



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KERICHO**

**CIVIL SUIT NO. 18 OF 2012**

**EMILY CHEPNGENO RUTO (Suing as legal representative of the estate of the late  
DAVID KIPLANGAT RUTO.....1<sup>st</sup> PLAINTIFF/APPLICANT  
RICHARD K. CHEPKWONY.....2<sup>nd</sup> PLAINTIFF/APPLICANT  
PETER K. CHEPKWONY.....3<sup>rd</sup> PLAINTIFF/APPLICANT  
EDWARD K. CHEPKWONY.....4<sup>th</sup> PLAINTIFF/APPLICANT  
ERICK K. CHEPKWONY.....5<sup>th</sup> PLAINTIFF/APPLICANT  
LEONARD K. CHEPKWONY.....6<sup>th</sup> PLAINTIFF/APPLICANT  
WILLY C. CHEPKWONY.....7<sup>th</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**DAVID KIPRONO KOSKE.....DEFENDANT/RESPONDENT**

**RULING**

1. The application dated the 29<sup>th</sup> September, 2020 brought under the provisions of Order 45 Rule 2 of the Civil Procedure Rules Sections 3 & 3A, 1, 1B of the Civil Procedure Act seeks for orders of stay of execution of the Ruling dated the 30<sup>th</sup> June 2020 and/or review of the said Ruling.
2. The Application is supported by the grounds set on its face as well as on the supporting affidavit of Leonard K. Chepkwony the 6<sup>th</sup> Applicant herein.
3. The application was opposed by the Respondent via their Grounds of opposition dated the 12<sup>th</sup> October 2020 wherein by consent parties took directions to have the same disposed of by way of written submissions to which only the Applicant complied.

**Determination.**

4. I have considered the said application herein and from the 6<sup>th</sup> Applicant's sworn affidavit and the grounds giving rise to the said application, the Applicants' assertion is that pursuant to the ruling delivered by the Court on 30<sup>th</sup> June 2020 ordering the inclusion of the Applicants herein being Joseph Cheruiyot, Esther Tole, Caroline Chebet and Jane Chepngetich to be listed as members of the first house thus being entitled to a share of the parcel of land known as Kericho/Kapsoit/1671, the said Joseph Cheruiyot, Caroline Chebet and Jane Chepngetich have since expressed their disinterest in receiving a share of the above captioned parcel of land and seek to be removed from the list of the persons entitled to the said share.
5. That it would be too costly for the Applicants to transfer the portions of the said land to the above mentioned individuals and later have the land transferred back to the Applicants who stand to suffer irreparable loss and damages unless the ruling was reviewed.
6. The Application was opposed through the grounds of opposition of 12<sup>th</sup> October 2020 to the effect that the Applicants had not

demonstrated the threshold for stay of execution of the ruling dated 30<sup>th</sup> June 2020 and neither had the Applicants tendered any evidence supporting affidavits dated 29<sup>th</sup> September 2020 in which, Caroline Chebet and Jane Chepngetich had expressed disinterest in receiving their share of the suit land No. Kericho/Kapsoit/167.

7. The Grounds of Opposition were further based on the fact that the 6<sup>th</sup> Applicant had no authority from the other Applicants to prosecute the Application and therefore had no capacity to institute the application which was incompetent, frivolous, vexatious and an abuse of the Court process. That there being no an error apparent on the face of the record. the Application was contrary to the provisions of Order 45 Rule 2 of the Civil Procedure Rules.

8. The Applicants' submission was based on two issues for determination hence.

i. Whether the application has met the threshold for review

ii. Who should bear the costs of the application

9. On the first issue for determination, the Applicants based their submissions on the provisions of Order 45 Rule 1 of the Civil Procedure Rules to submit that the impugned ruling having been delivered on 30<sup>th</sup> of June 2020, the application was filed on the 29<sup>th</sup> September 2020 three months later which was without inordinate delay.

10. That upon informing the concerned parties herein being Joseph Cheruiyot, Caroline Chebet and Jane Chepngetich of the Court's ruling, they had expressed their disinterest in receiving a share of the suit parcel of land and Joseph Cheruiyot had even refused to swear an affidavit stating that he did not want anything to do with the suit parcel of land.

11. The Applicant relied on the decided case of **Southern Engineering Co. Ltd. vs Heady Berge Limited & Another [2019] eKLR** to submit that the discovery of new evidence in the fact that Joseph Cheruiyot, Caroline Chebet and Jane Chepngetich were not interested in having a share of the suit land was only made after delivery of the Court's ruling of 30<sup>th</sup> of June 2020. That in this respect, the application had met the threshold for review of the ruling.

12. There were no submissions filed by the Respondent.

13. Order 45 Rule 2 of the Civil Procedure Rules, 2010 under which the application is brought provides as follows;

*(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 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.*

14. Order 45 Rule 1 of the Civil Procedure Rules, 2010 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.*

15. 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.*

16. 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.*

17. Since I have set out the necessary conditions that the Applicants needed to satisfy in their application for review, from the submissions of the Applicants, they appear to peg their application for review on the ground of discovery of new and important matter of evidence in that Joseph Cheruiyot, Caroline Chebet and Jane Chepngetich were not interested in having a share of the suit land high evidence was discovered only after delivery of the Court's ruling of 30<sup>th</sup> June 2020.

18. I have considered the terms of the impugned ruling of 30<sup>th</sup> June 2020 herein wherein it would be important to produce the same verbatim so as to understand the context in which it was made.

19. In the said Ruling, the Honorable Judge Held as follows:

*'I have also read the judgment that the Court delivered on 21<sup>st</sup> June, 2019. To me, the application before me is simple and straightforward. It is true, as the Plaintiffs say, that the Court ordered that 25 acres be transferred to the first house. The question that they have not addressed is what constitutes the first house. One would wonder whether the defendant is supposed to go to the land's office and apply to have a title issued in the name of what the Plaintiffs call "first house". That, it appears to me, would be a difficult or impossible task as the first house is not a company, or a society or any other kind of entity with recognized legal character or personality'. .....*

*.....given that the first house is not a legal entity in whose name a title can be issued, it seems to me logical that the first house means the membership of that house eligible to be issued with titles.*

*That membership would include the 2<sup>nd</sup> to 7<sup>th</sup> Plaintiff and the other members envisaged but not named in the judgement. The Plaintiffs alone are not the first house. The first house is larger than them. When the defendant therefore seeks to clarify who the other members are, he makes a lot of sense to this Court'' (emphasis mine)*

20. In my humble opinion, vide the ruling of 30<sup>th</sup> June 2020 the Honourable Judge was only implementing the order of the Judgement of 21<sup>st</sup> June 2019 and nothing more.

21. In the decided case of **Ajit Kumar Rath vs State of Orisa & Others on 2 November, 1999 Court at Page 608** the Supreme Court of India had this to say:-

*'the power can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression "any other sufficient reason" used in Order 47 Rule 1 means a reason sufficiently analogous to those specified in the rule"*

22. Having looked at the reason herein advanced by the Applicants in seeking that this Court reviews its ruling of 30<sup>th</sup> June 2020, the same does not constitute the discovery of new evidence within the scope of the provisions of Order 45 Rule 2 (1) of the Civil Procedure Rules and thus this is not a proper case for the Court to exercise its discretion in favour of the Applicants. Accordingly, I proceed to dismiss the said application dated 29<sup>th</sup> September 2020 with no costs.

**Dated and delivered at Kericho this 4<sup>th</sup> day of March 2021.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**