Bartilol & another v Ngomat (Environment & Land Case 39 of 2015) [2025] KEELC 1331 (KLR) (19 March 2025) (Ruling)

Neutral citation: [2025] KEELC 1331 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE 39 OF 2015

CK NZILI, J

MARCH 19, 2025

BETWEEN

DINAH JEPKEMOI BARTILOL ..... 1ST PLAINTIFF

JAPHETH KIPROTICH BARTILOL ..... 2ND PLAINTIFF

AND

MARTIN SANGULA NGOMAT ..... DEFENDANT

RULING

1. By an application dated 20/4/2023, the applicant has asked the court to review or vary its judgment delivered on 31/7/2017 and to direct the respondents to refund Kshs. 2,010,000/= plus interest at the court rate from 27/12/2005. The grounds on the face of the motion are that it was a finding in the said judgment that the applicant entered into a sale agreement with respondents and paid Kshs.2,010,000/=; the sale was contrary to the *Law of Succession Act* since the grant had not been confirmed for the estate of John Kiptum Bartilol and for lack of a land board consent.

2. The applicant avers that the issue of the land board consent was not raised in the pleadings; he has not filed an appeal on the judgment; he has discovered a new matter under the *Land Control Act*, which provides for a refund of the purchase price.

3. The applicant avers that the court did not address the issue of the purchase price, and the respondents will unjustly enrich themselves unless the orders sought are granted since the respondents will have both the land and the money. The applicant also avers that he stands to suffer prejudice for being condemned unheard, loss of the land as well as the purchase price.

4. In further grounds adduced in his affidavit sworn on 20/4/2023,the applicant gives a brief background of the case and has attached as annexures MSN 1 - 6; the plaint in ELC Case No.37 of 2015; a memorandum of appearance; application dated 13/7/2015; ruling dated 21 /1/2016; plaint in ELC Case No. 39 of 2015 and the judgment delivered on 31/7/2015.

5. The application is opposed through a replying affidavit sworn by Dinah Jepkemboi, the 1st respondent, on 6/5/2023. She avers that ELC Case No. 37 of 2015, filed by the applicant, and ELC Case No.39 of 2015, which the respondents filed, were tried at the same time. The 1st respondent alleges that the applicant did not claim the sum of Kshs.2,010,000/= from the respondents, either in his main suit or in his counterclaim. The first respondent avers that the prayer for review to order for refund of the purchase price is frivolous and an abuse of the court process, since it was neither pleaded nor determined, and no evidence was led to that effect. Therefore, the 1st respondent avers that the applicant's claim is res judicata, and the court has no jurisdiction to review the judgment.

6. In written submissions dated 3/2/2024, the applicant identifies three issues for determination. On whether the application is res-judicata, the applicant relies on Sections 107 and 112 of the *Evidence Act*, Henderson v Henderson [1843] 67 ER 313 citing with approval Muguongo & Another v Karombori & Another (2023) KEELC 22206 (KLR), Frann Investment Limited v Kenya Anti-Corruption Commission & 6 others [2024] KECA 714 (KLR) citing with approval Torino Enterprises Ltd v The Attorney General (Petition 5 (E006) of 2022) [2023] KESC 79 (KLR) (22 September 2023) (Judgment). It is submitted that the evidential burden was on the respondents to prove res-judicata since the issue of a refund of the purchase price never arose during the trial, and neither were the provisions of Section 7 of the *Land Control Act* invoked by the parties.

7. The applicant submits that the suit land is yet to be registered in the name of the allottee, who was then deceased, and thus, the allotment letter and transfer were incapable of transferring any interest in land, subject to the provisions of the *Land Control Act*.

8. Regarding the orders sought, the applicant submits that in the circumstances that the judgment is not reviewed in view of the purchase price paid to the respondents, which is a new matter raised by the court Suo moto in its judgment, it will amount to unjust enrichment for having both the land and the money. Reliance was placed on Sections 3, 3A, 34, and 80 of the *Civil Procedure Act*, Steve Ouma: A Commentary on the *Civil Procedure Act*, Cap 21, Registered Trustees of the Archdiocese of Dar es Salam v Chairman of Banju Village Government & others C A No. 47 of 2006 as cited in Abdalla & 6 others v Khansa Developers Limited &3 others [2024] KEELC3667(KLR). In sum, the applicant submits that a party should not benefit from an illegality and, therefore, the application should be allowed as prayed.

9. The respondents rely on submissions dated 18/5/2024. Reliance is placed on Section 80 of the *Civil Procedure Act*, Order 45 Rule 1 of the Civil Procedure Rules and DSV Silo v The Owner of Sennar (1995) 2 ALL ER104 and Bernard Mugo Ndegwa v James Nderitu Githae & 2 others [2010] eKLR. Similarly, the respondents submit that the court has no jurisdiction over the issues raised in the application, which ought to be dismissed with costs.

10. The issues for determination are:-

    i. Whether the application is res-judicata.

    ii. Whether the applicant has established a basis for review of this court's decision.

    iii. Whether the *Land Control Act* was applicable to the transaction.

    iv. What is the order as to costs?

11. The facts of this matter are that the applicant, as the plaintiff, sued the 1st respondent as the defendant in ELC Case No. 37 of 2015, seeking to be declared as entitled to be transferred 25 acres and to use an extra 36 acres out of Plot No. 5 Ndalala Settlement Scheme – the suit land, and costs of the

suit. The defendants filed an application dated 13/7/2015, which was dismissed with costs vide a ruling dated 21/3/2016. Subsequently, the respondents herein, as the plaintiffs, filed a suit as the legal representatives of the late John Kiptum Bartilol. The respondents prayed for invalidation of the sale agreement, mesne profits over 75 acres at the rate of Kshs.10,000/= per acre annually, from 11/1/2016, until the defendant to the suit ceased utilizing the 75 acres not paid for; eviction and costs of the suit.

12. The respondents also filed another application where they sought for the applicant to be restrained from tiling or ploughing or in any way interfering with the suit land; to remove the men at the farm who were intimidating the respondents with grievous harm; the defense be struck out; judgment be entered for invalidation of the sale agreement and payment of mense profits on the 75 acres at Kshs.10,000/ = per acre, from January 2006 to December 2014; eviction and interest. The said application was dismissed by the court on 21/1/2016.

13. Consequently, the two suits were consolidated and heard, and the court dismissed the applicant's claim in ELC Case No.37 of 2015 and his counterclaim in ELC Case No.39 of 2015.

14. The application is attacked for being res judicata. Section 7 of the *Civil Procedure Act* which provides that:

> " No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

15. The Black's Law Dictionary 10th Edition defines "res judicata" as:

> " An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits, and (3) the involvement of same parties, or parties in privity with the original parties..."

16. Section 80 of the *Civil Procedure Act* provides as follows: -

    a. "Any person who considers himself aggrieved 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 judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."

17. Order 45 Rule 1 of the Civil Procedure Rules, on the other hand, states that :

    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 a review of the judgment to the court which passed the decree or made the order without

unreasonable delay. See Benjoh Amalgamated Limited & Another v Kenya Commercial Bank Limited [2014] eKLR.

18. In this application, the applicant alleges that there was discovery of a new matter under the *Land Control Act*, which provides for a refund of the purchase price paid. He further alleges that if there is no refund, it would amount to unjust enrichment since the respondents will have the land and the consideration. Section 7 of the *Land Control Act* provides that where money or other valuable consideration has been paid in the course of a controlled transaction which becomes void under the Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, subject to Section 22 thereof. See M'ringera M'nyange v M'murungi M'ngatunyi [2008] eKLR.

The respondents oppose the application on account of res judicata

19. Looking at the rescinded sale agreement, clause 6 thereof provided that the vendor, (1st respondent), undertook to execute all necessary land control board consent and sign forms in favor of the purchaser. It is, therefore, evident that the provisions of the *Land Control Act* were well within the reasonable knowledge of the parties. The applicant appears to be reading the law in hindsight. Ignorance of the law is not a defense. The applicant was ably represented at the hearing of the two suits.

20. He ought to have pleaded or raised the issue of the refund of the purchase price appropriately. On this score, the ground that he has discovered a new matter of evidence fails because had he been diligent enough, the applicant would have explored his options. Res judicata aims at bringing finality to litigation as held in Maina Kiai v IEBC [2017] eKLR. It makes a judgment conclusive. A party in a case is expected to bring forward his whole case, and unless in exceptional circumstances, a party will not be permitted to reopen the case in respect of a matter that might have been brought forward as part of the subject matter in contest, out of negligence, inadvertence or accident. See Gurbachan Singh Kalsi v Yowani Ekori Civil Appeal No. 62 of 1958 [1958] EA 450

21. A party is also at liberty to forgo part of his claim. Once he chooses to forgo it, he cannot be heard to complain, otherwise he cannot be allowed to litigate by installments. See Apondi v Canuald Metal Packaging [2005] 1 EA 12.

22. The applicant urges the court to find that he has discovered a new material that was not available, hence the need for review. In Republic v Advocates Disciplinary Tribunal, Ex parte Apollo Mboya [2019] eKLR, the court held inter alia that; the mere discovery of new or important matter or evidence does not amount to a sufficient ground for review. A party seeking review ought to show that such matter or evidence was not within its knowledge, and even after the exercise of due diligence, the same could not have been produced before the court/tribunal. In my view, there is nothing new at all. It was within the applicant's knowledge that some money had been paid as consideration. The pleadings were about the alleged aborted sale agreement. There cannot be an agreement without a consideration. The applicant knew, as a matter of fact, that in the absence of value in exchange for his consideration, a refund should be the natural consequence.

23. An application for review must be made without undue delay. The decision sought to be reviewed was rendered on 31/7/2017, and the application for review was filed on 23/2/2024. The delay of almost seven years has not been explained. Order 45 Rule 1(1)(b) of the Civil Procedure Rules requires such an application as this, to be made without unreasonable delay.

24. In the circumstances, the application is devoid of merits and is dismissed with no order as to costs.

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT KITALE ON THIS 19TH DAY OF MARCH 2025.

In the presence of:

Court Assistant - Chemutai

Wanyama for the Applicant present

Kraido for the Plaintiff/Respondent absent

HON. C.K. NZILI

JUDGE, ELC KITALE.