



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**HCC NO. 18 OF 2004**

**FATUMA RAMADHAN.....PLAINTIFF**

**VERSUS**

**AISHA RAJAB RAMADHAN.....DEFENDANT**

**RULING**

The application herein is dated 31.10.2011 wherein the applicant is seeking an order that the Judgment delivered on 30.9.2009 be reviewed wholly and be set aside and or be reviewed to the extent that it only applies to the land owned by the 1st Defendant exclusively. The application is based on grounds that this suit had already been determined through Sharia Law of Succession. The trial was a travesty of justice as the Plaintiff did not disclose material facts to the court whereas the defendant was not aware that her advocate had a health problem which may have prevented the said advocate from representing or informing the court evidence within his knowledge. The applicant who is a part owner of the suit land was not served or represented during the proceedings and that the applicant will suffer irreparable loss if stay is not granted and this application will be rendered nugatory. Lastly that there is new important evidence which had not been discovered at the time of trial.

The application is supported by the affidavit of Ratib Rajab Ramadhani who states that he was enjoined in this suit by the Plaintiff through an application dated 1st July 2011 after judgment had been entered. That the subject matter is owned by the 1st defendant, Rabbeigh Rajab Ramadhan, Razak Rajab Ramadhan, Rishard Rajab Ramadhan and the applicant and while the 1st defendant owns 1/8 of the suit land the rest own 7/8 of the suit land accordingly and the 1st defendant was solely as a trustee and did not have capacity. That their mother the 1st defendant informed them that there was a case involving the suit land but he honesty believed that it would affect her share as the said land is owned by five independent persons none of them is a minor and that the land was distributed in the High Court Kenya sitting at Mombasa through succession cause NO. 166 of 1998 and a grant was issued accordingly while the letters of administration had been issued by Justice P.N Waki then sitting in Mombasa and therefore the said grant having been issued by a court of competent jurisdiction the only remedy that was available was to seek to nullify the said grant under Sharia Law as she subscribes to the same and coming to this court was misusing this court to nullify or set aside a grant dully issue as Sharia Law is supreme in regards to this matter.

He contends that the whole case resulted in this court sitting on its own appeal and or two courts of parallel jurisdiction issuing orders in respect to the same land whereas one court has previously decided the matter. That the plaintiff was present during the hearing of the said Sharia Law proceedings and cannot feign ignorance. That all facts including a fact that the property was developed and plaintiff had been illegally and irregularly gaining from the said development to the tune of 1.7 million at the time of

trial in exclusion of the registered owner had been given to advocate on record but the 1st defendant and the applicant were not aware the said advocate on record a Mr. Wachira Mahugu could at time take leave of his faculties and had a health problem and was later taken to a rehabilitation facility reason the said facts were not relayed to the presiding judge and had the said facts come to light they could have received a very different judgment. That the new discovered facts and or important matters were that the matter had already been decided by a court of competent jurisdiction namely high court of Kenya at Mombasa succession cause No. 166 of 1998 and this honourable court ought not have proceeded to distribute the said land in a matter which facts were purely succession and the same had been decided through Sheria Law and that the Advocate representing the applicants was not in total control of his faculties at the time as he later came to learn.

The subject matter was registered in the name of the 1st defendant and four other persons as such the said matter ought not to have proceeded without including the other four registered owners neither should have an order been issued affecting their registered proprietary interest without enjoining them in the suit. The applicant is apprehensive that he will suffer irreparable loss if the said judgment is not reviewed as he will lose his portion without being even been offered a chance to be heard and there is sufficient reason to review the said judgment. That the delay in bringing this application is because the 1st defendant had informed them that she had lodged an appeal and he verily believed that the said appeal would stop any further proceedings.

In the replying affidavit, the plaintiff states that the 2nd Defendant has not acted with vigilance and/or expedition all through and that he is not acting in good faith because he is raising matters which he ought to have raised before. She admits that he was only joined for purpose of removal of caution lodged by him the position alleged by the 2nd Defendant was reversed by the Judgment dated 30th September 2009, whereby the Plaintiff was held to be entitled to half of the suit land and no appeal has been filed and contends that at all material times the law applicable was the Law of Succession Act and in further answer thereto that Sharia law was not applicable but adds that she never participated in the succession cause.

The 2nd Defendant who is the applicant claim to be a part owner of the suit land but wholly excluded from the proceedings and was only included in this case after judgment had been entered. He further t claims to have been denied the fundamental right to be heard despite being a part owner of the suit parcel.

The application is based on grounds that the dispute had been determined by Sharia Law. The first succession case was **NO. 136 of 1991 in Nyeri wherein the petitioner was a brother to the Plaintiff and was confirmed in 1992**. The second succession cause was filed in Mombasa thus **Mombasa Succession Cause No. 166 of 1998** and the matter proceeded up to confirmation. There has been no revocation of the grant issued and confirmation done.

The **second** ground is that the 1st Defendant's advocate had a health problem. There are no documents to prove that the 1st Defendant's advocate had a health problem.

**Thirdly**, the applicant argues that the parties made a mistake in adopting written submission without and before the hearing of the suit. The applicant also argues that he was a part owner who was not party to the suit. He argues that the 1st Defendant only owned a share of the suit property and therefore it was wrong to proceed with a suit without involving the other parties. No reason was given as to why the other parties were not involved. The 2nd Defendant applicant was only enjoined in the matter to remove a caution he had placed on the suit land. The applicant contends finally that he would suffer irreparable loss if the orders are not granted.

The Respondent on her part submits that the 2nd Defendant became party when the application to remove the caution was made but was aware of the case and therefore cannot raise the issues now. She argues that this court cannot seat on its own appeal as it has already made a decision. The 1st Defendant supports the application and states that she was not aware that her advocate Mr. Mahugu was not in control of his senses.

The application is made under the provision of Order 45 Rule 1 (sub rules 1 and 2) Rule 2 and Section 3A of the Civil Procedure Rules. This rule provides that any person considering himself aggrieved:-

**(a) by a decree or order from which an appeal is allowed, but from which not appeal has been preferred; or**

**(b) by a decree or order from which no appeal is hereby allowed;**

**and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.**

Order 45(2) provides that a person not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

This court finds that the applicant has properly invoked order 45 rule 2 as the notice of appeal herein which has neither been struck out or withdrawn was not filed by the applicant.

I have read the application herein, the supporting affidavit, replying affidavit and have considered the rival submissions and found on the 26.2.2004, the Plaintiff filed an Originating Summons against the Plaintiff for determination of the following issues.

- 1. That there be a declaration that the Defendant/Respondent holds the suit and Title No. AGUTHI/GATITU/11 in trust of the Plaintiff/Applicant to the extent of half thereof.**
- 2. That by Reason of breach of trust the Defendant/Respondent be ordered to have the said portion of half of the said suit land registered in the name of the Plaintiff/Applicant**
- 3. That the Defendant/Respondent be ordered to execute all the necessary documents to effect the said transfer failing which the Executive Officer of this Honourable Court be authorized to do so.**

The Originating Summons was supported by affidavit sworn by the Plaintiff stating that she was a daughter of one RAMADHANI MURINGWA deceased who died in June, 2003. One Rajab Ramadhani Muringwa was her real brother while at all material times she was the only surviving sister and was a dependent of her said parents. In 1962 her said father in Kangemi Nyeri Towni purchased Land title No. AGUTHI/GATITUE/11 comprising of 0.544 hectares which he got registered in the names of her mother. That after the death of her mother, the said RAJAB RAMADHANI MURINGWA without her knowledge secretly succeeded the said land and got himself registered as the proprietor thereof and upon his death in 1997, his wife had again secretly and without her knowledge succeeded him and got herself registered as proprietor thereof during or about March, 2003 which was in breach of their trust to her as a beneficiary therein. She believed that due to the aforesaid reasons she was legally entitled to half of the said land which by reason of the said breach of trust on the part of her said brother she was entitled to get that half share in a separate title.

The 1st Defendant filed a reply to the Originating Summons stating that she was the registered trustee of land title AGUTHI/GATITU/11 on behalf of four others and therefor the Originating Summons dated 26th February 2004 had no merit, incompetent and fatally defective since the order sought therein was inapplicable. That the Applicant was a total stranger with no locus to seek such orders in the circumstances. That the affidavit sworn by Fatuma Ramadhan Muringwa on the 26th February 2004 was bare of any relevant facts to enable the Applicant herein be granted any orders. That in any event, the due

process of the law was followed in the succession process and that the orders sought in the Originating Summons were malicious as clearly.

When this matter came up for hearing the Petitioner consented to have it determined by way of pleadings and submissions.

The honourable judge considered the originating summons and found that the suit was brought under Order XXXVI rules 1 and 3(d) (1) Rules. The court found that the Plaintiff was a sister to Rajab Ramadhan Muringwa (deceased), while the defendant was a widow to the late Rajab Ramadhani Muringwa. The Registration for AGUTHI/GATITU 11 was opened on 21.2.1979. The learned judge held:

**“I am convinced that under the circumstances of this case that a resulting trust should be presumed. The plaintiff was and is a beneficiary of the estate of Mariam Binti Makuti, deceased. That constructive trust was carried over by the defendant who succeeded the late Rajab Ramadhan Muringwa.”**

Ultimately the judge found that the Plaintiff was entitled to half share of title No. AGUTHI/GATITU/11 hence the defendant was holding the same in trust for the Plaintiff. He directed the defendant to execute the necessary documents to have the half of the land Ref. No. AGUTHI/GATITU/11 transferred to the Plaintiff. In default of this, the Deputy Registrar was to step in place for the defendant. Each party to meet its own costs. Court expenses were to be shared equally.

Unknown to the honourable judge, the High Court of Kenya at Mombasa had issued a grant on the 27.5.1999 and confirmed the same on the 13.9.2000. In the schedule of Defendant's, the Plaintiff is not mentioned. The properly mentioned in the scheduled of assets was the suit land thus AGUTHI/GATITU/11.

I do agree with the applicant that the Originating Summons was determined without affording him a hearing and that the existence of the grant in Mombasa High Court Succession case No. 166 of 1998 was a fact that was not brought to the attention of the honourable judge. Had it been brought to his attention the judge could have arrived at a different decision. I do find that this would be sufficient reason to review the decision and decree of the court herein as the applicant who ought to have been made a party to the suit was left out and yet he was a beneficiary of the Estate of the deceased Ramadhani Muringwa who died in June 2003. It is a cardinal principle of the rule of law that no person shall be condemned unheard and therefore since the judgment in dispute was entered without hearing the applicant and yet it affected him the same cannot stand.

The upshot of the above is that the judgment delivered on 30.9.2009 is hereby reviewed wholly and set aside. No order as to costs as this is a family dispute.

DATED AND SIGNED AT ELDORET THIS.....DAY OF.....2015

**A.OMBWAYO**

**JUDGE**

DELIVERED AND SIGNED IN NYERI THIS 4<sup>TH</sup> DAY OF FEBRUARY, 2015

**LUCY WAITHAKA**

**JUDGE**