REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC NO. 23 OF 2012

WILLIAM KIPTERER KIRUI.....PLAINTIFF

VERSUS

ROSELINE CHEPKEMOI RUTO.....DEFENDANT

RULING

1. This ruling is essentially a determination of a post judgement application dated 4th July, 2019 and filed on 5th July, 2019. The application is a motion on notice expressed to be brought under Sections 80 and 3A of Civil Procedure Act (cap 21), Order 45 Rules 1,2, and 3 of Civil Procedure Rules, 2010 and all other enabling provisions of law. The applicant – **ROSELINE CHEPKEMOI RUTO** – was the defendant in the suit brought against her by the respondent – **WILLIAM KIPTERER KIRUI** – who was the plaintiff. The respondent won the case and the applicant at first wanted to go on appeal before changing her mind to file the application at hand. The application is about review of the judgement for various reasons.

2. There are eight (8) prayers on the face of the application but two – prayers 1 and 2 – are now spent, leaving six (6) – prayers 3,4,5,6,7 and 8 - for consideration at this stage. The prayers for consideration are as follows:

> *Prayer 3: That the honourable court be pleased to review and/or set aside the judgement delivered on 28/2/2019 and all consequential orders and the defendant/applicant be granted leave to introduce new evidence being a complete certified copy of the green card for parcel NO KERICHO/KIPCHIMCHIM/930*
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> *Prayer 4: That this honourable court be pleased to make a finding that the transfer and/or acquisition of parcel NO KERICHO/KIPCHIMCHIM/930 by the plaintiff herein from the previous owner one Philomena Cheboen was improper and illegal as the matter was still subjudice and was tailored towards defeating justice and denying the defendants/applicant the fruits of a favourable decision by the Chief Magistrate's Court in Misc. Application No. 54 of 2011.*
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> *Prayer 5: That this honourable court be pleased to make a finding that it has no original jurisdiction over the matter for the reason that the subordinate court had previously conclusively adjudicated over the subject matter, made a finding and a valid decree issued by the Chief Magistrate's Court in Misc. Application No. 54 of 2011 and that the court only has judicial review jurisdiction over the matter.*
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> *Prayer 6: That this honourable court be pleased to make a finding that the doctrine of res-judicata set out in Civil Procedure Act as Section 7 applies in this case and that the order and decree by the Chief Magistrate's Court in Misc. Application No. 54 of 2011 given and issued on 7/11/2011 is valid and capable of execution.*
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> *Prayer 7: That this honourable court be pleased to make such further or other orders as it may deem fit, just and expedient in the circumstances of this case.*
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> *Prayer 8: That costs of this application be provided for.*

3. The application is premised on grounds, interalia, that the respondent failed to disclose to the court that he acquired parcel no. 930 when the case between the defendant/applicant and the previous owner was still pending and therefore subjudice; that the respondent deliberately produced only the 2nd page of the copy of the green card so as to hide the name of the previous owner of the land; that the subordinate court had conclusively handled the matter and this court therefore could not handle it again except only as a judicial review; and that it would serve the interests of justice if this court reviews its orders of 28th February, 2018 to obviate an appeal.

4. The supporting affidavit that came with the application repeated, reiterated, and amplified the grounds advanced.

5. The respondent responded to the application vide a replying affidavit filed on 8th August, 2019. He deposed, interalia, that the new

evidence the applicant alleges to have has all along been available and was presented to court and addressed. The issue of jurisdiction was also said to have been addressed. According to the respondent, the option suitable to the applicant is appeal, not review. The judgement was also said to have been enforced already.

6. The application was canvassed by way of written submissions. The applicant's submissions were filed on 4th November, 2019. They captured well the substance of the application and gave an illuminating narrative containing some antecedents surrounding the whole matter. Then the issue of jurisdiction was highlighted and conjuncted with that of res-judicata. The issue of res-judicata was explicated more, with the decided case of **The Independent Electoral and Boundaries Commission Vs. Maina Kiai and 5 Others:(2017) eKLR**, which delineated its parameters, cited to drive the point home. The parameters themselves were spelt out thus:

> *(a) The suit or issue was directly or substantially in issue in the former suit*
>
> *(b) The former suit was between the same parties or parties under whom they or any of them claim*
>
> *(c) Those parties were litigating under the same title*
>
> *(d) The issue was heard and finally determined in the former suit*
>
> *(e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.*

7. After expressing himself on the issue of *res-judicata*, the applicant then submitted:

> *"This is the tool the applicant had deployed through the instant application. This suit touches on issues that have been litigated before a competent court in respect of the same property. The issues in respect of the suit properties which were before the lower court between the plaintiff and the defendant herein were determined by the court"*

The applicant ultimately asked the court to allow the application and direct the respondent to move the court in the proper manner.

8. The respondent's submissions were filed on 16th January, 2020. After making a few prefatory remarks regarding the matter at hand, he submitted that the court is required to decide whether it had jurisdiction to entertain and determine the suit, whether the applicant should be granted leave to adduce new evidence, and whether the application at hand suffices for the purpose.

9. On jurisdiction, the respondent viewed the applicant's concern as one not concerned with jurisdiction perse, but one where the doctrine of *res-judicata* applies to deprive the court of jurisdiction. And it so applies because in the applicant's view, the matter had already been handled earlier and determined by a competent court. The respondent answer to this is that the trial court addressed itself extensively to the issue of jurisdiction. The court was said to have made a finding that it had jurisdiction.

10. On whether new evidence should be adduced, the respondent submitted, interalia, that:

> *"the evidence which is intended to be adduced was within the knowledge and reach of the Applicant and the same was placed before the court and the court addressed the same"*

11. Then finally, the respondent addressed himself on the issue of suitability of the application for the purpose intended by the applicant. Here, there was extensive reference to both statutory law and decided cases. More specifically, the respondent made reference to Section 80 of Civil Procedure Act (Cap 21) and Order 45 of Civil Procedure Rules, 2010. The law was then explained to mean that a person seeking review requires to show discovery of new and important evidence or matter not known or knowable to him even after exercise of due diligence and therefore not possible to be produced during trial or at the time of making the decree or order.

12. It can also happen, the respondent further submitted, on account of some mistake or error apparent on the face of the record or for any other sufficient reason. And the application has to be made without unreasonable delay.

13. The respondent then made extensive reference to case law. He cited the case of **MUYODI VS INDUSTRIAL and COMMERCIAL DEVELOPMENT CORPORATION & ANOTHER (2006) I EA 243** said to have been cited with approval in **FRANCIS NJOROGE VS STEPHEN MAINA KAMORE (2018)eKLR,** where an error apparent on the face of record was viewed as one which should not be established through a long drawn process. The court's position was that it should be an obvious error, one that can clearly be noticed on the record itself.

14. According to the respondent, this is not the kind of error that the applicant is referring to. What the applicant wants to be viewed as an error was said to be a clear question of jurisdiction which the trial court clearly rendered itself on.

15. And if the court draws wrong conclusions of law or evidence, that may be a good ground for appeal but certainty not for review. The decided cases of **PAVCRAS T SWAI VS KENYA BREWERIES LIMTED (2014)eKLR** and **ABSIS BELINDA VS FREDRICK KANGWANA & ANOTHER: (1963) EA 557**, were cited to drive the point home.

16. Concerning the need to demonstrate "sufficient reason" as envisaged by statute, the case of **SADAR MOHAMMED VS CHARAN SINGH & ANOTHER** as cited in the case of **THE EXECUTIVE COMMITTEE CHELIMO PLOT OWNERS WELFARE GROUP**

& 288 OTHERS VS LANGAT JOEL & 4 OTHERS sued as the **MANAGEMENT COMMITTEE OF CHELIMO SQUATTERS GROUP (2018)eKLR** was said to clearly illustrate that such sufficient reason should be analogous to or closely related to an error apparent on the face of record or discovery of new and important matter.

17. Ultimately, the application at hand was said to lack merit. According to the respondent, it is one for dismissal.

18. I have considered the application, the response made, rival submissions, and the entire record of pleadings, proceedings, and eventual judgement. My appreciation of the applicant's grievance is, first, that the respondent is guilty of violating the subjudice rule, which to him consists in failure to disclose to the court that he acquired his land when the dispute between the applicant and the previous owner was still pending. His second grievance, which is tied to the first, is that the applicant produced to the court only the second page of the relevant green card and that was done deliberately to hide the name of the previous owner. The third and final grievance relates to jurisdiction of the court and this is inextricably tied to the issue of *res judicata* alleged to apply in this case. Any other averment in the application or even the submissions was either in elaboration or amplification of these three grievances.

19. Bearing these grievances in mind, a few questions came to mind. As regards the first grievance, namely that the respondent acquired parcel no. 930 when the dispute between the applicant and its previous owner was still pending, I wonder whether it was the respondent's duty to disclose to the court or the applicants'. The respondent was not party to the previous dispute. The previous owner of parcel no. 930 is not party to this dispute itself. The applicant, alone, was party to the previous dispute and this dispute itself. A question arises: who had better knowledge of these two disputes? Is it not the applicant herself? Who would benefit from such disclosure if there was a benefit to be derived? Again is it not applicant? And did the applicant have the opportunity to make the disclosure? Of course she had. She participated in the case right from the start and the event or transaction she is referring to took place before the case was filed. And why didn't she make the disclosure? No answer from her. Instead, it is the plaintiff to blame. She herself is not blameworthy. My POINT? There is absolutely no reason to use the first grievance as an excuse. What the applicant faults others for not doing could have been done by herself and she was infact better placed to do so.

20. I now come to the second grievance namely, that only the 2nd page of the relevant green card was availed by the respondent purportedly to mislead the court.

Question: Couldn't the applicant herself produce the whole green card? That second page was produced early in the proceedings. The alleged missing page must have been available in the relevant office. Why couldn't the applicant herself produce it to drive the point home that the respondent was misleading the court. Why should that green card be produced now? Why couldn't it be produced at the trial? And who would have benefitted from its production? Is it not the applicant herself? In my view, it was incumbent upon the applicant, not the respondent, to produce the whole green card. She cannot now be heard to cry late in the day that the respondent misled the court. Where was she when the respondent was allegedly doing so?

21. We now come to the third and final grievance. This one focuses on jurisdiction and the related issue of *res judicata*. The respondent pointed out that this issue was raised and addressed by the court. When the former counsel for applicant filed submissions after the conclusion of the trial, this is what he put in writing "*Yes we agree the court has jurisdiction to hear and determine the suit herein*." The trial court itself made jurisdiction its first issue for determination, and while expatiating on it, pointed out clearly that jurisdiction had been admitted in the submissions. The court even went further and explored jurisdictional sources for its operations before concluding that it indeed had jurisdiction. And while doing so, the court made reference to the former dispute between the applicant herein and the former owner of parcel no. 930.

22. Now the applicant wants to revisit the issue of jurisdiction as if it was not addressed. I agree with the respondent that the issue was raised and addressed.

23. But let's assume, for the sake of argument, that is was not raised. It is clear to me that the issue of the former dispute existed before the suit was raised. It is normal in such a scenario for the sued party to raise it in the defence and intimate intention to raise a preliminary objection based on it. Alternatively, one can file an application and raise the issue before the trial is concluded. And it should happen in either of these two ways because it has the potential to determine the suit preliminarily. The applicant did not do any of these. She now turns around long after the case is concluded to fault the court's jurisdiction on the basis of res judicata. She is wrong. She squandered her chance.

24. I would like to say further that the law is as explained by the respondent. More specifically, where a party wants to introduce new evidence for purposes of review, such party is duty-bound to demonstrate that such evidence could not be produced even after exercise of due diligence. The party should infact show that due diligence was exercised but the evidence couldn't be produced. Alternatively, and where applicable, a party can show that he was deprived of the evidence at the time of trial. The applicant has not shown any of this. I have focused on this issue of new evidence because the applicant filed her application wanting to produce new evidence. She didn't point an error apparent on the face of record and she has not demonstrated discovery of any new and important matter. She is talking of things that existed when or before the suit was determined.

25. The court has to be careful. A review cannot be allowed to be an appeal in disguise. Under the guise of a review, parties are not entitled to a re-hearing of the same issue. Further care should be taken so that a review is not sought to supplement the evidence on record. My appreciation of this matter is that the applicant is inviting the court to sit on appeal against its own decision. This cannot be allowed.

26. The upshot, in light of the foregoing, is that the application herein is without merits. I hereby dismiss it with costs.

Dated, signed and delivered at Kericho this 6th day of May, 2020.

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A. K. KANIARU

JUDGEa