1991 respectively related to the original L.R. No10902/1 and so the orders were not effected in respect of L.R.No.10902/91.

(d) That there is no concrete evidence that agent was aware of the previous sale between defendant and the administrators of the estate.

Have read the supporting affidavit of Stanely Kirima Mbagiue and the alleged document, I have also read the replying affidavit of Peter Kahara Muigai. I have also re-read the Judgment of the court delivered on 29th September 1999.

The Ruling dated 24/2/1993 was an interlocutory ruling on the application by Equity for an order of injunction. The court dismissed the application for an order of injunction. It is true as the application states that in the Ruling of 24/2/1993 court established that there was an agreement of sale and that Mary Wamuhu Muigai of the dispute and existing suits. The court made the same findings in the final Judgment of 29/9/1999. These facts were not decisive on their own. They had to be considered in relation to Mwihoko's counter claim in HCCC No.5992/92 for cancellation of Equity title and in relation to Mwihokos claim in HCCC No.4686/92 for cancellation of subdivisions of the original title L.R.10902/1. Indeed issues were framed in relation to those facts e.g issues No8 consented the transfer to Plaintiff by Mary Wamuhu Muigai of L.R. 10902/9 was valid fraudulent and whether

(a) Plaintiff acted in consent with Mary Wamuhu Muigai in the subdivision, of original L.R.

No.10902/1 and in the transfer of subdivision L.R. No.10902/9.

Mwihoko had pleaded fraud on party of Equity. The court considered all the evidence including the two alleged important and new matters and evidence and considered that equity had obtained an absolute and indefeasible title.

The alleged important and new matters or evidence are not new. They arose during trial and were considered in relation to the pleadings and issues arising from the pleadings.

The alleged error or mistakes on the record and infact, finding of the court after considering all the evidence including documentary evidence and counsel submissions. The applicant is in essence saying that the court erred in making those findings. The application in the Court of Appeal for leave to appeal out of time was dismissed by the Court of Appeal. The applicant cost be cause to lodge an appeal against the Judgment of this court.

But applicant is asking this court to do what in his view the Court of Appeal had jurisdiction to do and ought to have done that to set aside the entire Judgment of this court.

The court made the findings complained of other full trial and after due consideration of the evidence and records of existing suits. The findings of the court were on the merits. If the court erred in making those findings it has no jurisdiction to sit on appeal against its own decision. The mistake or errors alleged to have been committed by the court are not mistakes or errors envisaged in order XLIV Civil Procedure rules. As the applicants is asking the court to sit on appeal against its own decision, on the merits, the application is totally misconceived.

From the foregoing the application is misconceived and previous it is dismissed with costs.

Dated and delivered at Nairobi this 20th May, 2002 E.

**GITHINJI**

**JUDGE**

Mr. Ndege present

**Mr. George for Kirundi present**