REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC NO. 6 OF 2014

CHRISTINE ANDREE JOSHI.....1ST PLAINTIFF/RESPONDENT

STEPHEN ELKINGTON.....2ND PLAINTIFF/RESPONDENT

BARRY JAMES JOSHI.....3RD PLAINTIFF/RESPONDENT

VERSUS

SALLY CHEPWOGEN KIRUI.....DEFENDANT/APPLICANT

RULING

1. What is coming before me for determination is the Notice of Motion dated the 29th November, 2019 brought under the provisions of Section 3A of the Civil Procedure Act, Order 51 Rule 1, Order 45 Rule 1, 2, 3 of the Civil Procedure Rules and all enabling provisions of the law where the Applicant herein seeks for orders of stay of execution and/or the setting aside or review of the ruling of the 15th November 2019 and its consequential orders.

2. The Applicant also sought that court orders the Land Registrar Boment, to avail the parcel file to land parcel No Kericho/Chemagel/1401 and the respective Registry Index Map to aid the hearing and determination of the suit.

3. The Application is supported by the grounds set on its face as well as on the supporting affidavit of S**ally Chepwogen Kirui** the Applicant herein.

4. The application was opposed by the 1st Respondent's Grounds of Opposition and Replying Affidavit both dated the 9th December 2019. Vide the orders of the Court of 12th October 2020, parties took directions to have the Application disposed of by way of written submissions.

Applicant's written Submissions.

5. The Applicant gave brief facts of the matter in issue to the effect in response to a suit filed by the Plaintiff/Respondent via her Plaint dated 28th February 2014, seeking that the Applicant gives vacant possession of the suit land known as No Kericho/Chemagel/1401, or in the alternative the Applicant be evicted from thereon, the Applicant herein had filed her Defence and Counterclaim thereto wherein the suit had proceeded for hearing undefended and judgment had been entered.

6. Upon delivery of the Judgment, the court had been informed of the Applicant's pending counterclaim dated 11th June 2014, to which the Plaintiff/ Respondent herein filed their Preliminary Objection stating that the issue raised in the counterclaim had been res judicata. The court had then directed that the said Preliminary Objection be disposed of by way of written submissions.

7. Parties complied and a ruling had subsequently been delivered on 15th November 2019. The Applicant's complaint therefore is that the said ruling had adverse effect on her as she had been condemned unheard and denied the chance to present her case before the court in line with her counterclaim against the Plaintiff's claim. This then gave rise to the filing of the present application where the Applicant framed her issue for determination as follows;

i. Whether the orders of this honorable court dated 29th November 2019 should be revived and/or set aside.

8. The Applicant submitted that Section 80 of the Civil Procedure Act grants the court the power to make orders for Review and Order 45 (sic) sets out the jurisdiction and scope of Review by hinging the same to discovery of new and important matter or evidence, mistake or error on the face of the record and any other sufficient reason.

9. That in the present case, there had been an error apparent on the face of the record as the court had not taken into consideration their submissions dated 7th August 2019 which submissions had raised weighty points. That had the said points been dealt with, then this would have altered the court's reasoning on the Preliminary Objection raised by the Plaintiff.

10. The Applicant relied on the decided case of **Mosese Kipkolum Kogo vs Nyamogo & Nyamogo Advocates** quoted with approval in the **Eldoret ELC No. 72b of 2019 Phillip Kiprotich Tuitoek vs Edna Jebiwott Kiplagat & 2 Others (sic)** to submit that there having been an error on a substantial point of law, the court should thus find that this was a clearly a case where there was an error apparent on the face of the record.

11. That the Respondent in their Preliminary Objection dated the 28th May 2019 had raised points of facts specifically that the parcel of land in dispute had been sold to them through an auction on the 22nd March 2002 at Sotik, which matter had been the basis of the entire suit and which facts had been heavily contested by the Applicant. That the said Preliminary Objection dealt with disputed facts, and not points of law, which ought to have been tested by the rules of evidence in order to be ascertained.

12. The Applicant further submitted that parties litigating under this claim had at all times been different from the parties in the previous matter to the effect that in Civil Suit No. 3154 of 1989 the litigating parties had been Bank of Credit & Commerce International (Overseas) Limited vs Sun Produce Company Limited & Philip Arap Kurui & 2 Others whilst in the Civil Suit No 3 of 2009 formally HCC No. 1550 of 2002 the parties had been **Sally Kirui & Phillip Kirui vs Oriental Commerce Bank, Moses Korir, Steve Elkington and Jimmy Josh. But the parties in the present suit were not similar. The Applicant relied on the decided case in Independent Electoral and Boundaries Commission vs Maina Kiai & 5 Others [2017] eKLR to submit that both the parties and the subject in issue in the previous suit had been different. That the Preliminary Objection on the point that the current suit was res judicata had failed to which the court ought to review its decision of 15th November 2019.**

Respondent's Submission.

13. In opposition of the Applicant's application, the Plaintiff/Respondent submitted on the following issues;

i. Stay of execution pending the hearing and determination of the application.

ii. An order for review of the orders of this court issued on 15th November 2019.

iii. An order directing the Land Registrar Bomet to avail the relevant file to L.R No Kericho Chemagel/1401

14. On the first issue, the Respondent's submission was to the effect that there was nothing to execute and therefore nothing to stay. That the court's orders of 15th November 2019 were to the effect that the Defendant's/Applicant's counterclaim had been dismissed as it was res judicata. That the dismissal of the Defendant's counter claim only paved the way for re-hearing of the main suit. The Respondent further submitted that the eviction referred to by the Applicant at paragraph 11 of her supporting affidavit had strictly be done within the precincts of law and in actuation of a valid court order. That the dismissal of the counterclaim was therefore not open to the Plaintiff for execution as the suit was yet to be heard and a decision made.

15. On the second issue the Respondent submitted that the application for review must be clear and concise on which ground it was presented and that the court can only review on the basis of the grounds set out under Order 45(sic) which included discovery of new and important matter or evidence, mistake or error apparent on the face of the record and sufficient reason.

16. That in the present application, there had been no suggestion that the Review was premised on the ground of new and important matter or evidence as no such new and important matters were shown and none were urged and therefore this ground did not hold.

17. That although the Applicant's main ground buttressing her application herein was that there had been an error apparent on the ruling delivered on 15th November 2019, the Respondent submitted that for the said ground to hold;

i. The Applicant must show that the error was apparent on the face of the record

ii. The error or omission must be itself evident and should not require an elaborate argument to be established

iii. It is settled that it will not be sufficient grounds for review that another judge could have taken a different view of the matter

iv. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.

v. An error apparent on the face of the record must be such an error which must strike one on mere looking at the record and would not require any long drawn process of reasoning on points where there may conceivably be two opinions.

18. That in the present case, it is clear that the Applicant had not shown that there had been an error apparent on the face of the record. That the application was indeed an Appeal styled as an application for Review.

19. The Respondent relied on the decided case in Grace Akinyi vs Gladys Kemunto & Another [2016] eKLR to submit that the

matters raised by the Applicant in her application were matters which ought to have been escalated to the Court of Appeal on Appeal as they were not matters of review within the meaning and intent of Order 45 Rule 1 (b) (sic) and Section 80 of the Civil Procedure Act.

20. That further there had been no sufficient reasons raised, by the Applicant in her application, which would have been strong grounds on whose effect would have amounted to re-opening the application or case afresh.

21. As to whether the court should direct the Land Registrar Bomet to avail the relevant file to L.R No Kericho Chemagel/1401, the Respondent submitted that the matter herein had gone through all the pre-trial processes where the documents stretching way back close to 30 years relating to the suit were on record. That the Applicant's prayer was therefore just but a fishing expedition and a delay in further prosecution of the matter.

Determination.

22. I have considered the Application for stay of execution of the ruling dated the 15th November 2019, its review and/or setting aside of the same. I have also considered the reasons given for and against the said application.

23. The genesis of the Applicant's application, is that the court had allowed the Respondent's Application on a Preliminary Objection vide its ruling delivered on the 15th November, 2019 in which it had found that the Respondent's counter claim in the *present suit was Res Judicata Nairobi HCC No.3154 of 1989 and HCC No. 3 of 2009 (Formerly Civil Suit No. 1550 of 2002. In the impugned ruling, the Hon Judge found as follows:*

> *'I find it useful to point out that what I have said heretofore relates to the Defendant's counter-claim only, not her defence. To hold otherwise seems to me to be perilously tantamount to telling the Defendant not to defend the suit. The defence as filed should be allowed to stand. What is untenable is the Defendant's counter-claim. In fact the defence is not a suit filed by the Defendant. The suit filed by the Defendant is the counter-claim and it is the one eligible for consideration and action on the basis of RES JUDICATA. As we have seen, that counter-claim is not defensible from a legal or factual perspective. It is a claim that is dead on arrival; it is a non-starter.'*

24. It was thus this decision that brought forth the present application where the Applicant sought for orders of stay of execution and/or its setting aside or its review.

25. I find the issues arising for determination as follows:

i. Whether or not the orders of stay of execution orders should issue.

ii. Whether the ruling dated the 15th November 2019 should be reviewed and/or set aside.

iii. **What is th***e just order to make in the circumstances?*

26. In the case of **Butt vs Rent Restriction Tribunal (1982) KLR 417**, the Court of Appeal held that **the power of the court to grant and refuse an application for stay of execution is discretionary and that a Judge should not refuse a stay if there are good grounds for granting it merely because in his/her opinion, a better remedy may become available to the Applicant at the end of the proceedings. The Court further held that a court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and unique requirements.**

27. In the present case, the Applicant has sought to have the execution on ruling of 15th November 2019 stayed. The ruling of Hon **A. K. Kaniaru** J. was to the effect that the Applicant's counter-claim was not defensible from a legal or factual perspective and that it was a claim that was dead on arrival. The Hon Judge further held that the defence as filed should be allowed to stand.

28. Under Section 2 of the Civil Procedure Act, the definition of a decree holder alludes to an order that is capable of being executed. It defines a decree holder as:

> *'any person in whose favour a decree has been passed or **an order capable of execution** has been made…"*

29. It therefore obtains that there are orders that are capable of execution while others are not. In the present Ruling, the court did not order the parties to do anything or to abstain from doing anything. It therefore followed that the said holding was incapable of execution and therefore there can be no order of stay that can properly issue relating to that ruling.

30. On the second issue for determination, the Applicant based her grounds for seeking to review and/ or setting aside the Ruling of 15th November 2019 on the basis that there had been an error apparent on the face of the record in that the Honorable court had erred when it dismissed her counter claim for being res judicata *Nairobi HCC No.3154 of 1989 and HCC No. 3 of 2009 (Formerly Civil Suit No. 1550 of 2002.*

31. Order 45 of the Civil Procedure Rules which provides the procedure and the conditions that an Applicant must satisfy in an application for review states 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 a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A 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.

32. 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.

33. 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.*

34. In the impugned Ruling of 15th November 2019, the Hon Judge found as follows:

'My understanding of the matter at hand is that the Defendant's late husband guaranteed a party to obtain an overdraft facility from a bank. The guarantee involved offering the disputed land as security. The party defaulted in payment and the bank sued to recover the money. It is clear that the bank not only sued the party but the guarantors as well. The Defendant's late husband was one such guarantor. The bank won the case but payment of money to it by those sued became a problem. It is for this reason that the bank resulted to selling the securities offered in order to recover its money. One of the securities sold was the disputed land.

But the Defendant and her late husband filed a suit challenging the sale. The suit was HCC NO. 1550 OF 2002. They however failed to prosecute it and it was dismissed for want of prosecution. A look at the suit vis-a-vis the counter-claim filed herein show obvious broad similarities both in substance and the prayers sought. But the Defendant would rather that the counter-claim is viewed as a totally different suit that merits its own independent consideration. With respect, this is not the position; it simply is not the case. It is difficult, nay, even impossible, not to find obvious similarities in the two cases.

The Defendant would also like the court to take the position that the other case was not decided on merits and is therefore not one for consideration for RES JUDICATA. Again here, the Defendant is wrong. The law is as stated by the Plaintiffs. A case dismissed for want of prosecution can be a proper basis for raising a defence of RES JUDICATA. But even if one were to assume that the issues raised in HCC NO 1550 of 2002 are not the same as the issues raised in the counter-claim one would then be confronted by the obvious reality that the issues raised in the counter-claim should have been raised for consideration in HCC NO 1550 of 2002. And failure to do this would also give rise to the defence of RES JUDICATA'.

35. After considering the above captioned holding, I beg to differ with the Applicant's disposition in that the court had not considered that the parties litigating in the present claim had at all times been different from the parties in the previous matters. I find that there had been existence of sufficient evidence that had been placed before the court upon which the Court relied on to reach its verdict and therefore it cannot be said to be new evidence.

36. In the decided case of **Ajit Kumar Rath -vs- The State of Orisa & Others, 9 Supreme Court Case 596:** 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"

37. Having looked at the reason herein advanced by the Applicant seeking that this Court reviews its judgment of 15th November 2019, I find that the same did not meet the threshold set out under Order 45 Rule 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 Applicant.

38. Accordingly, I proceed to dismiss the application dated 29th November 2019 in its entirety with costs.

Dated and delivered via Microsoft Teams this 8th day of April 2021

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE