



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KERICHO

CIVIL SUIT NO. 21 OF 2009

EMERG INVESTMENT LTDPLAINTIFF

VERSUS

LABAN RUTO & 9 OTHERS.....DEFENDANT

RULING

This ruling relates to the application by Notice of Motion dated 26th July 2010 in which the Defendant sought review and setting aside of the Court Ruling dated and delivered on 19th July 2010. The application was supported by the affidavit of Wilfred Akhonya Mutubwa, an advocate of this Court. It was made on the grounds, *inter alia*, that the Plaintiff had willfully failed to disclose a material fact, to wit, the existence of suit no. 56 of 2009 in which the ownership of the property known as **L. R. No. 631/IV/60** was in dispute. It was also made on the ground that the Plaintiff had sought in the suit vacant possession as opposed to eviction. But a careful perusal of prayer (a) of the Plaint shows that as a remedy the Plaintiff had prayed for vacant possession and recovery of the suit premises. Clearly, without eviction, the Plaintiff could not recover the premises. The judgment entered on 19/7/2010 was in accordance with prayer (a) of the amended Plaint. This ground fails.

Mr. Mutubwa, learned Counsel for the Defendant also urged the Court to grant the application and review the Ruling not least because the Plaintiff had failed to disclose that Kericho H.C.C.C No. 56 of 2009 was pending and consequently the Plaintiff was guilty of material non disclosure. The copy of the plaint filed in the said suit shows that the Plaintiffs were **Bernard Gesora Makori** and **Kepha Onduko Makori** and the defendants were **The Co-operative Merchant Bank Ltd** and **Emerg Investment Ltd** and that the former had purchased property **No. 631/IV/60** at Kericho town and sought as a remedy specific performance against the Co-operative Merchant Bank Ltd. In the suit herein, only Emerg Investments Ltd, the Plaintiff, is a party to the said suit as a second Defendant. But the subject matter in both suits does not appear to be the same. In this case, the subject matter is **L R 631/VI/60 Kericho** while in suit no.56 of 2009, the subject matter is **LR 631/IV/60 Kericho**, unless there was an error in this suit or in the suit No. 56 of 2009 which has not been pointed out. In these circumstances, and having regard to the different parties and different subject matter, it cannot be legitimately argued that there was material non-disclosure.

Mr. Bundotich, learned Counsel for the Plaintiff, opposed the application and contended that it did not bring itself within Order 45 (formerly order 44) of the Civil Procedure Rules not least because it did not disclose any new or important matter. It was Mr. Bundotich's submission that the Defendant's advocates had not filed a notice of change of advocates as required by **Rule 9 (a) of Order 3** (of the old rules) and consequently the application was rendered incompetent.

The Defendant's application for review and setting aside was filed by Messrs Lubulella and Associates on behalf of the Defendant. The previous advocates on record for the Defendant were E. M. Orina & Company. The Court record shows that prior to the filing of the application for review of the Court Ruling, Messrs Lubulella & Associates had not (and have not up to now) filed Notice of Appointment of advocates. At the time when they filed the said application on 26/7/2010, there was judgment which had been entered on 19/7/2010. **Order III Rule 9A** of the old rules provided that **R 9A "When there is a change of Advocate or when a party decides to act in person having, previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effect without an order of the Court upon an application with notice to the advocate on record"**.

Under the old **Rule 6** of the **Order III**, once leave was granted under the old Rule 9A of Order III, a Notice of Change of advocates would then be filed in accordance with Rule 6 which stated

R 6 "A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 7, the former advocate shall, subject to rules 11 and 12, be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal."

The record shows that the M/s Lubulella & Associates filed an application by way of Notice of Motion dated 26/7/2010 seeking leave to go on record for the Defendant in place of M/s E. M. Orina & Company Advocates. That application never came up for hearing but a purported consent order was endorsed in the file to the effect that the application "**be allowed with costs in the cause**". The DR did not sign his part to endorse the consent nor was the application heard. In absence of a proper Court order such as was envisaged by **Rule 9A of Order III**, and in absence of a Notice required to be filed by **Rule 6 of Order III**, it cannot be said that M/s Lubulella & Associates were properly on record. I so hold. Consequently, the application for review and setting aside was incompetent and I would on this ground strike it out.

At any rate, it is my finding that there is no discovery of new and important matter or evidence or mistake or error apparent on the face of the record or any other sufficient reason to justify the grant of the review sought.

DATED at KERICHO this 30th day of March 2011

G.B.M KARIUKI, SC
RESIDENT JUDGE

COUNSEL APPEARING

Mr. W.A. Mutubwa, Advocate, for the Defendant

Mr. S.K. Bundotich, Advocate, for the Plaintiff

Mr. R. Koech, Court clerk