



**Cheruiyot v Chebochok & 3 others (Environment & Land Case
36 of 2018) [2023] KEELC 18175 (KLR) (15 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18175 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 36 OF 2018**

MC OUNDO, J

JUNE 15, 2023

BETWEEN

HEZRON KIMELI CHERUIYOT PLAINTIFF

AND

RUSI CHEPKEMOI CHEBOCHOK 1ST DEFENDANT

JOSEPH KIPYEGON SIGEI 2ND DEFENDANT

MOSES KIPKOECH SIGEI 3RD DEFENDANT

JOHN SIGEI 4TH DEFENDANT

RULING

1. Pursuant to the striking out of the Plaintiff's suit for being time barred by virtue of the provisions of the [Limitation of Actions Act](#) and secondly for being in contravention of the [Law of Succession Act](#) in that the Respondents had no legal capacity as vendors of the suit land, the firm of JK Bosek and Company Advocates have now filed the present application dated August 19, 2022 pursuant to the provisions of Order 9 Rule 9 and 10, Order 45 Rule 1 and 2, and Order 51 Rule 1 of the [Civil Procedure Rules](#) and Section 3A of the [Civil Procedure Act](#) and all other enabling provisions of the law seeking to come on record for the Plaintiff/Applicant. Counsel also seeks that the court reviews its order contained in the ruling of the April 15, 2021, vary the same and reinstate the suit for hearing. The Applicant has also sought for costs for the application.
2. The application is premised on the grounds therein and on the supporting Affidavit of the Applicant's Counsel dated the August 19, 2022 wherein he had sought leave to come on record and had proceeded to argue that the Applicant's action in the main suit having been founded on the recovery of land, the limitation period was 12 years as per the provisions of Sections 7 of the [Limitation of Actions Act](#). That there was therefore an error/mistake on the face of the record as the action herein was founded on a contract for purchase of and recovery of land and not based on ordinary commercial contract



whose limitation period was 6 years. That the period of 12 years had not lapsed from the time the cause of action accrued. That the court did not benefit from submissions from the Applicant's previous Counsel and mistakes of Counsel should not be visited upon innocent litigation. That it was in the best interest of justice that the prayers in the application be granted.

3. The application was opposed by the 3rd Respondent's Replying Affidavit dated October 13, 2022 and Notice of Preliminary Objection dated October 13, 2022 to the effect that the court had no jurisdiction to grant the orders sought. That the application was mischievous, vexatious, frivolous, trivial, unmerited, a non- starter and ill conceived. That whilst the application failed the threshold required for review, its supporting affidavit dated August 19, 2020 offended the provisions of Section 17 of the *Oaths and Statutory Declarations Act* as it was sworn by an Advocate on issues that were controversial and required the deponent to be well versed with.
4. Since the Preliminary Objection sought to dispose of the Application, the court, on the October 17, 2022 directed that it be disposed of in the first instance through written submissions. Only the Respondent complied.

Respondent's written submissions.

5. In support of the Preliminary Objection, the Respondent's submission after giving a history of the matter in question framed the issues for determination as follows
 - i. Whether the honorable court has jurisdiction to hear and determine this application.
 - ii. Whether the application has satisfied the threshold for grant of review orders.
 - iii. Whether the supporting affidavit dated August 19, 2020 offends the provisions of Section 17 of the *Oaths and Statutory Declarations Act*.
 - iv. Who should bear the costs of the application?
6. On the first issue for determination, it was the Respondent's submission that the suit was founded on sale agreements that were null and void abinitio the same having been executed in contravention of the law contrary to the provisions of Section 45(1) 55 and 82(b) (ii) of the *Law of Succession Act* in that they were executed after the demise of the registered proprietor Joseph Kipsigei Bii and before the Letters of Administration had been issued. That the persons engaged in the sale transaction over the deceased's property had no good title to pass as they had no capacity to represent the estate of the deceased. In so submitting the Respondent relied on a number of authorities including and not limited to *Muktur Dubow Hassan vs Shama Haji Ismail & Another [2021] eKLR*, *Virginia Mwari Thuraira vs Purity Nkirote Thurairira [2017] eKLR* the among others.
7. Secondly that the suit was statutory time barred by dint of Section 4 of the *Limitation of Actions Act*, the same having been filed after 13 years, 10 years, 8 years and 7 years respectively for each of the said agreements which surpassed the six years window for bringing an action based on a contract.
8. Reliance was placed on the decision in *Bartholomew Mwanyungu & Others vs Florence Dean Karimi [2018] eKLR* to submit that the Applicants' right to specific performance lapsed after the expiry of six years from the date the contract was entered into as is stipulated under Section 4 of the *Limitation of Actions Act*. That the provision of Section 7 of the said act was only applicable when one had adversely possessed land from its proprietor having lived on it continuously, openly, notoriously and uninterrupted for a period of 12 years.



9. That the court had no jurisdiction when the subject matter of the suit had dissipated and neither did it have jurisdiction when the Plaintiff sought to rely on the agreements that were invalid, illegal, null and void for contravening the provisions of the *Law of Succession Act*.
10. On the second issue as to whether the application had satisfied the threshold for grant of review orders, it was the Respondents' submissions that the Applicant had failed to substantiate this prayer. That Order 45 Rule 1 of the Civil Procedure Rules was clear on the threshold that needed to be met for an order or decree to be reviewed. Reliance was placed on the decision in the case of *Republic vs. Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR*.
11. That although the Applicant attributed his prayer for review on an error/mistake on the face of the record, he did not specify what the error was. That a view of the court, be it a wrong view, could not constitute a ground for review but could be a ground for an Appeal.
12. The Respondent's further submitted that the matter, being a contentious one that was based on evidential facts and issues of evidence, the Applicant's Counsel having not been party to the agreement, was not a competent witness to testify on the agreement, and neither was he a witness competent to be called to testify on the contents of his supporting affidavit which rendered the said affidavit dated August 19, 2022 incompetent. That in swearing the said affidavit in the manner he did, it would place him in a compromising situation when asked to relinquish his privileged position as an Advocate to be a witness in the same matter and this would be in contravention of Rule 8 of the Advocates (Practice) Rules. Reliance was placed on the case in *Copana Limited vs Panafrika Insurance Company limited [2015] eKLR*. The Respondent submitted that the said impugned affidavit was a candidate for dismissal.
13. As to who will bear the cost, it was the Respondents submission that costs followed the course. That the application therefore be struck out with costs to themselves.

Determination.

14. I have considered the Applicant's application herein, the Respondents' Replying Affidavit and Preliminary Objection as well as the Respondents' written submissions.
15. The firm of Advocates through which the Applicant brought the application filed their notice of a Notice of Change of Advocates dated the December 14, 2021 on the December 17, 2021 seeking to come on record in place of M/S WK Ngeno Lessan & Company Advocates wherein there has been no contention on service and therefore the court shall take it that there had been compliance with the provisions of Order 9 Rule 5 and 6 of the Rules to the effect that the firm of JK Bosek and Company Advocates are properly on record for the Applicant.
16. In the present matter, there is no doubt that the Applicant's suit had been struck out vide the court's ruling of April 15, 2021 for being time barred by virtue of the provisions of the *Limitation of Actions Act* and secondly for being in contravention of the *Law of Succession Act* in that the Respondents had no legal capacity to pass title as vendors of the suit land.
17. Upon the striking out of the suit, the Applicants then went and engaged the law firm of JK Bosek and Company Advocates to file the current application wherein Counsel sought to come on record so as to file an Application to have the court review its order, vary the same and reinstate the suit for hearing.
18. It is now a settled practice under the new constitutional dispensation that filing of written submissions is the norm as written submissions serve the purpose of expedience and amounts to addressing the court on the evaluation of the evidence of each party and analysis of the law. It is therefore trite that



a party who fails to file their submissions as ordered by the court is deemed as a party who has failed to prosecute and or defend the matter and therefor the said matter is liable for dismissal or to be considered as an unopposed matter. The filing of submissions having been ordered, the failure by the Applicant to exercise the leave granted to them to file the said submissions clearly demonstrates inertia and inordinate delay, lack of interest and/or seriousness on the Applicant's part and therefore the Preliminary Objection shall be deemed as unopposed but I shall determine it on its merit.

19. The application August 19, 2022 has been opposed by the Respondents in their Replying affidavit as well as their Preliminary Grounds of Opposition. I shall thus proceed to make a determination on the Preliminary Objection herein raised.

20. In the notorious case of *Mukisa Biscuit Manufacturing Comapany Limited vs West End Distributors Limited [1969] EA 696*, and in the case in *David Nyekorach Matsanga & Another vs Philip Waki & 3 Others [2017] eKLR* the court had held as follows:

' Traditionally, the case of Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd [1969] EA 696 has been the watershed as to what constitutes Preliminary Objections. The Court of Appeal in Nitin Properties Ltd v Singh Kalsi & another [1995 eKLR] also pellucidly captured the legal principle when it stated as follows:

'...A Preliminary Objection raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion... This statement of the law has been echoed time and again by the courts: see for example, Oraro v Mbaja [2007] KLR 141.'

21. I shall base my issues for determination on the Preliminary Objection raised by the Respondent as to whether the court had no jurisdiction to grant the orders sought in the Applicant's application based on the following:-

- i. The Supporting Affidavit dated August 19, 2020 offended the provisions of Section 17 of the *Oaths and Statutory Declarations Act* as it was sworn by an Advocate on issues that were controversial and required the deponent to be well versed with.
- ii. The court had no jurisdiction to decide on a matter that was based on invalid, illegal, null and void the agreements that contravened the provisions of section 45(1) 55 and 82(b) (ii) of the *Law of Succession Act*.
- iii. The suit having been found to be statutory time barred by dint of Section 4 of the *Limitation of Actions Act*.
- iv. The application had not satisfied the threshold for grant of review orders.

22. Considering the implications of paragraphs 5, 6, 7, 8, 10, 15, 20 and 21 of the Supporting Affidavit sworn on the August 19, 2020 by Counsel to the Applicant, I find that the same, and in agreement with the Respondent, did not conform to the provisions under Rule 8 of the Advocates Practice Rules which prohibits Counsel from entering into an arena of a dispute in contentious matters where they could be required to give evidence either through an affidavit or orally.

23. The said provision of the law is as follows:

'No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or



by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear:

Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears.'

24. Indeed in a persuasive decision in the case in *East Africa Foundry Works (K) Limited vs Kenya Commercial Bank Ltd [2002] eKLR*, the court held as follows;

I have considered the rival arguments. I accept the submissions of Mr Akiwumi that in reality paragraphs 3,4 and 8(c) of the affidavit of Mr Ngatia contain not statements of facts of which he had personal knowledge but statements based on information the source whereof he has not disclosed. Accordingly those paragraphs offend Order 18 rule 3(1) of the Civil Procedure Rules. I also accept the further submission of Mr Akiwumi that indeed they consist of contentious averments of fact which an advocate should not be allowed to depose to in a case where he is appearing as such. I have always deprecated depositions by advocates on contentious matters of fact in suits or applications which they canvass before the courts and I have never had any hesitation in striking out such depositions as a matter of good practice in our courts. The unseemly prospect of counsel being called upon to be cross-examined in matters in which they appear as counsel must be avoided by striking out such affidavits as a matter of good practice. As regards paragraphs 9, I accept the submission of Mr Ngatia that it is no more than a deposition as to his understanding of the law in response to an affidavit by a fellow advocate.

25. I agree with the holding of the court and have nothing useful to add.

26. On the second issue as regards jurisdiction of the court to decide on a matter that was based on agreements that contravened the provisions of Section 45(1), 55 and 82(b) (ii) of the [Law of Succession Act](#), as well as the provisions of Section 4 of the [Limitation of Actions Act](#), I find that the court had pronounced itself vide its decision of the 15th April 2021, as follows;

'Having considered the evidence before me as well as the exhibits herein produced, it clearly emerges that Section 55 of the [Law of Succession Act](#) was not complied with before these properties were transferred.

The sale agreement therefore did not pass title to the Plaintiff/Applicant herein and the same was incapable of being enforced. I therefore hold and find that the Defendant/Respondents did not hold a valid title to the suit property to enable them to sell and/or transfer the same to the Plaintiff.'

27. The court further held that;

'this matter was based on a sale contracts for the purchase parcel of land known as No Kericho/Kipkuror/42, which contracts were executed on diverse dates, being the January 25, 2005, April 27, 2008, April 27, 2010 and January 11, 2011. Essentially therefore, the Plaintiff/Applicant's cause of action arose when the Defendant/Respondent's herein allegedly sold to him the suit land.



That subsequently the Plaintiff filed the present suit on the May 11, 2018 which was 13 years, 10 years, 8 years and 7 years respectively which was way outside the 6 years set under the [Limitation of Actions Act](#) for seeking relief.

The issue of limitation goes to the jurisdiction of court to entertain claims and therefore if a matter is statute barred, the court has no jurisdiction to entertain the same.'

28. The above captioned issue having been raised in both the application and the Grounds of Preliminary objection, and the court having previously deliberated on the same, I find that the said issues are res judicata and in contravention of the provisions of Section 7 of the [Civil Procedure Act](#) and therefore the court has no jurisdiction to delve into the same.

29. The Applicant has faulted this finding of the court and seeks that the court reviews the same which application was objected to by the Respondent to the effect that it had failed the threshold required for Review under Order 45 Rule 1 of the Civil Procedure Rules which provides as follows;

'Any person considering himself aggrieved-

- a. By a decree or order from which an appeal is allowed, but from which no 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 review of judgment to the court which passed the decree or made the order without unreasonable delay.'

30. Section 80 of the [Civil Procedure Act](#) further provides that:-

'Any person who considers himself aggrieved-

- (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is allowed by this Act, May apply for a review of judgement to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.'

31. From the above provisions, it is clear that whereas Section 80 of the [Civil Procedure Act](#) gives the court the power to review its orders, Order 45 Rule 1 of the Civil Procedure Rules sets out the rules which restrict the grounds upon which an application for review may be made. These grounds include;

- i. discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the Applicant or could not be produced by him at the time when the decree was passed or the order made or;
- ii. on account of some mistake or error apparent on the face of the record, or
- iii. for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.



32. The main grounds for review are therefore; discovery of new and important matter or evidence; mistake or error apparent on the face of the record; or for any other sufficient reason and most importantly, the application has to be made without unreasonable delay. In this case the Applicant did not specify what apparent error he had discovered on the face of the record.
33. In the decided case of *Ajit Kumar Rath vs State of Orisa & Others* on November 2, 1999 Court at Page 608 the Supreme Court of India had this to say:-
- ‘A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it.’
34. The mere view of the court be it wrong cannot therefore be a ground for review although it may be a ground for an appeal.
35. All this said and done. I find in favour of the Respondent’s a Preliminary Objection and proceed to dismiss the application dated August 19, 2022 with costs.

DATED AND DELIVERED VIA TEAMS MICROSOFT AT KERICHO THIS 15TH DAY OF JUNE 2023.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

