



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT SIAYA**

**ELC CASE NO. 51 OF 2021**

**ALFRED OGOLA ODUL.....APPLICANT**

**VERSUS**

**JOSEPH ONYANGO YUAYA.....RESPONDENT**

**RULING**

**Introduction**

1. The gravamen of the application is of importance. By the decision of Siaya District Land Disputes Tribunal in **SYA/44/2005** between the parties, the applicant's claim in LAND PARCEL NUMBERS **Kathieno/B/694** and **Kathieno/B/694** (suit properties) was dismissed on 8/3/2006.
2. Aggrieved, the applicant appealed to the Provincial Land Disputes Appeals Committee however, before the appeal could be heard and determined, the ELC was established and consequently, the appeal was transferred to Kisumu ELC for hearing and determination.
3. Upon transfer, the applicant filed an application dated 14/03/2014 seeking a stay of proceedings in **Kisumu ELC No. 307 of 2013** and **Kisumu PMCC No.55 of 2006** and withdrawal of these two suits and their consolidation with this suit. However, the court on 13/06/2019 dismissed this application for non-attendance with costs to the respondent.
4. The applicant thereafter filed the instant motion dated 6/12/2021 in which he has sought orders.

**Applicant's case and Submissions**

5. The motion has not cited any provision of law and the applicant has sought several orders; an ongoing taxation be set aside, this suit be reinstated and his suit in **Kisumu ELC No. 307 of 2013** be reviewed. The motion is supported by the affidavit of the applicant dated 6/12/2021 in which he contended that his counsel and the respondent's counsel made improper misrepresentations before the court and that the misrepresentation led to the dismissal of the applicant's case in **Kisumu ELC No. 307 of 2013**.
6. The applicant filed written submissions dated 12/01/2022. He reiterated the averments in his motion and contended that the taxation process contravened the rule of law.

**Respondent's Submissions**

7. The respondent filed written submissions dated 12/12/2021 in which he contended that that by a ruling dated 2/3/2021, the court dismissed the plaintiff's appeal in **Kisumu ELC No. 307 of 2013** and that the application for review was time barred and an abuse of the court process and that in accordance with the provisions of **Order 45 of the Civil Procedure Rules**, the applicant had neither established that there was a new and important matter and that this court could not sit on an appeal in its own decision and that this is the 2<sup>nd</sup> time the applicant is seeking a review and his cases were dismissed in **Kisumu ELC No. 307 of 2013** on the respective dates of 27/7/2016 and 2/3/2021. According to him, the suit was essentially *res judicata*.

**Analysis and determination**

8. Having considered the motion, supporting affidavit, annexures, grounds of opposition and rival submissions, this court is of the considered view that the single issue falling for determination is whether the application is merited.

9. At the outset, I wish state that the manner in which both parties have filed their respective submissions are rather strange in law. The applicant has annexed documents to his while the respondent too has purportedly attached copies of court orders to his. Parties must advance their cases by means of evidence and not vide submissions. In the case of **Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR** the court stated thus;

***“Submissions cannot take the place of evidence... Such a course only militates against the law...Submissions are generally parties’ “marketing language””***

10. Be that as it may, I shall address my mind to the substratum of the issues to be determined.

11. The motion is in itself muddled up. The provisions of law the applicant relied upon in support of his case have not been posited. The orders he is seeking are rather confused and composite. On the taxation orders, he prayed that an ongoing taxation process be set aside. How can a matter that has not been determined be set aside? On the prayer for reinstatement, this court is not certain what he wants reinstated. Worse still, contrary to the provisions of **Order 51 Rule 15** of the **Civil Procedure Rules**, he has not sought to set aside whatever orders he wants this court to reinstate. On the prayer for review, he has sought for a review of **Kisumu ELC No. 307 of 2013** yet this matter is not the subject of this suit.

12. From the court record, there is no evidence that the instant suit was dismissed. What was dismissed was an application dated 14/03/2014. However, from the pleadings and court record, **Kisumu ELC No. 307 of 2013** had a bearing to the instant matter and this does not preclude that the suit was dismissed.

13. It is trite law that pleadings must be specifically pleaded and a party must endeavour to seek clear and specific orders because court orders can never be issued in vain.

14. In an adversarial system such as ours and subject to the relevant provisions of the law on the structure of particular pleadings, each party has the burden to chart his own case which binds him. The essence of this is to ensure certainty and finality so that each party knows well in advance the case that he has to meet and cannot be taken by surprise. It is trite law that courts are bound by pleadings presented before it by the parties and the court cannot enter the arena of litigation. As an independent arbiter, the courts role is to adjudicate upon the specific matters in dispute which the parties themselves have raised in their pleadings and not otherwise. This position of law was upheld by the Court of Appeal in the case of **Kenya Airports Authority vs Mitu-Bell Welfare Society & 2 others [2016] eKLR** that cited the decision of **Malawi Railways Ltd. -vs- Nyasulu [1998] MWSC 3** which equally quoted an article by **Sir Jack Jacob** entitled **“The Present Importance of Pleadings.” published in [1960] Current Legal problems, at page174** which stated thus;

***“Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation”.***

15. In upshot, it is my finding that the motion is not merited. It is trite law that costs follow the event and I award costs to the respondent. Before I issue my disposal orders, it is pertinent that parties address me on **Kisumu ELC No. 307 of 2013** which in my considered view has a bearing on this suit.

16. Ultimately, I issue the following disposal orders;

***a) The Notice of Motion dated 6/12/2021 is hereby dismissed with costs to the respondent.***

***b) Matter to be mentioned on 18/5/2022.***

17. It is so ordered.

**Ruling delivered virtually.**

**DATED, SIGNED AND DELIVERED THIS 28TH DAY OF MARCH 2022**

**In the Presence of:**

N/A for the parties

Court assistant: Ishmael Orwa

**HON. A. Y. KOROSS**

**JUDGE**

**28/3/2022**