



**Kemei & another v Mohamud & another (Environment & Land Case 60 of 2014) [2023] KEELC 21946 (KLR) (30 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21946 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERICHO  
ENVIRONMENT & LAND CASE 60 OF 2014  
MC OUNDO, J  
NOVEMBER 30, 2023**

**BETWEEN**

**SOLOMON KIPKOECH KEMEI ..... 1<sup>ST</sup> PLAINTIFF**

**JOSEPH KIPLANGAT RONO ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**MOHAMUD MOHAMED MOHAMUD ..... 1<sup>ST</sup> DEFENDANT**

**NATIONAL OIL CORPORATION OF KENYA LTD ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. Pursuant to the delivery of an ex parte judgment on the 10<sup>th</sup> day of March 2022, where the court had found in favour of the Plaintiffs, the 1<sup>st</sup> Defendant /Applicant filed an Application dated the 14<sup>th</sup> April 2022, seeking orders of stay of execution of the ex-parte judgment and for all the consequential orders to be set aside so that the suit could be heard on merit. The said application was dismissed via the court's ruling of 16<sup>th</sup> February, 2023.
2. Subsequent to the dismissal of the said application the 1<sup>st</sup> Defendant/Applicant then filed another application dated the 27<sup>th</sup> February, 2023 pursuant to the provisions of Sections 1A, 1B, 3A, 63(e) and 80 of the *Civil Procedure Act*, Orders 21 (rule 1), 24 (rules 2, 3 & 4), 45 rules 1,2 & 3, 51 (rule 1) the Civil procedure Rules seeking a review of the said ruling and thereafter for the setting aside of the court's judgment of 10<sup>th</sup> March, 2022.
3. The Application was supported by the grounds thereto as well as by an undated Supporting Affidavit sworn by the 1<sup>st</sup> Defendant/Applicant.
4. On 28<sup>th</sup> February, 2023, the Court directed for service of the said Application upon the Respondents and it was whilst awaiting compliance, that the 1<sup>st</sup> Defendant/Applicant filed yet another Application dated 3<sup>rd</sup> March, 2023 pursuant to the provisions of sections 1A, 1B, 3A, 63(e), and 94 of the *Civil*



Procedure Act, Orders 22 Rule 6 and 7, 51 (rule 1) of the Civil Procedure Rules seeking orders to restrain the Plaintiffs from carrying out an illegal eviction of the decree of the court dated 18<sup>th</sup> March 2022, entering trespassing or interfering with the 1<sup>st</sup> Defendants' possession and/or business and further, to set aside, and/or lift the purported or illegal execution of the decree against the 1<sup>st</sup> Defendant carried out on the 27<sup>th</sup> February, 2023, and consequently direct them to remove the barriers fixed and/or placed on the entrance and doors to the suit properties. The said Application was supported by the grounds therein and the Supporting Affidavit by the 1<sup>st</sup> Defendant/Applicant sworn on 3<sup>rd</sup> March 2023.

5. In his Replying Affidavit sworn on the 8<sup>th</sup> March, 2023 the 1<sup>st</sup> Plaintiff, Solomon Kipkoech Kemei, deponed that the 1<sup>st</sup> defendant's application was a blatant abuse of the Court process, an act of frivolity and vexatious litigation.
6. That after the court had declined to issue an order of stay of execution, and knowing very well that the court was not sitting, the 1<sup>st</sup> Defendant in an act of mischief and an attempt to use the back door, had approached the deputy registrar of the court seeking an order of stay of execution, which the court had earlier declined, and which orders had been granted by the Deputy Registrar without any legal basis.
7. That the Applicant lacked conscience as he was seeking to bar him (the 1<sup>st</sup> Plaintiff) from accessing his own property after a lawful judgment had been delivered. That indeed the 1<sup>st</sup> Defendant was not on the suit property as he had sub-leased it to Oilhub, a third party, without his (1<sup>st</sup> Plaintiff's) consent. That he had also attempted to register a sub-lease in an attempt to subvert the course of justice and frustrate him (1<sup>st</sup> Plaintiff) from accessing his property. That indeed he had obtained a certified copy of the register of his parcel, L.R No. Kericho/Kapsoit/1832 where he had confirmed that the 1<sup>st</sup> Defendant/Applicant had indeed subleased the property to Oilhub Limited, who were still in occupation of the premises further breaching his (1<sup>st</sup> Plaintiff's) property rights.
8. That pursuant to the registration of the decree of the court against the register (Ref; annexure SKK-1) of the property as per entry number 5 dated 28<sup>th</sup> February, 2023 under the proprietorship section, the lease to the Applicant had been effectively terminated and there was no longer any contractual basis to form the foundation of the multiple applications that he was filling in court.
9. That indeed the application dated 3<sup>rd</sup> March, 2023 had been overtaken by events and there was no legal basis upon which the Applicant's subtenant could access the premises and enjoy use and occupation to his (1<sup>st</sup> Plaintiffs) detriment.
10. That the court had pronounced itself and declined to grant the order for setting aside the ex parte judgement as well as the stay of execution sought by the 1<sup>st</sup> Defendant/Applicant herein vide a ruling dated 16<sup>th</sup> February, 2023 hence the instant applications amounted to being res judicata as the issues raised therein had already been adjudicated upon by the court. The Respondent sought for the Applications to be struck out with costs for being a sham and having been brought in bad faith.
11. Parties took directions to dispose the said Applications by way of written submissions which I shall summarize as herein under.

### **1<sup>st</sup> Defendant/Applicants' submissions**

12. The 1<sup>st</sup> Defendant Applicant, in support of his application dated 27<sup>th</sup> February, 2023 framed one issue for determination to wit;
  - i. Whether the Applicant's application is merited.



13. That 1<sup>st</sup> Defendant/Applicant placed reliance on Section 80 of the *Civil Procedure Act*, Order 45 of the Civil Procedure Rules, the decided cases of *Pancras T. Swai vs. Kenya Breweries Limited* [2014] eKLR and *Michael Mungai vs. Ford Kenya Elections & Nominations Board & Others & 2 Others* [2013] eKLR to submit that he had sought for an order of the review and or setting aside of the ruling of the 16<sup>th</sup> February 2022 (sic) as well as the judgment of 10<sup>th</sup> March 2022 on the ground of discovery of new and important evidence, error apparent on the face of record and other sufficient reasons.
14. That the 2<sup>nd</sup> Plaintiff herein passed away on the 20<sup>th</sup> of November, 2021 but neither the 1<sup>st</sup> Plaintiff nor their Advocates had informed the court of the same. That further at the time when the ruling was delivered on the 6<sup>th</sup> February, 2023, the Applicant was not aware of the demise of the 2<sup>nd</sup> Plaintiff as the Applicant only learnt of the said information from the administrator of the 2<sup>nd</sup> Plaintiff's estate upon conducting due diligence. That additionally, the demise of the 2<sup>nd</sup> Plaintiff was not brought to the attention of the Court on the 10<sup>th</sup> of March, 2022 when the matter came before the judge for delivery of judgement. That the 1<sup>st</sup> Plaintiff was well aware of the demise of his co-plaintiff but failed to inform the court since the court would have granted parties time to substitute the 2<sup>nd</sup> Plaintiff with the administrator of his estate to protect the interest of the deceased person's estate.
15. That the Applicant and the 2<sup>nd</sup> Plaintiff had reached an agreement which was signed and brought to the attention of the Applicant's previous counsel; the said counsel however, failed to file the same in court. That the said agreement was to aid in the conclusion of the claim by the 2<sup>nd</sup> Plaintiff herein as against the Applicant. That it was only upon appointment of the current Advocate and perusal of the court proceedings that the Applicant discovered that the court was never informed of the said agreement. Further that at the time of filing the previous application, the Applicant was not aware that the said agreement had not been filed in court. Ref was made to annexures MMM (a-c) and the decided case of *Tana 7 Athi Rivers Development Authority v Jeremiah Kemigho Mwakio & 3 Others* [2015] eKLR.
16. It was the Applicant's further submissions that the previous counsel who acted for him failed to attend court and/or inform the Applicant of the hearing and that when the matter came up for hearing, the Applicant was away on a business trip. That the said trip would not have been scheduled had the Applicant been informed that the instant matter was coming up for hearing. That the Applicant had appointed his previous Advocates on the presumption that they were in a position to safe guard his best interest but the said Advocate regardless of having full instructions failed to attend court on several occasions and in effect jeopardizing the Applicant's case.
17. That in as much as it was upon the litigant to follow up his case, there was also an obligation on the Advocate to inform his client of the date fixed as often when a date is fixed for hearing, the same is usually upon the counsel's availability as per their diary and not necessarily that of their client. That the possibility that a date could be fixed and the litigant not informed due to inadvertence on the part of the counsel was not far fetched and ought to be excusable to a certain extent. He thus urged the court to find that the Applicant did not deliberately fail to attend court on the date fixed for hearing and that the mistake of his Advocate ought not be visited on him.
18. On the ground relating to a mistake or error apparent on the record, the 1<sup>st</sup> Defendant/Applicant relied on the Provisions of Order 45 Rule 1 and Section 80 of the Act (sic) as well as on the decided cases of *Republic vs. Principal Secretary, Ministry of Internal Security & another Ex Parte Schon Noorani & Another* [2020] eKLR and *Paul Mwaniki vs. National Insurance Fund Board of Management* [2020] eKLR to submit that the issue of the demise of the 2<sup>nd</sup> Plaintiff was not captured in the court's ruling dated 16<sup>th</sup> February, 2023. That the 1<sup>st</sup> Plaintiff indicated vide a replying affidavit dated 8<sup>th</sup> June, 2022 that he had the authority of the 2<sup>nd</sup> Plaintiff to swear the affidavit despite having prior knowledge of



- the 2<sup>nd</sup> Plaintiff's death. That it was apparent that the 1<sup>st</sup> Plaintiff and their Advocates were willing to mislead the court in a scheme to object to granting an order for review sought by the Applicant, whereas they knew that the 2<sup>nd</sup> Plaintiff had passed on.
19. That a number of inconsistencies, contradictions and discrepancies with regards to the dates on which certain proceedings or actions were undertaken could be noted in the ruling of 16<sup>th</sup> February 2023, including;
    - i. Whereas paragraph 35 of the ruling states that the Plaintiffs' case proceeded on the 13<sup>th</sup> of May 2018, the proceedings indicate that the hearing proceeded one year late;
    - ii. Paragraph 36 of the ruling talks of a hearing date rescheduled for the 19<sup>th</sup> of January 2020 but no such date is found in the proceedings.
  20. The 1<sup>st</sup> Defendant/Applicant thus submitted that the said paragraphs ought to be corrected noting that wrong dates were alluded to which were not contained in the proceedings. That further the court in the said ruling indicated that the 1<sup>st</sup> Defendant had occasioned numerous adjournments of the matter while in the contrary the proceedings shows that the adjournments were occasioned by the 2<sup>nd</sup> Defendant and the Plaintiffs and that the 1<sup>st</sup> Defendant's counsel only sought for an adjournment on the 26<sup>th</sup> of October, 2020 and the 19<sup>th</sup> November, 2021.
  21. He further submitted that at the time of the delivery of the judgement of 10<sup>th</sup> March, 2022, there was no notice issued upon the 1<sup>st</sup> Defendant/Applicant and/or his Advocates on record. That the failure to issue the said notice was an error apparent on the face of record since on 2<sup>nd</sup> February, 2022, the 1<sup>st</sup> Defendant/Applicant's previous counsel did not appear in court and the judgement date was taken in his absence. Further that the Plaintiffs Advocates did not issue a judgement notice to the Applicant's Advocates hence when the matter came up for judgment, the Applicant's counsel did not attend court for judgement thus the proceedings of 2<sup>nd</sup> February, 2022 to 10<sup>th</sup> March, 2022 were a nullity for lack of issuance of a Notice to the Applicant's Advocates.
  22. Reliance was placed on the Provisions of Order 20 Rule 1 of the Civil Procedure Rules, the decided cases of Ngoso General Store Ltd vs. Jacob Gichunge Civil Appeal No 248 of 2001 [2015] eKLR, Mathew Kangora vs. Maretee Kotha [2016] eKLR and Mulla on Civil Procedure sixteenth edition at page 4119 to submit that failure to serve a notice rendered the judgement delivered a nullity and the same ought to be set aside.
  23. That from the foregoing, the Applicant had met the threshold for granting an order of review of the judgement and urged the court to allow the Applicant's application as prayed and accord the said Applicant an opportunity to give evidence in support of their case.

#### **1<sup>st</sup> Plaintiff/Respondent's submissions**

24. In opposition to the application dated 27<sup>th</sup> February, 2023 the 1<sup>st</sup> Plaintiff/ Respondent submitted that the said application forms substantially the same prayers as the application dated 22<sup>nd</sup> April 2022 to which they had raised the issue of Res judicata and further that the Application had been overtaken by events.
25. That further the supporting Affidavit to the said application and sworn by one Kimutai Robinson and all the allegations contained therein were facts of "conspiracy firefighting" as it was clear that the said administrators had not even filed any notice of change of Advocates or notice to act in person. That all their averments including notification of the death of the 2<sup>nd</sup> Plaintiff upon the firm of Mutai



Kiprotich & Company Advocates, were mischievous and needed to be treated with circumspection. The 1<sup>st</sup> Plaintiff/ Respondent thus framed his issues for determination as follows:

- i. Whether or not the application is res judicata.
  - ii. Whether or not the application merits the grant of review orders under Order 45 rule 1 threshold.
  - iii. Who should bear the cost of the Application.
26. On the first issue for determination as to whether the application was res judicata the 1<sup>st</sup> Plaintiff/ Applicant submitted that it was trite law that once an application had been adjudicated upon and had been determined on merits by the court, the party filing it was barred from regurgitating it and calling upon the court to reconsider the application. That the Applicant herein had fragrantly filed the application in violation of the said principle of law as the Application dated 27<sup>th</sup> February, 2023 and an earlier application dated 14<sup>th</sup> November 2023 which had already been determined sought that the judgement delivered on 10<sup>th</sup> March, 2023 be set aside and the defense case be reinstated for hearing.
27. He relied on the decided cases in John Florence Maritime Services Limited & another vs but. Cabinet Secretary Transport & Infrastructure & 3 others (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment) and Kennedy Mokuva Ongiri vs. John Nyasende Mosioma & Florence Nyamoita Nyasende [2022] eKLR where the court cited the case of Uhuru Highway Development Ltd vs. Central Bank of Kenya, Exchange Bank Ltd in voluntary liquidation) and Kamlesh Mansukhlal Pattni, to submit that the doctrine of res judicata applied with equal force and measure, to applications within the same suit. That it barred several applications on the same issue being filed one upon another which was the scenario in the instant case. That the Applicant was duty bound to bring all issues in the previous application dated 14<sup>th</sup> of April, 2022 and have them adjudicated upon and not to later file a similar application giving it cosmetic face-lift.
28. That the Applicant had tactfully and mischievously cited grounds here and there blaming everyone and everything. That unless restrained, the Applicant would never lack what to do in filing further applications of similar nature and tenor as the once determined.
29. On the second issue for determination as to whether or not the application merited the grant of review orders under the Order 45 rule 1 (sic) threshold, the 1<sup>st</sup> Plaintiff/Respondent placed reliance on the provisions of Order 45 Rule 1 of the Civil Procedure Rules and the decided case of Republic vs. Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR to submit that the affidavits in support of the application contained several grounds which did not qualify as new and important matters or evidence and neither did they qualify as mistakes or errors apparent on the face of the record.
30. That the said issues were not brought during the application dated the 14<sup>th</sup> of April, 2022 and their listing in the application dated 27<sup>th</sup> of February, 2023 offended both the provisions of Order 45 rule 1(a)sic) as no evidence had been tendered to show that they were matters or evidence which after the exercise of due diligence, were not within the knowledge of the Applicant or could not be produced by him at the time when the ruling or order dismissing the application dated the 14<sup>th</sup> of April, 2022 was made.
31. That the deponents of both supporting affidavits were not genuine as it was not clear whether the Applicant s discovered or remembered the facts they were stating only upon instructing the new counsel. That one Kimutai Robinson, the administrator of the estate of the 2<sup>nd</sup> Plaintiff had not filed a notice of change of Advocate or notice to act in person nor had they taken any step to withdraw the



case against the Defendant/Applicant. That the application was mischievous and was an attempt to force entry to the grant of orders earlier denied in the application dated 14<sup>th</sup> of April, 2022.

32. On costs, the 1<sup>st</sup> Plaintiff/Respondent submitted that the same followed the events of the suit and urged the court to condemn the Applicant to pay the costs of the application upon the order of its dismissal as that was the fate of the application. The 1<sup>st</sup> Plaintiff/Respondent thus submitted that the Application dated 27<sup>th</sup> February, 2023 be dismissed with costs to the 1<sup>st</sup> Plaintiff/Respondent.

### **Determination.**

33. Before I embark on the determination of the applications herein it must be remembered that both the Plaintiffs herein testified in court during the hearing of the main suit on the 13<sup>th</sup> May 2019 wherein their respective testimonies had been captured in the impugned judgment delivered on the 10<sup>th</sup> March 2022.
34. It is to be noted that pursuant to the delivery of the impugned judgment on the 10<sup>th</sup> March 2022, the Applicant herein filed an application dated 14<sup>th</sup> April 2022 where he had sought for orders of stay of execution of the ex-parte judgment entered against him and that all consequential orders be set aside so that the suit be heard on merit and he can be afforded an opportunity to be heard. The court had found that the said Application was without merit and had proceeded to dismiss it with costs on the 16<sup>th</sup> day of February 2023.
35. Following the said dismissal, the Applicant filed two other applications, one dated 27<sup>th</sup> February, 2023 seeking a review of the said ruling and thereafter the court's judgment of 10<sup>th</sup> March, 2022 be set aside so as to allow the defendant adduce evidence. The second application was dated the 3<sup>rd</sup> March 2023 where he had sought orders to restrain the Plaintiffs from carrying out an illegal eviction of the decree of the court dated 18<sup>th</sup> March 2022, entering, trespassing or interfering with the 1<sup>st</sup> Defendants' possession and/or business and further, to set aside, and/or lift the purported or illegal execution of the decree against the 1<sup>st</sup> Defendant carried out on the 27<sup>th</sup> February, 2023. That further there be orders directing them to remove the barriers fixed and/or placed on the entrance of doors to the suit properties.
36. I have considered the Applicant's applications herein, the 1<sup>st</sup> Respondent's Replying Affidavit as well as the parties written submissions to which I find the issues arising therein for determination as being;
- i. Whether there should be a review of the ruling of 16<sup>th</sup> February 2023
  - ii. Whether the applications are res judicata
  - iii. Whether the Applications are merited.
37. On the first issue for determination, Order 45 Rule 1 of the Civil Procedure Rules 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.”

38. Section 80 of the [Civil Procedure Act](#) provides as follows:-

“ 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.”

39. 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.

40. 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.

41. In this case, the reason given by the Applicant in his Application seeking to have the Ruling and Order of the 16<sup>th</sup> February 2023 reviewed and set aside was based on the discovery of new evidence to wit that the 2<sup>nd</sup> Plaintiff herein had passed away on the 20<sup>th</sup> of November, 2021 but this had not been brought to the attention of the court at the delivery of both the judgment and ruling. Secondly that the Applicant and the 2<sup>nd</sup> Plaintiff had reached an agreement which was not also brought to the attention of the court. That this discovery had been made only upon appointment of the current Advocate and perusal of the court proceedings.

42. On the issue as to whether there had been an error apparent on the face of the record which error the Applicant had termed as “inconsistencies, contradictions and discrepancies with regards to the dates” was in reference to the typographical error on the year at paragraphs 35 of the ruling where the court had indicated the date as 13<sup>th</sup> of May 2018 instead of 13<sup>th</sup> of May 2019, and paragraph 36 where the date had been indicated as 19<sup>th</sup> of January 2020 instead of 19<sup>th</sup> of January 2021, which errors I find were clerical errors that did not go to the crux of the matter nor add any meaningful assistance in view of the court’s conclusion. The said errors in my view did not generate any controversy, regarding the Judgment or decision of the Court nor change the substance of the Judgment or alter the clear intention of the Court.

43. Indeed Section 99 of the [Civil Procedure Act](#) allows a judge to correct “clerical or arithmetical mistake in judgments, decrees or orders, or errors arising therein from an accidental slip or omission” where the court can either evoke the provisions of the section on its own motion or an application.



44. The court of appeal in the case Leonard Mambo Kuria vs. Ann Wanjiru Mambo (2017) eKLR extensively discussed Section 99 and 100 of the [Civil Procedure Act](#) as follows:

“The application of these two sections [Sections 99 and 100 of the [Civil Procedure Act](#), CAP 21] has been considered before in several decisions. They vest a general power to the courts to correct or amend their records. As such they are an exception to the doctrine of ‘functus officio.’

45. In Republic vs. Attorney General & 15 others, Ex-Parte Kenya Seed Company Limited & 5 Others [2010] eKLR the court of Appeal had held as follows:-

“It is a codification of the common law doctrine dubbed ‘the Slip Rule’, the history and application of which has a wealth of authorities both locally and from common law jurisdictions. It is a rule that applies as part of the inherent jurisdiction of the court, which would otherwise become functus officio upon issuing a judgment or order, to grant the power to reopen the case but only for the limited purposes stated in the section.

Some of the applications of the rule are fairly obvious and common place and are easily discernible like clerical errors, arithmetical mistakes, calculations of interest, wrong figures or dates. Each case will, of course, depend on its own facts, but the rule will also apply where the correction of the slip is to give effect to the actual intention of the Judge and/or ensure that the judgment/order does not have a consequence which the Judge intended to avoid adjudicating on.

The Australian Civil Procedure has provisions in pari materia with section 99. As was stated in the case of Newmont Yandal Operations Pty Ltd v The J. Aron Corp & The Goldman Sachs Group Inc [2007] 70 NSWLR 411, the inherent jurisdiction extends to correcting a duly entered judgment where the orders do not truly represent what the court intended.

Nearer home the predecessor of this Court in Lakhmshi Brothers Ltd v R. Raja & Sons [1966] EA 313 endorsed that application of the rule, that is, to give effect to the intention of the court when it gave its judgment or to give effect to what clearly would have been the intention of the court had the matter not inadvertently been omitted. Spry JA in Raniga Case (supra) also stated as follows: -

A court will, of course, only apply the slip rule where it is fully satisfied that it is giving effect to the intention of the court at the time when judgment was given or, in the case of a matter which was overlooked, where it is satisfied, beyond doubt, as to the order which it would have made had the matter been brought to its attention.

What is certainly not permissible in the application of section 99, is to ask the court to sit on appeal on its own decision, or to redo the case or application, or where the amendment requires the exercise of an independent discretion, or if it involves a real difference of opinion, or requires argument and deliberation or generally where the intended corrections go to the substance of the judgment or order”.

46. Secondly, it is trite that before a review is allowed on the ground of a discovery of new evidence, it must be established that the Applicant had acted with due diligence and that the existence of the evidence was not within his knowledge when the decree was made. Hence it is not open to the Court to admit evidence on the ground of sufficient cause. The 2<sup>nd</sup> Plaintiff herein testified in court during the hearing



of the main suit on the 13<sup>th</sup> May 2019 wherein his testimony had been captured in the impugned judgment delivered on the 10<sup>th</sup> March 2022. Secondly when the Applicant filed his application that he now seeks to review, the 2<sup>nd</sup> Plaintiff had allegedly already passed away, in my opinion the omission mentioned as such in the said application cannot be said to be discovery of new and important matter or evidence which after due diligence could not have been within the Applicant's knowledge. The Applicant and his legal counsel simply did not act with due diligence, thus, it is not open to the Court to admit evidence even on the ground of sufficient cause. Besides, nothing stopped the alleged 2<sup>nd</sup> Plaintiff's administrators to seek to be joined to the suit to arrest either of the decisions. In fact, in his application dated the 3<sup>rd</sup> March 2023, the Applicant sought for injunctive orders against not only the 1<sup>st</sup> Plaintiff but both the Plaintiffs yet he now turns around to allege that he had discovered new evidence of the demise of the 2<sup>nd</sup> Plaintiff.

47. Lord Griffiths in his speech in the case of *Ketteman vs. Hansel Properties Limited* [1988] 1 ALL E.R. 38 AT Page 62 had this to say:

“...another factor that a judge must weigh in the balance is the pressure on the courts caused by great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall on their own heads rather than allowing an amendment at a very late stage of the proceedings. For these reasons, I decline to exercise my discretion in favour of the Applicant and dismiss the application with costs.”

48. On the third issue as to whether the application was made with unreasonable delay, it is not disputed that the impugned decision that the Applicant seeks to have reviewed was made on 16<sup>th</sup> February 2023 while the present application had been filed in court on 27<sup>th</sup> February, 2023 which was after a period of about 11 days. There was however no explanation for the delay. In *Mbogo Gatiuki vs A.G HCCC* 1983 of 1980, High Court, Nairobi Mwera J (as he then was) emphasized on the need to file applications for review without delay and to explain any delay thereto as ‘even a delay of a day or two calls for an explanation’.

49. I find that the application dated the 27<sup>th</sup> February 2023 does not meet the threshold set out under Order 45 Rule 1 of the Civil Procedure Rules and thus is not a proper case for the court to exercise its discretion to review its ruling in favour of the Applicant.

50. On the second issue for determination as to whether the application was res judicata the ruling of 16<sup>th</sup> February 2023, it is clear vide his application dated the 27<sup>th</sup> February 2023, the Applicant had sought for the setting aside of the court's judgment of 10<sup>th</sup> March, 2022 so as to allow the defendant adduce evidence. In his Application dated the 14<sup>th</sup> April 2022, the Applicant had also sought for orders of stay of execution of the ex-parte judgment entered against him and that all consequential orders be set aside so that the suit be heard on merit and he can be afforded an opportunity to be heard. The said application had been canvassed where a ruling dismissing the same was delivered on the 16<sup>th</sup> day of February 2023.

51. The substantive law on res judicata is found in Section 7 of the [Civil Procedure Act](#) Cap 21 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”

52. The doctrine of res judicata is important in adjudication of case and serves two important purposes;
- i. it prevents multiplicity of suits which would ordinarily clog the courts, and heave unnecessary costs on the parties to litigate and defend two suits which ought to have been determined in a single suit and
  - ii. it ensures litigation comes to an end; disappointed parties are barred from camouflaging already decided cases in new garment in the art of pleadings.
53. In order therefore to decide as to whether this Application is res judicata, a court of law should always look at the decision claimed to have settled, the issues in question and the entire pleadings of the previous case and the instant case to ascertain;
- i. What issues were really determined in the previous case;
  - ii. Whether they are the same in the subsequent case and were covered by the decision of the earlier case.
  - iii. Whether the parties are the same or are litigating under the same title and that the previous case was determined by a court of competent jurisdiction.
54. Looking at the circumstance of the present Application and pursuant to the ruling of 16<sup>th</sup> day of February 2023, where the court had found that the application had no merit and dismissed it, I find that the instant application is res judicata and the Applicant is estopped from litigating under the provisions on Section 7 of the *Civil Procedure Act* since the said issue had been settled by the previous judicial decision, it could not be resuscitated by another Application.
55. Indeed it was held in E.T vs. Attorney General & Another (2012) eKLR that:
- “The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the Plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi Vs National Bank of Kenya Limited and Others (2001) EA 177 the court held that, ‘parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.’ In that case the court quoted Kuloba J., in the case of Njangu vs Wambugu and another Nairobi HCCC No.2340 of 1991 (unreported) where he stated, ‘If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata.....”
56. There must be an end to Applications of similar nature otherwise there would be no end to interlocutory applications as much as there ought to be an end to litigation. Litigation cannot be conducted on the basis of trial and error and that is why there are provisions of the law and procedure to be adhered to. Based on the above finding, I thus find that the prayer sought in the 2<sup>nd</sup> limb in the Application dated 27<sup>th</sup> February 2023, is res judicata and an abuse of the court process. The said application is herein dismissed with costs to the 1<sup>st</sup> Respondent. There having been no orders of stay of execution of the court’s judgment and Decree, the Application dated the 3<sup>rd</sup> March 2023 must also fail.



DATED AND DELIVERED AT KERICHO VIA MICROSOFT TEAMS THIS 30<sup>TH</sup> DAY OF NOVEMBER 2023.

M.C. OUNDO

ENVIRONMENT & LAND COURT JUDGE

