



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MOMBASA

CIVIL CASE NO. 531 OF 2000

**KALYAN KESHRA PATEL
PLAINTIFF**

V E R S U S

**MARY W.J. KIGHALA MWAIGAMBA 1ST
DEFENDANT**

**PATRICK KIGHALA MWAIGAMBA 2ND
DEFENDANT**

**OSMAN SULEIMAN 3RD
DEFENDANT**

**NINA MARIO 4TH
DEFENDANT**

R U L I N G

The Application before the court is by way of Notice of Motion brought under Order 44 rules 1 and 3 Section 3A and 80 of Civil Procedure Act and Order 50 C.P.C.

The prayers sought are the review with a view to setting aside ruling delivered by this court on 6.2.2002. The application is supported by affidavit of Osman Suleiman and on grounds that there has now emerged new and relevant evidence not in possession of defendant previously. And is evidence which if fully considered will cause the honourable court to fundamentally alter its said ruling.

The new evidence pleaded is that by a sale agreement dated the 11th day of July 1991 shows:-

- a) that 2 purch asers were involved but only one has filed the suit.***
- b) that the purchase price was deposited with a third party and there is no evidence that the vendor received the price.***
- c) that the cheques in payment was drawn by Naseeb Construction Company Ltd. Which was not a party to the transaction neither is it a party to this suit.***

My observations, first, this agreement was made in 1991 and no dispute on it has arisen until now. Secondly it is not shown that this is evidence which is new and not available or in possession of

applicants prior to the hearing of the application for injunction. Mary Walegwa Kighala was a signatory as vendor and should have known of it (the agreement) and had a copy since its execution. Against this case is not on agreement of sale. It is by the plaintiff (respondent here) for vacant possession and damages on the footing that the respondent is the registered owner of the property. Also the first agreement related to plot nos. 618/2/A (original 618/1/MN). The plot transferred in 1995 October 31st relates to subdivision No. 8425 (original 618/3 Section one Mainland North and being comprised in Certificate of Title R. 25653.

I find that the sale agreement dated 11.7.1991 has nothing to do with the present land on dispute. The consideration differs because there is different in time and subject matter. Two different advocates are involved namely Mr. Parkar in the first transaction and Mr. Khatib in second transaction . The issue raised that only one registered owner has sued is not material. The proprietors own undivided shares on the land and anyone of them may take action for all the property. I conclude therefore that no new material as required under Order 44 CPC has been exhibited to warrant the court to apply the provisions of the said order. Instead I find the attempt by the applicants to introduce unrelated evidence vexatious aimed to mislead the court.

The application is hereby dismissed with costs.

Dated this 3rd day of June, 2002.

J. KHAMINWA

COMMISSIONER OF ASSIZE

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PROCEEDINGS

3.6.2002

Khaminwa – Commissioner of Assize Esther – Clerk Mr. Kiume Mr. Kiarago

The ruling read means that the defendants may be removed from the plot. They wish to be heard and they have a right to be heard. To avoid much anxiety on all sides I order that this suit be heard as a matter of urgency.

By consent the full suit shall be heard on 20.6.2002.

J. KHAMINWA

COMMISSIONER OF ASSIZE

Status quo be maintained.

J. KHAMINWA

COMMISSIONER OF ASSIZE