



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL APPEAL NO. 83 OF 2001**

**ALI SAID SALIM RUKBY ..... APPLICANT**

**- VERSUS -**

**SALIM SAID SALIM RUKBY )**

**FATMA SAID SALIM RUKBY ) ..... RESPONDENTS**

**J U D G E M E N T**

The appeal originates from the decision of the Kadhi's court sitting at Malindi in Case No. 40"B" of 2000. The plaintiffs in that case filed suit against the Defendant (Appellant) claiming their share of inheritance in the estate of SALMA (SULUMA) SALIM RUKBY who died in October, 1984. She left behind a Temporary constructed house without land standing on land known as Plot 1335.

The Appellant who is one of the heirs, in 1995 went ahead and renovated and or built afresh the building now in dispute. It is said this was without the consent of the other heirs.

When the hearing commenced on the 14.11.2000 the plaintiffs were present but the defendant was absent. The court did not establish whether he had been served with a Hearing Notice and proceeded to hear the sworn evidence of the 1st plaintiff. The 2nd plaintiff also gave his evidence but the record does not show whether she was sworn or not. At the close of the proceedings the court on its own motion directed that a copy of a written Will and title document be produced during the next hearing on 20.11.2000.

On the 20.11.2000, again the Defendant was absent and the Court did not enquire as to whether he had been notified of the hearing date but at the close of the proceedings of the day an order was made to the effect that the Defendant be served with a hearing Notice for the next hearing which was for the 27.11.2000. Once again there was no appearance and the record shows he had been served with the hearing Notice.

The case went on for hearing until the 15.1.2001 when the Defendant appeared and the court after hearing him found he had not been served with hearing notices and the court ordered a fresh hearing which commenced on 25.1.2001.

Once again the record shows proceedings are defective in that the 1st Plaintiff's evidence was not taken while that of the 2nd plaintiff is not shown whether it was under Oath or otherwise. There is no cross-examination either. The same scenario is repeated for the Defence case.

Both counsels for the parties had submitted on the appeal but before Mr. Abdulla for the Respondents could reply, he conceded that the proceedings are a nullity and the matter should be referred for retrial

. I have considered the issues raised and are in agreement that the proceedings point to a lot of flaws in the manner the case was conducted. In the circumstances I find in the interest of justice and more so as this is a matter involving the division of property amongst family members, the matter is hereby referred to the Kadhi's Court for a hearing de-novo. The Chief Kadhi is to give directions as to which Kadhi other than the one sitting at Malindi is to hear the case. On the issue of costs, I find that each party bares it's

own costs as the appeal and the cross-appeals have not been considered on their merits but on a technicality arising on the part of the Court.

**Dated and Delivered at Mombasa this 26th day of July, 2002.**

**P.M. TUTUI**

**COMMISSIONER OF ASSIZE**