



REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL CASE NO. 10 OF 2000

RAEL TARKOK SAWE)

PHILIP KIPROP SAWE)

**FRANCIS KIPKEMBOI SAWE) (All suing as representatives of the estate of
The estate of the late DAVID CHEPTUM SAWE).....PLAINTIFF**

VERSUS

JOHN KIPSAONA CHEROTICH.....1ST DEFENDANT

PERIS JEPKEMBOI KIMUTAI)

ISAAC KIBIWOT CHEROP)

FRANCIS KIPSANG KIMUTAI) (Legal representatives of the estate of the

Late Wilson Kimutai Cherop)2ND DEFENDANT

KIPRONO ARAP TOROITICH.....3RD DEFENDANT

ATTORNEY GENERAL.....4TH DEFENDANT

CHIEF LAND REGISTRAR.....5TH DEFENDANT

JOHN KOSGEI TOROITICH (Legal representative of the estate of the

Late Toroitich Cheboi).....INTERESTED PARTY/6th DEFENDANT

RULING

The applicants filed an application dated 17th July 2018 seeking the following orders;

- Pending the hearing of the application the court stay all proceedings herein
- Pending the hearing of the application the court stay the proceedings herein and in particular the cancellation of Title of the parcel of land known as Kaptagat/Block 1 (Lotonyok)/10 be stayed.
- The Honourable court enjoin the applicant as a defendant in the suit.
- The honourable court review and set aside the judgement of 29th May 2015, grant the defendant leave to defend this suit and order for a fresh hearing of the suit.

The application is founded on the grounds that the court ordered the cancellation of title on 29th May 2015, of land parcel Kaptagat/Block 1 (Lotonyok)/10 and the late Toroitich Arap Cheboi was not enjoined in the proceedings. That the court has jurisdiction to review the same and the defendant has a good defence. Further, that unless the application is allowed his right to be heard shall be violated and that the plaintiff

shall not suffer any prejudice.

APPLICANT'S CASE

The applicant filed an affidavit in support of the application. He also filed submissions.

In his supporting affidavit, the applicant averred that the suit parcel is registered in the name of the deceased and annexed the green card as JKT2. When the administrator visited the lands office in Eldoret to obtain a search to facilitate the confirmation of grant he was informed that the title was due for cancellation in execution of the court order. He annexed the pleadings and the judgment and averred that his father was not a party to the said suit.

The judgment affects the estate of the late Toroitich Arap Cheboi. The applicant was born and raised on the suit property and in 1990 he was allocated Kaptagat/Block 1 (Lotonyok)/ 10. He occupied the property from 1990 and made some developments on it. He averred that the court erred in failing to give his father an opportunity to be heard at the trial which resulted from a flawed process and unless it was corrected the applicant would forever lose the family asset.

The applicant filed a supplementary affidavit on 3rd September 2018. He averred that despite the estate of the deceased being unrepresented, it was wrong not to enjoin the estate of the deceased. He questioned how one could sue the deceased's estate but move to court to have the deceased person's title cancelled. At the time of the death of the deceased, his children occupied the land but were not served with any documents thus they were unaware of the existence of the suit.

The land was allocated to the late Toroitich Cheboi and the applicant is only administering the estate. The deceased was not aware of the suit nor was he enjoined in the suit yet his title was ordered to be cancelled thus offending the principles of natural justice.

The applicant also filed submissions in support of his application. He submitted that there are laid down procedures in succession on how to sue the estate of a deceased person which the plaintiffs ignored yet they moved to court to have the deceased's title cancelled. This was a violation of the applicant's right to a fair hearing as per article 50 of the constitution. he relied on the case of **Richard Nchapi Leiyangu vs. IEBC & 2 others and Salome Mumbi Karumba v Stephen Ndichu Njihia (2017) eKLR**. He also cited the case of **JMK vs MWM & Another (2015) eKLR**.

The plaintiff's reason for cancellation was that the titles had been acquired fraudulently. How did the court establish that the title had been acquired fraudulently if he was not a party to the suit? A registered proprietor's title can only be defeated in accordance with *Section 26(1) (a) of the Land Registration Act*. The court could not prove fraud against the deceased's estate as there is no way the court could make a determination against a person who was not a party to the suit. The applicant ought to have been afforded an opportunity to prove the land was not fraudulently acquired.

The applicant submitted that he had met the threshold for being enjoined as a party to the suit as the deceased's estate is directly affected by the judgment of the court. Order 1 Rule 10 provides for the addition of a party to the suit at any stage of the proceedings. The applicant cited the case of **Pravin Bowry v John Ward & another (2015) eKLR**, he also cited the case of **Benjamin K. Kikulei v County Government of Mombasa & Another (2015) eKLR** and **Civicon Limited v Kivuwatt Limited & 2 others [2015] eKLR**.

The court should issue orders for stay of execution proceedings pursuant to *Order 22 of the Civil Procedure Rules*. He relied on the case of **Kenya Power and Lighting Company v Esther Wanjiru Wokabi (2014) eKLR**. He submitted that the applicant has shown that by judgment dated 29/05/2015 the deceased's title was cancelled in proceedings in which the deceased's estate was never given a chance to defend hence breaching the rules of natural justice.

The application was made diligently as the applicant did not have knowledge of the suit until July 2018 when he visited the land registry. The applicant could not have moved the court before the judgment as he was not aware of the existence of the suit.

The applicant has demonstrated that the deceased right to own property was breached and that judgment delivered cancelled the deceased's title without granting him an opportunity to defend it.

Order 45 Rule 1(b) of the Civil Procedure Rules sets out rules for review and gives requirements that should be met by an applicant before a court can grant him review orders. The grounds for review was set out in the case of **Stephen Gathua Kimani v Nancy Wanjira Waruingi t/a Providence Auctioneers [2016] eKLR**.

The applicant submitted that he has met the criteria for grant of review orders and setting aside of the judgment of the court.

There is no appeal pending and the applicant could not appeal the suit as he was not a party to it.

PLAINTIFF'S/RESPONDENT'S CASE

They filed a replying affidavit to the application and a further affidavit, all sworn by Phillip Kiprop Sawe. Toroitich Arap Cheboi passed away in 1988 and not 1998 as per annexure JKT-1 and the applicant seeks to mislead the court. At the time of filing of the case, his estate was not represented and could not be a subject of the case. The estate remained unadministered until 29/11/2016 and the administrators cannot run to court late in time to stop the plaintiffs from enjoying the fruits of judgment.

Land Parcel No. Kaptagat Block 1(Lotonyok) 10 was registered in the name of Toroitich Cheboi but the court declared it fraudulently acquired and ordered its cancellation. The title was issued to him on 14/12/1990 when he was already deceased and there is no way he could

have resurrected to execute the necessary documents.

The applicant could not have failed to have heard of this matter when the deceased's son Kiprono Toroitich had been sued as the 3rd defendant herein. It is not true that the applicant was allocated land yet the same was in the name of the deceased. The applicant cannot seek to be enjoined and ask for review orders in the same application.

In their further affidavit, the plaintiffs annexed a death certificate as PKS-5 to prove that the deceased died in 1988. The documents to transfer the subject land to the deceased were all forgeries as he had already passed away.

The plaintiffs filed submissions on 18th December 2018. They held the position that the application is incompetent and bad in law as the deceased died in 1988 and not 1998 as indicated on the grant letters. Thus, the application is premised on a defective grant.

The transfer instrument indicates that David Cheptum Sawe did not sign the transfer instrument. It also indicated that the deceased signed the same on 14/12/1990 yet his death certificate indicates that he died on 10/03/1988. He could not have signed a transfer instrument 2 years after his death.

They reiterated that Kiprono Arap Toroitich, the 3rd defendant herein is a son to the deceased therefore they cannot claim to not have known about the subsistence of the suit. The applicant's claim that his father died in 1998 amounts to perjury. The court was fully seized of the issue pertaining to the death of Toroitich Arap Cheboi and the purported fraudulent transfer instrument and title over Land Parcel No. Kaptagat Block 1(Lotonyok) 10 as per paragraph 25 of the judgment. The applicant waited 3 years to file the application and the delay is inordinate. The judgment has been the subject of proceedings before in Eldoret CA, Civil Application No. 59 of 2016 thus rendering this court functus officio. The respondents cited *Order 45 Rule 1*, *Thomas Ondieki v National Bank of Kenya (2011) eKLR*, *James M. Kingaru & 17 others v J. M Kangari & Muhu Holdings Limited & 2 others (2005) eKLR*, *Stephen Boro Githa v Family Finance Building Society & 3 others, Mwioko Housing Company Limited v Equity Building Society (2007) 2 KLR 171* among other decisions in support of their submissions.

1ST-3RD DEFENDANT'S CASE

They submitted that the court should order stay of execution. It is undisputed that there are contempt proceedings against some of the defendants herein for non-cancellation of titles as per the judgment therefore the act of cancellation is pending. Courts have discretion to order stay upon being shown sufficient cause.

They as well submitted that sufficient cause have been shown as there was an order of the court cancelling his title without affording him a right to a fair trial. The plaintiffs failed to follow the procedure set out in the law of succession.

The 3rd defendant was sued in his capacity as a proprietor of Land Parcel No. Kaptagat Block 1(Lotonyok) 11 and he should have been sued in his capacity as an administrator. He had letters of administration with regards to the estate. They cited the cases of *Troustik Union International v Mrs Jane Mbeyu and another – Nairobi CACA No. 145 of 1991*, *Coast Bus Limited v Samuel Mbuvi Lai – Nairobi CACA No. 8 of 1996* and *Peter Maundu Mua v Leonard Mutunga and another Machakos HCCC No. 305 of 1995*.

The right to be heard was also infringed upon by the plaintiffs and he relied on the case of *JMK v MWM & Another (2015) eKLR*.

The defendants further stated that the applicant is entitled to be enjoined as a party to the suit as it is without a doubt that he is registered as a proprietor of one of the suit properties and he was denied the right to be heard. the applicant can be enjoined after judgment as per JMK (supra). They also relied on the case of *David Kiptugen v Commissioner of Lands, Nairobi & 5 others [2016] eKLR*.

The 6th defendant was condemned unheard. *Section 80* of the *Civil Procedure Act* and *Order 45 Rule 1* of the *Civil Procedure Rules* provides the criteria upon which the court may be inclined to grant orders for review.

It was their submission that he had met the criteria and that the judgment be reviewed and set aside. It should then be placed before the Environment and land Court for hearing.

4th & 5TH DEFENDANT'S CASE

The 4th and 5th defendants submitted that the interested party had laid a basis for the court to allow the application. This was based on the fact that the title was cancelled when it was clear to the court that at the time of the suit he was deceased and neither he nor his estate could defend the legitimacy of his title as there were no letters of administration that had been issued. The fact that the deceased's son was a party to the suit did not give him capacity to represent the estate of the deceased as one cannot manage a deceased's property without being granted letters of administration. The estate was not represented by a competent party. They further submitted that the judgment was tainted with illegality on the ground that the court intermeddled with the deceased person's property.

They submitted that the errors on the certificate of grant are not fatal as they can be rectified, they relied on *Section 74* of the *Succession Act*. They concluded by saying that the proposed 6th defendant be allowed to ventilate his case and that his constitutional rights were infringed upon.

ISSUES FOR DETERMINATION

- a) Whether the Deceased was the proprietor of the suit land

- b) Whether the deceased was condemned unheard
- c) Whether the Applicant should be enjoined as a party in the suit
- d) Whether the Application was fatally defective because of the appeal
- e) Whether the court should review/set aside judgment
- f) Whether the delay in filing the application was unreasonable

WHETHER THE DECEASED WAS THE PROPRIETOR OF THE SUIT LAND

The respondent's case is that the deceased was registered as the proprietor of the suit land after he died and therefore he could not have signed the transfer documents. The Plaintiff's affidavit dated 8th October 2018, filed on 9th October 2018 annexed the death certificate of Toroitich Cheboi as PKS-5, which indicated that he died on 18th March 1988. The transfer document annexed as PKS-6 was dated 14th December 1990 and indicated that the deceased appeared before the land registrar and signed the document. This is a blatant contradiction as the deceased was already dead at the time the transfer documents were executed. It is therefore evident that the title was fraudulently acquired and the deceased was not the legitimate proprietor of the suit land.

WHETHER THE DECEASED WAS CONDEMNED UNHEARD

The deceased was not condemned unheard as it was evident that the title was fraudulently registered in his name. In the event that the estate had been represented in the suit it would have no proprietary rights to defend as it is crystal clear that the transfer documents were allegedly executed by the deceased 2 years after his death and the said parcel of land did not legitimately form part of the Estate. This is enough proof of fraud and the deceased and his estate had therefore no place in the suit.

WHETHER THE APPLICANT SHOULD BE ENJOINED AS A PARTY TO THE SUIT.

In COMMUNICATIONS COMMISSION OF KENYA AND 4 OTHERS V ROYAL MEDIA SERVICES LIMITED & 7 OTHERS, PETITION NO. 14 OF 2014 [2014] eKLR the supreme court held that:

“In determining whether the applicant should be admitted into these proceedings as an interested party we are guided by this Court's decision in the Mumo Matemo case where the Court (at paragraphs 14 and 18) held:

[An] interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause.

Similarly, in the case of Meme v Republic, [2004] 1 EA 124, the High Court observed that a party could be enjoined in a matter for the reasons that:

- (i) Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;*
- (ii) Joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;*
- (iii) Joinder to prevent a likely course of proliferated litigation.*

We ask ourselves the following questions:

- a) what is the intended party's stake and relevance in the proceedings" And b) will the intended interested party suffer any prejudice if denied joinder"*

Following the guidelines set above, the fact that the transfer document was evidently fraudulent, it follows that the presence of the estate of the deceased in the suit will serve no purpose and there are no proprietary rights that will be adversely affected in the absence of joinder. The intended interested party/6th defendant has no stake in the proceedings and will suffer no prejudice.

WHETHER THE APPLICATION FOR REVIEW WAS FATALLY DEFECTIVE BECAUSE OF THE APPEAL.

The respondents submitted that the court was functus officio as the judgment had been a subject of proceedings before the court of appeal.

The applicants had applied to file the notice of appeal out of time but the application was dismissed. The Notice of appeal was not filed and therefore the appeal could not be deemed to have been filed as well. In the premises the applicants were well within the law to file the application for review.

In Paul Obonyo v Kenya Revenue Authority & 2 others [2019] eKLR the court held;

However, in my humble view, I am persuaded by the reasoning of Justice G.A Pall in the case of Noradhco Kenya Ltd v Loria Michele (supra) where the Hon. Judge held that by filing a notice of appeal to the court of appeal, a party does not lose the right to file an application for review.

Therefore, the application was not fatally defective on that particular ground.

WHETHER THE COURT SHOULD REVIEW/SET ASIDE JUDGMENT

Order 45 Rule 1 states;

(1) 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 judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is 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.

The applicant has not met the threshold for review orders to issue. The applicant has not proven that there is any evidence that he will produce that would be important and change the outcome of the suit. Given that there is a death certificate on record indicating that the deceased passed on 2 years before the transfer instrument was executed by him, it is improbable that there is any evidence that would negate the fraudulent nature of that transfer. In the application, it is contended that the deceased acquired an interest in the suit land but the same interest appears to have been acquired after he had passed on. A grant of letters of administration is not proof of death therefore the death certificate is proof that the deceased died in 1988.

The court cannot therefore review or set aside the judgment as there has been no sufficient cause shown, to do the same.

WHETHER THE DELAY IN FILING THE APPLICATION WAS UNREASONABLE.

In *Stephen Gathua Kimani v Nancy Wanjira Waruingi t/a Providence Auctioneers [2016] eKLR* the court held;

I find that in absence of any explanation for the delay this is not a proper case for the court to exercise its discretion in favour of the applicant. In this regard, I find useful guidance in the court of appeal decision in the case of *Richard Nchapai Leiyangu vs IEBC & 2 others* where the court expressed itself as follows:-

“We agree with the noble principles which go further to establish that the courts’ discretion to set aside ex parte judgement or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice” (Emphasis added)

The Applicant has not given an explanation for the delay of three years. The judgment was delivered in 2015 and the application made 3 years later. I find that the delay was unreasonable and the application is a ploy to stop the plaintiffs from enjoying the fruits of the judgment.

In the premises, the application fails in its entirety. Costs goes to the respondents.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 27th day of June, 2019.

In the absence of:-

Mr. Njuguna and Mr. Kandie for Plaintiff/Respondent and Mr. Tororey for 1st, 2nd and 3rd defendants; And Mr. Kuria for 4th and 5th defendants.

Ms Sarah - Court clerk