



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT KITALE

LAND CASE NO. 64 OF 2011

BOAZ KIPCHUMBA KAINO.....PLAINTIFF/RESPONDENT

VERSUS

G.H. TANNA & SONS LTD.....DEFENDANT/RESPONDENT

AND

ISAIAH WANYONYI & 47 OTHERS.....1ST PROPOSED INTERESTED PARTY/APPLICANT

AND

JACOB KISANG KILIMO.....APPLICANT

RULING

(CONSOLIDATED)

1. This is a consolidated ruling of two applications; one dated **20/11/2019** and filed on the same date and that dated **14/12/2020** and filed on **18/12/2020**.

2. Vide an application dated **20/11/2019**, brought under Certificate of Urgency, the Applicants sought orders as follows:

1. Pending the hearing and determination of this application, and further orders of this Honourable court, the Applicants be granted a temporary stay of the judgment issued on 30/5/2017 together with orders issued pursuant thereto pending hearing and determination of this application *interpartes* and subsequently pending hearing and determination of this suit.

2. The proposed interested parties herein be granted leave to enjoin in this suit, tender evidence and participate in the proceedings herein.

3. This Honourable Court be pleased to set aside, review and/or vary its judgment of 30/5/2017 and all consequential orders thereof pending hearing and determination of this application.

4. Upon prayer 3 being granted, the proposed Interested Parties be allowed to participate in the proceedings by tendering evidence in support of its case herein.

5. Any other relief as the Honourable Court may deem fit and just to grant in the circumstances of this application.

6. The cost of the application be provided for.

3. The application is brought under **Order 45, Rule 1&2, Order 51 Rule 1, Order 10 Rule 11 & Order 22 Rule 75** of the **CPR, Section 1A, 1B, 3A, 63(e) & 80** of the **CPA 2010**.

4. The application is supported by the two affidavits of **Isaiah Wanyonyi** sworn on the **20/11/2029** and **18/12/2019** respectively. The supporting affidavit expounds the grounds in the application.

5. The grounds in which the application is premised are that the Plaintiff filed a suit against the Defendant which was fully heard and judgment entered on **30/5/2017** in favour of the Defendant ordering the eviction of the interested parties from the suit parcels of land; that the applicants have had possession of the suit properties and occupied the suit parcels since **1996** to date and the said properties are developed with permanent structures; that the Applicants stand to be evicted from the suit parcels of land unless this honourable court grants them stay of execution; that the applicants were condemned unheard in contravention of the principles of natural justice since they have a legal stake in the suit properties by virtue of having allotment letters; that the applicants herein should be enjoined in this suit as interested parties by virtue of having a legal stake in the suit properties; that the Applicants stand to suffer prejudice and irreparable loss if they are not enjoined in the suit as interested parties; that the applicants have a claim against the Plaintiff and the Defendants case herein and the Applicants will be condemned unheard unless this application is allowed and that the Honourable Court has wide and unfettered discretion to allow this application for stay in the interest of justice and fairness.

6. The Application is opposed vide a Replying Affidavit sworn by **Paresh Gordhandas Tanna** dated **2/12/2019**. He depones that the application dated **20/11/2019** is *res judicata* as a similar application filed earlier was heard and determined on **14/11/2019**; that the prayers in the instant application are word for word those in the earlier application save for prayer **3** which is an addition in the instant application; that despite addition of prayer **3** the character and nature of the dispute remain the same thus enjoinderment of the alleged interested parties in this suit which is already concluded and judgment delivered; that the application is aimed at vexing and harassing the Defendant/Respondent with unwarranted litigation and attendant costs over the same matter; that the interested parties did not appeal against the courts' ruling of **14/11/2019** but instead filed the current application; that the issue of enjoinderment was heard and determined after this court delved into the merits of the same in its ruling dated **14/11/2019** and that the applicants have not placed any credible evidence to warrant the review or setting aside judgment of the court.

7. The Applicants filed a further affidavit dated **18/12/2019**. Their response is that the respondents have not controverted their evidence as laid down in the supporting affidavit dated **20/11/2019**; that the alleged **Kitale Municipality Block 4/364** does not exist on the ground as it has no map; that the allottees of **Kitale Block 4/439, Kitale Block 4/440, Kitale Block 4/441 and Kitale Block 4/442** were not part of the proceedings leading to the cancellation of its title; that the buildings being constructed belong to the applicants which affirm that they have been in possession; that the application is not *res judicata* since the applicants have not tendered their evidence in having the case determined to its finality; that the parties in the present application are not the same to earlier applications that was dismissed; that the issues raised are not similar to the earlier applications and that the former parties and the present parties to the suit are not the same.

8. In a rejoinder, the respondent filed a supplementary affidavit dated **17/2/2020** where he depones that during the pendency of the instant application, the same applicants have filed **Kitale ELC No. 10 of 2020** against the Defendant herein among other Defendants over the same subject matter seeking for declaratory orders that they are legal owners of the suit property among other orders; that the instant application is an abuse of the court process and that the applicants should elect one cause of action and not to subject the Defendant/Respondent to a multiplicity of suits.

9. In regard to the application dated **14/12/2020**, the applicant herein one **Jacob Kisang Kilimo** filed an application vide a Notice of Motion brought under **Sections 80** of the **C.P.A, Order 45 Rule 1**, of the **C.P.R** and **Section 19(3) (f)** of the **Environment and Land Court Act 2011**. In the application, the applicant herein sought *inter alia* orders that:

1. This Honourable court be pleased to review and set aside its judgment of 30/5/2017 to the extent that it ordered for the cancellation of Title No. Kitale Municipality Block 4/439;

2. In the event that the title for Kitale Municipality Block 4/439 has been cancelled in terms with the judgment, this Honourable court upon allowing prayer No. 1 be pleased to order the restoration of the said title No. Kitale Municipality Block 4/439

3. Costs of the application be provided.

10. The grounds in which the application is premised are that with effect from **6/8/1997** the applicant, jointly with the late **Samuel K. Kisang alias Sammy Kiprop Kilimo** became the registered owners of the land comprised in Title No. **Kitale Municipality Block 4/439**; that **Samuel Kisang alias Sammy Kiprop Kilimo** died on the **20/01/2009**; that the Applicant has this year learnt of the court Judgment in the case herein that was read on the **30/5/2017** and by which the Title No. **Kitale Municipality Block 4/439** was ordered cancelled; that neither the applicant nor his late co-owner were parties to this suit or even the earlier suit i.e. **Kitale HCCC No. 105/2005 (Boaz K. Kaino -vs- G.H. Tanna & Sons Ltd)** and that the applicant has been condemned unheard contrary to the laws of natural justice and that is an error apparent on the face of the record.

11. The application is supported by the affidavit of **Jacob Kisang Kilimo** sworn on the **14/12/2020** which reiterates the grounds in the application.

12. The application is opposed vide a replying affidavit sworn by **Paresh Gordhandas Tanna** dated **10/2/2021**. He depones that it is true that the Plaintiff/Respondent filed the first suit in **2005** vide **Kitale HCCC No. 105 of 2005** against the Defendant which he withdrew and thereafter he instituted the instant suit in **2011** in which he lost and the Defendant/Respondents' counterclaim was granted; that the Plaintiff/Respondent did not appeal the judgment of **30/5/2017**; that it is not in dispute that the suit plot was originally registered and purportedly owned by the Plaintiff/Respondent and later transferred to the applicant on **6/8/1997** and subsequently a caution and restriction respectively were registered against the title of the suit land by the respondent and the Commissioner of Lands respectively on the **24/8/1999** and **17/9/1999** respectively; that the applicant allegedly bought the land in **1997** but never occupied it until **2020** when he learnt of the judgment; that in the Respondents' list of documents filed in the case is a certificate of lease for the suit land; that all the Respondents' annexures were part of the evidence in the instant suit that guided the court to arrive at its judgment of **30/5/2017**; that the applicant was aware of the suit but acquiesced on his rights and hence the delay to file the instant application and no explanation has been given for the delay; that the plaintiff had no good title to pass to the applicant herein; that the applicant has not shown that he has made any discovery of new and important matter/evidence which was not within his knowledge, and neither have they shown any other sufficient reason to warrant a review; the respondent states that all issues were determined with finality in the judgment of **30/5/2017**. It prays for the application to be

dismissed with costs.

13. The court directed that the applications be canvassed by way of written submissions which the parties filed.

ANALYSIS AND DETERMINATION

14. I have carefully considered both applications, the affidavits, the submissions and the case law relied by the parties herein and find that the issues for determination are:

a. Whether the applicants should be enjoined in the suit in which judgment has already been delivered?

b. Whether the judgment dated 30/5/2017 should be reviewed/varied or set aside?

c. Whether the application is res judicata?

d. What orders should issue?

15. The issues are discussed hereunder:

(a) Whether the applicants should be enjoined in the suit in which judgment has already been delivered?

16. It is not in dispute that the applicants in both the applications are well alive to the fact that judgment has been entered in respect to this suit hence the prayer for review and setting aside of the judgment.

17. **Order 1 R (10) (2) of the CPR** provides as follows:

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

18. In *Moses Wachira Vs Niels Bruel & 2 Others (2015) eKLR* the court quoted the Supreme Court in decision of *Communications Commission of Kenya & 4 Others Vs. Royal Media Services Limited & 7 Others Petition No. 15 of (2014) eKLR* wherein the Supreme Court pronounced itself on who an interested party is and held as follows:

“In determining whether the applicant should be admitted into these proceedings as an interested party we are guided by this Courts’ decision in the Mumo Matemo case where the court) held:

“An interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause. Similarly in the case of Meme v. Republic, [2004] 1 EA 124, the High Court observed that a party could be enjoined in a matter for the reasons that:

(i) Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;

(ii) Joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;

(iii) Joinder to prevent a likely course of proliferated litigation.

19. In *Lilian Wairimu Ngatho & another v Moki Savings Co-Operative Society Limited & Another [2014] eKLR* Judge Nyamweya held as follows:

“The provisions of Order 1 Rule 10(2) state that joinder of a party can be made “at any stage of the proceedings”. “Proceedings” are defined in Black’s Law Dictionary Ninth Edition at page 1324 as “the regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment”. A party can therefore only be joined to a suit at any time during the pendency of the suit, but not after the same has been concluded. This finding is premised on the basis that the purpose for joinder is to enable the court effectually and completely adjudicate upon and settle all questions involved in a suit. It is therefore of no use if a party seeks to be joined when the court has already made its findings on the issues arising.

Similarly, the main purpose for joining a party as a Defendant under Order 1 Rule 3 of the Civil Procedure Rules is to claim some relief from the said party, and therefore such joinder can only be made during the pendency of a suit. As this court has declined to set aside the judgment herein, there is no suit pending before this court, and the Applicants cannot therefore be joined as parties at this stage”.

20. In the instant application, the court has already pronounced its judgment thus it is *functus officio*. There is no pending suit. The applicants seek to be enjoined to a suit which has already been heard and determined. It is their claim that they have an interest in the suit for the reason that they have titles to the property which was sold to them by the Plaintiff who lost the case.

21. This court is alive to the fact that the titles the interested parties have annexed to their application formed part of the material evidence at the trial. Therefore the court considered the fact that those titles were in existence at the time the matter was heard and before reaching its conclusion.

22. Of what relevance then should the interested parties be enjoined to this suit when all the evidence they intend to rely on if enjoined formed part of that which had already been considered by the court when passing its judgment? In my considered view, there is not much that the joinder, if allowed, can salvage at this stage.

23. Furthermore, the **48** interested parties in the application dated **20/11/2019** have filed a fresh suit being **Kitale ELC No. 10/2020** against the Defendant and **3** others. I have perused the court file and found that indeed the **48** Plaintiffs in that suit are the same persons who are seeking to be enjoined to this suit.

24. The **48** applicants herein filed the new suit on **3/2/2020**. In their plaint, the plaintiffs who are the interested parties herein seek for a declaration that they are the legal proprietors of the suit properties being **Kitale Block 4/439, Kitale Block 4/440, Kitale Block 4/441 and Kitale Block 4/442**, and that the defendants are trespassers; damages and a permanent injunction restraining the defendants from interfering with the suit properties are also sought. The suit was therefore filed after the instant application was filed on **20/11/2019** and while it was pending hearing and determination. I have no doubt that if the interested parties were enjoined to this suit; they would raise the same pleadings and prayers as the ones that have been raised in **Kitale ELC No. 10/2020**. This in my view amounts to abuse of the court process and a waste of this courts' judicial time. Litigation has to come to an end.

(b) Whether the Judgment dated 30/5/2017 should be reviewed/varied or set aside?

25. In both the applications, the applicants seek for a review and setting aside of the judgment dated **30/5/2017**.

26. Order 45 Rule 1(1) of the **Civil Procedure Rules** is clear that for the court to review its decision, certain requirements should be met. That rule provides as follows:

“(1) any person considering himself aggrieved-

a. by a decree or order from which an appeal is allowed but which no appeal is preferred; or

b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of a 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.

27. The aforesaid rule is based on **Section 80** of the **CPA**. The Court has unfettered discretion to make such order as it thinks fit upon sufficient reason being given for review of its decision. However, the discretion should be exercised judiciously and not capriciously. That section provides as follows:

“Any person who considers 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 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”.

28. The conditions for the grant of orders of review therefore are as follows that:

a. There is discovery of new and important matter or evidence which after the exercise of due diligence was not within the applicants knowledge and which could not therefore produce at the time the order was made or,

b. Some mistake or error apparent on the face of the record or,

c. Any other sufficient reason

29. Further that the application for review must be made without unreasonable delay.

30. The question that arises is: have the applicants satisfied the above conditions to warrant the court to issue orders for review in respect to the judgment dated **30/5/2017**?

31. First, I will address the issue of whether there was discovery of new and important matter or evidence which after the exercise of due

diligence was not within the applicant's knowledge. In the case of **Republic -v- Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR** the court held that:

“For material to qualify to be new and important evidence or matter, it must be of such a nature that it could not have been discovered had the applicant exercised due diligence. It must be such evidence or material that was not available to the applicant or the court.” (emphasis mine)

32. Similarly in the case of **Evan Bwire v Andrew Aginda Civil Appeal No. 47 of 2006** cited in the case of **Stephen Githua Kimani v Nancy Wanjira Waruingi T/A Providence Auctioneers [2016] eKLR** the Court of Appeal held as follows:

“An application for review will only be allowed on strong grounds particularly if its effect will amount to re-opening the application or case a fresh. In other words, I find no material before me to demonstrate that the applicant has demonstrated the existence of new evidence which he could not get even after exercising due diligence.”

33. I have perused the applications and the annexures thereto; and I have not seen any explanation advanced by the applicants to demonstrate to and to convince this court that there is discovery of new evidence to warrant review of the judgment delivered on the **30/5/2017**. The applicants have not taken any effort to show the court what new evidence they have discovered after the delivery of the judgment which was not within their knowledge at the time of the trial. The title deed in respect to the disputed land was produced in court as evidence before the honourable court at the hearing and there is no new evidence that the applicants intend to produce if the application is allowed.

34. Having found that the applicants have not demonstrated that there was discovery of new evidence, and that there is no error apparent on the record, I now turn to the issue of delay.

35. Upon perusal of the court record, judgment was entered on **30/5/2017** whereas the instant Applications were filed on **20/11/2019** and **14/12/2020** respectively. That is to say **2½** and **3** years respectively after judgment in the instant suit was delivered. The applicants have not explained the reasons for the delay save that they were not aware of the case. The applicant **Jacob Kisang Kilimo** would have this court believe that from the time of purchase of part of the suit land in **1997** he came to claim the land only in **2020**.

36. Any delay must be explained; In the case of **John Agina v. Abdulswamad Sharif Alwi C.A Civil Appeal No. 83 of 1992** the court stated as follows:

“An unexplained delay of two years in making an application for review under Order 44 Rule 1 (now Order 45 rule 1) is not the type of sufficient reason that will earn sympathy from the court.”

37. In my considered view therefore delay of **2 ½** and **3** years which is unexplained amounts to unreasonable delay.

38. In the application dated **14/12/2020**, the applicant does not explain to the court what to do after it has reviewed its judgment. He does not for example seek that the suit be heard afresh once the review and setting aside orders are obtained from the court. He only prays that the subject title be restored when the court had already found that it had to be cancelled for the reason that it was not genuinely issued to the plaintiff who sold it to the applicant. In this court's view, such restoration is not possible by way of an application without a hearing in the face of the existing judgment of the court.

(c) Whether the application is res judicata?

39. The Respondent has in his supplementary affidavit contended that the application dated **20/11/2019** is *res judicata*. Reason given is that the application is similar to that which gave rise to the ruling issued on **14/11/2019** in the instant suit.

40. The law pertaining to the doctrine of *res judicata* is captured under the provisions of **Section 7** of the **Civil Procedure Act** which states:

“No court shall try any suit in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

41. The doctrine of *res judicata* has stated has been explained in a plethora of decided cases. In the recent case of the **Independent Electoral and Boundaries Commission -v- Maina Kiai & 5 Others (2017) eKLR**, the Court of Appeal held as follows:

“Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in distinctive but conjunctive terms:

a) The suit or issue was directly and subsequently 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.”

42. The court explained the role of the doctrine thus:

“The rule or doctrine of *res judicata* serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundation of *res judicata* thus rest in the public interest for swift, sure and certain justice.”

43. In my understanding the *res judicata* principle is meant to lock out from the court system a party who has had his day in a court of competent jurisdiction from re-litigating the same issues against the same opponent. The question therefore is whether the respondent in the application has satisfied the conditions for the principle of *res judicata* in view of the facts of this case.

44. It is trite law now that the doctrine of *res judicata* applies even to applications. According to **Section 7** of the **Civil Procedure Act** any matter that could have been made the subject of a concluded suit or application and was not can not be made the subject of a new suit or application without violating the doctrine of *res judicata*.

45. In my considered opinion and based on the legal principles and statutory provisions cited, the application dated **20/11/2019** is *res judicata* since it delves into the issues in the concluded application dated **29/4/2019** save for the inclusion of only one extra prayer.

46. In conclusion, I find that both the applications dated **20/11/2019** and **14/12/2020** are devoid of merit and are consequently they are hereby dismissed with costs to the respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 24TH DAY OF JUNE, 2021.

MWANGI NJOROGI

JUDGE, ELC, KITALE.