

REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA AT NAIROBI
SUCCESSION CAUSE NO. 2442 OF 1998**

RUTH WINNIE OKOTH OGENDO PLAINTIFF

VERSUS

THE DIRECTOR OF SURVEYS & ANOTHER DEFENDANTS

R U L I N G

The third defendants have changed advocates. They have every right to do this and at any stage. This is the third time that they are doing so.

M/s. Okwach & Company Advocates now represent them. The said firm of advocates have filed an application on behalf of the said 3rd defendants.

A brief survey of this case is as follows:- An Originating Summons had been filed. A hearing was held in presence of all three parties - namely the advocate for the plaintiff; the advocate for the state and the advocate for the third defendant.

I entered judgment for the plaintiff.

I am made to understand that this matter went up to the Court of Appeal in an application which was later withdrawn. I have nothing to show me this same what the advocates themselves informed me and to a court order. The 3rd defendants now file this present application. It is brought under Order 92 rule 8. Order 36 rule 12 and Section a Civil Procedure Act. It is an application dated the 11th of September 1999 and filed on the 11.11.99. Order 96 rule 8 Civil Procedure Rules reads as follows:- "Where under this Order judgment has been entered or the suit has been dismissed. The court on application by summons may set aside or vary the judgment or order upon the term are just".

This is under hearing and consequence of no attendance. The advocate for the plaintiff argued that there was a full hearing on submissions in presence of all the parties. there was therefore no esparto hearing.

The advocate for the State and original co-defendant for No. 1 & 2 had not been served with the application but was in fact able to read the application and strongly object to it. Basically, because the applicants now deny they are the owner of the land. If this is true then they need not fear as the orders would not effect them. The State counsel prayed that the application should be dismissed as it is formless. From the applicants affidavit I note that much time had been spent on the affidavit of the former advocate's negligence. I believe what argument to be perused by the applicant is a negligence suit against their former advocates. the present advocates M/s Okwach & Co. Advocates would have perhaps filed a review to my judgment or further still peruse the appeal against the said orders. this had not been done.

I am not able to grant prayers under Order 96 rule 8 Civil Procedure Rules as the rules envisage a situation where one of the parties was absent during the hearing and the matter proceed esparto.

Order 36 rule 12 Civil Procedure rules refers to where applications are to be made it must be in writing and by way of chamber summons. I therefore have Section 3A Civil Procedure Rules left for me. i believe that it is inappropriate to use it in this application when these are the owners not perused or completed.

I dismiss this application with costs to the respondents and the 1st and 2nd defendants and plaintiff.

Dated this 8th day of February, 2000 at Nairobi.

M.A. ANG'AWA

JUDGE