REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL CASE NO. 82 OF 2008

VERONICAH JEPKOSGEI NAIMET ..... PLAINTIFF

VERSUS

JANE CHUMO ..... 1ST DEFENDANT

LEAH KIPROP ..... 2ND DEFENDANT

RULING

By Notice of Motion dated 3rd July, 2013, the Plaintiff is seeking that orders of court given on 10th June, 2013 be reviewed and set aside and for costs.

The application is premised on grounds that:-

(i) That the matter has taken a long time, more than 17 years and it is just and equitable that it be concluded soon.

(ii) That the matter has almost reached its conclusion as the Plaintiff/Applicant intends to close it's case.

(iii) That the Defendant/Respondent will not be prejudiced at all if this application is granted.

(iv) That it is fair and just that the Application be allowed.

It is also supported by the affidavit of Veronica Jepkosgei Maimet. She deponed that the order of 19th June, 2013 was to the effect that the suit be heard De Novo which is prejudicial to her. She stated that the matter is nearly concluded and has been pending in court for about seventeen (17) years. She stated that her main witness, one Siakwei Mwaimet who had already testified died in the year 2005 and so cannot testify if the hearing starts afresh.

In opposing the application is a Replying Affidavit sworn by Elijah Momanyi Mogona, counsel for the Defendants/Respondents on 18th November, 2013. He deponed that there is no error apparent on the face of the record to warrant a review of the orders given on 19th June, 2013. He deponed that the Plaintiff is to blame for failure to have the matter concluded expeditiously. In particular, he stated that when the matter was transferred to the lower court, the Plaintiff objected and requested that it be transferred to the High Court. That when it was returned to the High Court, she failed to set it down for hearing. That again the matter was transferred to the Environment and Land Court and she applied to have it transferred to the High Court. That when the order to have the matter heard De Novo was given, she was ably represented, and that she ought to have raised

her objection to have the case heard De Novo before the Environment and Land Court.

Mr. Momanyi further deponed that the fact of the death of Siakwei Mwaimet who was a Plaintiff's witness was known to the Plaintiff before the order of 19th June, 2013 was made. In any case, the Plaintiff's case is not predicated on the evidence of the said deceased witness. He stated that no prejudice will be suffered by the Plaintiff if the case is heard afresh.

The application was canvassed before me on 20th November, 2013 by way of oral submissions. Learned counsel, Mr. Birech submitted on behalf of the Applicant while learned counsel, Mr. Momanyi submitted on behalf of the Respondents. Mr. Birech reiterated that the Plaintiff stands heavily prejudiced if the matter is heard afresh as her key witness who had testified as PW2 is now deceased. He submitted that the plaintiff no longer intends to call other witnesses and would close her case if the case proceeds from where it had reached.

Mr. Momanyi on the other hand submitted that the order to have the matter heard De Novo was entered by consent and that the Plaintiff has not met any of the requirements provided for setting aside a consent order. He submitted that the fact of the death of the Plaintiff's witness was known to her as at the time the order was issued and in any case, all witnesses should be treated equally. Finally, he submitted that the Plaintiff has never been willing to conclude the case and that the application is brought as a delaying tactic to hamper an expeditious disposal of the matter.

In rejoinder, Mr. Birech submitted that the case has dragged due to shortage of Judges in the station. He stated that the evidence of the Plaintiff's witnesses was heard in the High Court and not the lower court and so this court is most competent to conclude it.

The application is mainly brought under Order 45 Rules (1) and (2) of the Civil Procedure Rules which provide as follows:-

"1(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) Any 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.

2 (1) An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the Judge who passed the decree, or made the order sought to be reviewed.

(2) If the Judge who passed the decree or made the order is no longer attached to the court, the application may be heard by any other Judge who is attached to that court at the time the application comes for hearing.

(3) If the Judge who passed the decree or made the order is still attached to the court but is precluded by absence or other cause for a period of three (3) months next after the application for review is lodged, the application may be heard by such other Judge as the Chief Justice may designate."

Rule 1 (1) (b) spells out the instances under which the court can review an order. In the instant case, the Applicant begs the court to review its earlier order on account that she would be prejudiced if the case starts afresh as one of her key witnesses is now deceased. She also relies on the fact that the evidence on record was taken by the High Court and not the lower court as was earlier thought, and so this court is best placed to conclude the hearing.

Back to the court record of 19th June, 2013, the file was brought before court for mention for directions on how it should proceed. On record were Miss Kamau for the Plaintiff and Miss Maroko for the Defendants. Earlier Mr. Kathili had appeared as holding brief for Mr. Momanyi for the Defendants but later Ms. Maroko came on record for the parties.

Miss Kamau informed the court that this file was initially before the Magistrate's court as civil case No. 172 of 2004 but that it was transferred to the High Court by a High Court order dated 16th October, 2007. She also told court that the dispute revolves around land.

On her part, Miss Maroko told court in one statement that "***the matter should be heard De Novo***".

The court then ruled as follows:-

"High Court cannot rely on evidence taken before the lower court. This file having been transferred from the lower court should start afresh.

Being a land matter, I agree with Ms. Maroko that it should be heard afresh and by the Land and Environment Court.

Accordingly, parties are asked to go to the Land Court Judge forthwith for mention to take a hearing date."

On this date, pursuant to the above order, the respective counsel appeared before Hon. Justice Munyao of Environment and Land Court. It is then that Ms. Kamau informed the Judge that on her part, she would prefer that the matter proceeds from where it had reached. The Judge then noted that such sentiment required a review of the order this court had earlier given. She was granted leave to file an application for review of the orders within fourteen (14) days, and that is now the application before me for determination.

From the above summary of what transpired on 19th June, 2013 it is very clear that when the court ordered that the matter be heard De Novo, it was of the impression that the evidence of the witnesses already on record was heard by the Magistrate's court. This impression followed the submission by Ms. Kamau advocate that this file had been transferred from the lower court and when Ms. Maroko requested for hearing De Novo, Ms. Kamau did not object. The court then noted that it was not prudent of the High Court to rely on the evidence recorded by the lower court and ultimately concurred with Ms. Maroko that the hearing should begin De Novo.

A thorough scrutiny of the record does show that before the matter went to the lower court, it was previously before the High Court as HCCC. No. 251 of 1999. It was allocated No. 172 of 2004 upon transfer of the Chief Magistrate's Court. It was thereafter transferred to the High Court as the current file by order of the High Court in High Court Civil Miscellaneous application No. 112 of 2007.

While it was HCCC. No. 251 of 1999 two witnesses for the Plaintiff testified namely, the Plaintiff herself as PW1 and Siokwei Segiti as PW2. Therefore, the evidence of the witnesses who have

already testified was recorded by the High Court and not the Magistrate's Court.

In conformity with the submissions of Mr. Birech, PW2 is one Siokwei Segiti who died in 2005 as attested by a copy of the death certificate marked annexture VJM.1 to the supporting affidavit. I opine that this is a fact that was not within the knowledge of Ms. Kamau advocate on 19th June, 2013 when the subject order was made. The fact that PW2 is now deceased and was the only major witness for the Plaintiff means that if the order of 19th June, 2013 is not reviewed, the Plaintiff will be left with an unsupported testimony. This is giving regard to the submission by Mr. Birech advocate that the Plaintiff does not intend to call any other witness once the hearing is ordered to proceed from where it had reached.

This scenario then sharply contrasts the submission by Mr. Momanyi advocate that if the order is reviewed it will facilitate a further delay in the disposal of the matter. To the contrary, as the Plaintiff shall call no other witnesses, the review of the order will enhance an expeditious disposal of the case.

It is my further view that, had it been brought to the attention of the court on 19th June, 2013 that the evidence of PW1 and PW2 was recorded by the High Court, this court would have ruled otherwise. That is to say, it would not have ordered the case to be heard De Novo as it did. This then explains that this error of the fact that the case was part-heard before the High Court was not brought to its attention on 19th June, 2013.

Also giving regard to the old age of this matter, it is only fair that it proceeds from where it had reached.

I also disagree with Mr. Momanyi for the Respondents that all witnesses should be treated equally. Our justice system is adversarial. Each party takes the discretion to call the witnesses it wishes and no one can choose for it. The importance of its respective witnesses is also determined by the party itself and not the opponent. Neither can the opponent party command that the other party should not call a particular witness. And it is also a party to the case who decides the weight of the evidence of its witness(es). For this reason, it is only the Plaintiff who determines which witness(es) are crucial to her case. She has elected that PW2 is the only witness she intended to call in support of her case. In the absence of this witness (now deceased) therefore, the Plaintiff's case is glaringly left bare. And there being no reason not to allow the evidence on record to remain as adduced, it is my view that not to allow the orders sought would greatly prejudice her (Plaintiff) case.

In sum, I allow the application. I set aside the order of 19th June, 2013 and order that this suit should proceed from where it had reached. Parties are directed to fix the matter for hearing in the registry. I give no orders as to costs.

DATED and **DELIVERED** at **ELDORET** this 26th day of May, 2014.

G. W. NGENYE - MACHARIA

JUDGE

In the presence of:

Mr. Birech for the Plaintiff/Applicant

M/s. Maroko holding brief for Mr. Momanyi for the Defendants/Respondents