



**Chepkwony v Langat & 3 others (Environment & Land Case
13 of 2011) [2022] KEELC 3507 (KLR) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3507 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 13 OF 2011**

MC OUNDO, J

JULY 28, 2022

BETWEEN

KIPROTICH ARAP CHEPKWONY PLAINTIFF

AND

SIMON LANGAT 1ST DEFENDANT

SAMSON MOLOTI 2ND DEFENDANT

DAVID NGENO 3RD DEFENDANT

CHUMEK ARAP KETER 4TH DEFENDANT

RULING

1. The Judgment in this matter had been delivered on the 3rd February 2017 wherein the Plaintiff's case succeeded and the Defendants' counterclaim was dismissed with costs. The Defendants were then ordered to vacate the suit land L.R No. Transmara/Olosakwana "B"/29 within 30 days of being notified of the judgment and in default, the Plaintiff be at liberty to apply for their eviction.
2. Subsequently, the Plaintiff then moved the Court by way of a Notice of Motion Application dated 7th June 2018 seeking eviction orders against the Respondents pursuant to the Judgment and decree of the Court of 3rd February 2017 and that Ronboy Auctioneers of P.O Box 52 Litein be appointed to evict them. The application was allowed via a ruling of 10th September, 2018.
3. What followed next was that by an application dated 7th December 2018, the Plaintiff sought orders that the Respondents be held in contempt of the court's ruling and orders dated 13th September 2018. *Vide* a ruling of 31st January, 2019, the court having carefully considered the pleadings, the application and supporting affidavit, as well as the relevant authorities, was satisfied that the Respondents were guilty of contempt of the court order dated 13th September 2018 wherein it invoked the powers conferred on the court under Article 159 of the Constitution and directed that the Respondents be



arrested and brought to court to show cause why they should not be committed to civil jail. In the cause of the proceedings, the 4th Defendant passed away.

4. Indeed on the 21st March 2022, the 1st and 3rd Defendants appeared in court which sentenced them to 3 (three) months in civil jail each, without an option of a fine. The 2nd Defendant is still at large and warrants of arrest have since been issued.
5. Now what is before court is yet another application by the Plaintiff dated the 16th February 2022 (erroneously indicated as 26th February 2022) seeking restraining orders against the burial of the 4th deceased Defendant on the suit land, and that should the Defendants succeed in burying him thereon, that his body be exhumed therefrom. The Plaintiff further sought for a review of the court's order in the ruling dated 13th June 2020 appointing Ronboy Auctioneers of P.O Box 52 Litein to evict the Defendants from the suit land, and instead opponent Indomitable Auctioneers and further that the OCS Emurua Dikir Police Station to assist in the enforcement of the court orders.
6. The application was supported by the grounds thereto as well as by the supporting affidavit of the Plaintiff, Kiprotich arap Chepkwony, dated 16th February 2022. Despite there having been service effected upon the Respondents/Defendants herein, there was no response and the application proceeded as unopposed through written submissions.

Plaintiffs written submissions.

7. The Plaintiff submitted that judgment had been entered in his favour on 3rd February 2017 wherein the Defendants/Respondents had been ordered to vacate from the suit premises within 30 days of notification of the judgment. The Defendants failed to vacate from the suit land within the time stipulated and an application had been filed for protection orders against them. The Defendants failed to respond to the same despite service wherein an application for contempt of court orders had successfully been filed and orders granted on the 31st January 2019.
8. That subsequently, the 4th Defendant had passed away in the month of January 2022 wherein the 1st, 2nd and 3rd Defendants had wanted to bury his remains on the suit land. That this necessitated the filing of the present application which sought for injunctive orders barring the Defendants from burying the remains of the 4th Defendant on the suit land. That secondly, the Plaintiff had since found a new firm of Auctioneers being Indomitable Auctioneers of PO Box 1133 Kericho, and therefore the court should review its orders dated 10th and September 2018 appointing the firm of Ronboy Auctioneers of P.O Box 52 Litein and instead replace it with Indomitable Auctioneers of PO Box 1133 Kericho to execute the court orders.
9. The Plaintiff framed his issues for determination as follows;
 - i. Whether the Applicant is entitled to the injunctive orders sought.
 - ii. Whether the Applicant is entitled to the order of review sought.
 - iii. Who should bear the costs of the application.
10. On the first issue for determination, the Applicant/Plaintiff relied on the decided case in *Kenya Power & Lighting Co. Ltd vs Sheriff Molana Habib* [2018] eKLR to submit that the matter had already been heard and decided in his favor wherein the Defendants had been ordered to vacate from the suit land. That subsequently the Defendants had been found to be in contempt of court orders wherein the 1st and 3rd Defendants had been sentenced to three months imprisonment and a warrant of arrest issued for the 2nd Defendant.



11. That the issue of ownership of the suit land had been determined but the Defendants had continued to be in occupation therefore being in contempt of the order of the court. That their further attempt to bury the remains of the 4th Defendant on the suit land ought to be declared as a further act of contempt of the court orders. That taking all this into consideration, the Plaintiff was entitled to an order of permanent injunction barring the Defendants and/or any other person acting on their behalf from burying the remains of the 4th Defendant on the suit land.
12. On the second issue for determination, the Plaintiff relied on the provisions of Order 45 Rule 1 of the [Civil Procedure Rules](#) to submit that via the ruling of 10th September 2018, the court had appointed the firm of Ronboy Auctioneers of P.O Box 52 Litein to evict the Defendants from the suit land. That the Plaintiff had tried severally to contact the said auctioneers to execute the court orders, in vain. That he had since found a new firm of auctioneers being Indomitable Auctioneers of PO Box 1133 Kericho, to whom he sought to be appointed by the court to execute the said orders.
13. That at the time of making the application to appoint Ronboy Auctioneers, the Plaintiff had been in contact with the said auctioneers whom he believed would execute the court orders. However when the time came for execution, the said firm of auctioneers could not be reached. That at the time the application had been made to contract Ronboy Auctioneers, the Plaintiff did not know that he would lose touch with them before the eviction was carried out. That the discovery therefore that the said auctioneers cannot execute the court orders was reason enough for the court to review its orders.
14. On the last issue for determination, the Plaintiff relied on the provision of Section 27(1) of the [Civil Procedure Act](#) that gives the court discretion to decide who should bear the costs of the suit. That as a general principle, costs normally followed the event and the successful party would always have the costs unless the court had good reason order for stay. The Plaintiff sought for the application to be allowed.

Determination.

15. I have considered the Application herein filed as well as the written submissions and authorities so cited. I have considered the fact that there was no response by the Defendants to the application despite service and further the fact that this was a decided case wherein Judgment had been entered in favour of the Plaintiff on 3rd February 2017 wherein the Defendants had been ordered to vacate from the suit land being L.R No. Transmara/Olosakwana “B”/29. Subsequently eviction orders had been issued upon the filing of the Application dated 7th June 2018. The Defendants still defied the court orders wherein they had been held in contempt via the court’s ruling of 31st January, 2019. On the 21st March 2022, the 1st and 3rd Defendants were sentenced to three months in civil jail without an option of a fine, whereas warrants of arrest had been issued against the 2nd Defendant who is still at large.
16. It is on record that in the cause of the proceedings the 4th Defendant passed away in the month of January 2022 wherein the 1st, 2nd and 3rd Defendants wanted to bury his remains on the suit land. That is what necessitated the filing of the present application which sought for injunctive orders barring the 1st, 2nd and 3rd Defendants from burying the remains of the 4th Defendant on the suit land.
17. The issue that arises for my determination herein is whether the Plaintiff has made out his case for the grant of the orders so sought by the court.
18. It is apparent from the pleadings, that the Plaintiff seeks a permanent injunction against the Defendants after the determination of the matter in which he had been declared as the registered proprietor of land parcel No L.R No. Transmara/Olosakwana “B”/29 and no appeal had been filed against the said determination.



19. In *Kenya Power & Lighting Co. Ltd v Sheriff Molana Habib* (*supra*) the Court had held that;

“A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the Defendant in order for the rights of the Plaintiff to be protected.”

20. The Defendants/Respondents have not controverted the Applicant’s case or even denied the Applicants’ claim. There having been a Judgment in favor of the Plaintiff declaring him the proprietor of the suit premises and further pursuant to the continuous defiance of the court orders by the Defendants/Respondents, I have considered the conduct of the Defendants and the holding in the case of *Republic v Senior Registrar of Titles Ex-Parte Brookside Court Limited* (2012) eKLR, where the court had held that the statutorily sanctity of title to land is assured and protected under the provisions of Sections 24, 25 and 26 of the *Land Registration Act*. I do agree that the Plaintiff has made out his case where a permanent injunction sought is hereby issued against the Defendants barring them and/or any other person acting on their behalf from burying the remains of the 4th Defendant on the suit land.

21. The Plaintiff has also sought that the court reviews its orders in the ruling of 10th September 2018 wherein it had appointed the firm of Ronboy Auctioneers of P.O Box 52 Litein to evict the Defendants from the suit land, and instead appoint Indomitable Auctioneers of PO Box 1133 Kericho to execute the court orders for reason that the Plaintiff had lost contact with Ronboy Auctioneers whom they did not know that they would lose touch with before the eviction was carried out. That the discovery that the said auctioneers could not execute the court orders was reason enough for the court to review its orders.

22. 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.”

23. 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 judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.
24. 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.
25. 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.
26. In this case, the reason given by the Applicant in his Application seeking to have the Ruling and Order of the 10th September 2018 reviewed was that the auctioneers appointed by the court could not execute the court order because the parties had lost touch. I am in agreement with the Plaintiff that the application is based on the discovery of new and important matter which after the exercise of due diligence, was not within the knowledge of the Applicant at the time when the decree was passed or the order made. I therefore allow the second limb of the application and proceed to appoint Indomitable Auctioneers of PO Box 1133 Kericho to execute the Judgment and decree of the Court of 3rd February 2017.
27. In essence thereof the Plaintiff's application dated 16th February 2022 is herein allowed with costs at a lower scale since the same was undefended.

DATED AND DELIVERED VIA TEAMS MICROSOFT AT KERICHO THIS 28TH DAY OF JULY 2022.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

