



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC NO. 49 OF 2020

REUBEN ROTICH CHELUGO.....PLAINTIFF

VERSUS

**JERUGUT BOWEN & ANOTHER (Suing as the administrator of the
Estate of Wilson Rotich Deceased).....DEFENDANT**

RULING

1. This is a ruling in respect of a Notice of Motion dated 13th July, 2021 in which the Plaintiff/Applicant seeks the follow orders;-

1) Spent

2) That this Honourable Court be pleased to review and/or set aside ruling delivered on 9/03/2021 and all consequential orders thereof pending hearing and determination of this application.

3) That the costs of this application be provided for;

2. The Applicant had filed an application for injunction dated 1st September, 2020. This Application was heard and was dismissed vide a ruling delivered on 9th March, 2021. The Applicant filed a Notice of Appeal against the ruling but the Notice of Appeal was withdrawn on 13th July, 2021 paving the way for the filing of the present application.

3. The Applicant contends that there is an error apparent on the face of the record in that the trial judge held that the Applicant had not explained the outcome of Eldoret ELC No.283 of 2013 yet he had done so through paragraph 5 of the supplementary affidavit to the application for injunction.

4. The Applicant also contends that there is discovery of new and important evidence which he would not have discovered with due diligence. It is on these two grounds that Applicant seeks a review of the ruling delivered on 9th March, 2021.

5. The Defendants/Respondents opposed the Applicant's application based on a replying affidavit sworn on 27th September, 2021. The Respondents contend that the Applicant's application is incompetent and that the Applicant should instead have appealed against the ruling. They further contend that the grounds put forth are the same grounds which have been raised in the previous application and that in any case, this application has been overtaken by events as the estate has already been distributed in accordance with the confirmed grant obtained in Eldoret High Court Succession Cause No.69 of 2014.

6. The Respondent also contend that the Applicant cannot claim to have discovered the sale agreement which occurred in 2009 and that the Applicant has been aware of the purchaser who was already in the suit property even before this case was filed.

7. I have carefully considered the Applicant's application as well as the opposition thereto by the Respondents. I have also taken into account the oral submissions by counsel for the parties during the hearing of the application. The only issue for determination is whether the Applicant has met the threshold for grant of a review.

8. The Applicant contends that there is an error apparent on the face of the record. According to the Applicant, the error which is apparent on the record is that the trial judge made a finding of fact that the Applicant had not explained what had happened to Eldoret ELC No.283 of 2013 when the same had been explained in the supplementary affidavit in support of the application for injunction.

9. Black's Law Dictionary Tenth Edition defines an error apparent on the record as follows:-

“A mistake of Law or fact in a tribunal’s judgment, opinion or order”.

10. The Applicant seems to be complaining about the erroneous findings of the trial judge. The law is clear that erroneous findings of fact or law on the part of a judge cannot be a ground for review. It can only be a ground for appeal.

11. The Applicant also argues that he has discovered new and important evidence which he could not obtain with due diligence as at the time the application for injunction was argued. I have looked at some of the alleged new discovery. The Applicant has annexed a copy of a sale agreement entered into in 2009. The purchaser has been in possession of the portion he purchased even before this suit or even Eldoret ELC NO.283 of 2013 were filed. He cannot say that this is something he would not have discovered had he carried out due diligence.

12. The discovery of an acknowledgement of money paid in respect of sale of a portion of the suit property which occurred after the application for injunction had been filed cannot be a basis for review of the ruling of 9th March, 2021. The Applicant lost the application on other grounds and majorly for not providing any materials to show that he had a prima facie case. He should have clearly pursued the appeal which he had filed and not pursue a review. I therefore find that the Applicant’s application lacks merit. The same is hereby dismissed with costs to the Respondents.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 8TH DAY OF NOVEMBER, 2021.

E.O. OBAGA

JUDGE

In the virtual presence of:-

Mr. Kagunza for Plaintiff/Applicant

Court Assistant – Mercy

E.O. OBAGA

JUDGE