



REPUBLIC OF KENYA



**Makori & another v Co-operative Merchant Bank Ltd & another (Civil Case 46 of 2008) [2024] KEHC 8945 (KLR) (25 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8945 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERICHO  
CIVIL CASE 46 OF 2008  
JK SERGON, J  
JULY 25, 2024**

**BETWEEN**

**JOHNSON ONDUKO MAKORI ..... 1<sup>ST</sup> PLAINTIFF**

**BERNARD GESORA MAKORI ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**THE CO-OPERATIVE MERCHANT BANK LTD ..... 1<sup>ST</sup> DEFENDANT**

**EMERG INVESTMENTS LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The application coming up for determination is a notice of motion dated 3rd May, 2024 seeking the following orders;
  - (i) Spent
  - (ii) That the court be pleased to review its ruling delivered on 15th June, 2023.
  - (iii) That the transfer of L.R No. 631/60/IVIR/9454/17 be canceled under the doctrine of *Lis Pendens*.
  - (iv) That the costs of this application be provided for.
2. The application is supported by grounds on the face of it and the supporting affidavit of Bernard Gesora Makori the 2nd plaintiff/applicant herein.
3. The applicant avers that the 2nd defendant filed an application dated 21st November, 2022 against which grounds of opposition had been filed. The applicant avers that he has no idea when the ruling was heard and the ruling was delivered and further that the court record indicates he was to be served with notice of the ruling and when he sought to establish status of the matter, for a long time the court could not be traced.



4. The applicant avers that while this matter was pending the second defendant caused property to be transferred to itself notwithstanding a restriction entered against title had not been removed. The applicant avers that the application dated 21st November, 2022 which was dismissed with costs, had been filed to have the restriction on the property removed yet the records show that the property had already been transferred on or before 23rd March, 2023.
5. The applicant further avers Lady Justice Angawa had ruled that that matter had abated and therefore the application dated 21st November, 2022 could not lie in the light of the decision by Lady Justice Angawa.
6. The 2nd Defendant/Respondent filed grounds of opposition dated 17th May, 2024 in response to the application dated 3rd May, 2024 on the following grounds;
  - (i) That there is no subsisting suit within which the 2nd Plaintiff can seek the purported reliefs. The suit by the 2nd Plaintiff was struck out.
  - (ii) That the 2nd Plaintiff vide an application dated 1st December, 2023 sought orders of review to reinstate the suit but subsequently withdrew the application to arrest this court's ruling
  - (iii) That the firm of Khaminwa & Khaminwa Advocates did not seek Court's leave to come on record in place of Messrs Lubulellah & Advocates and neither did they file any consent letter allowing them to come on record and consequently order 9 rule 9 of the Civil Procedure Code has been violated and the application is incurably defective
  - (iv) That the application is res judicata as the issues in dispute have been determined in Kisii ELC No. 686 of 2016 and Kisumu Court of Appeal Civil Appeal No. 7 of 2018 to the finality.
7. The 2nd Defendant/Respondent therefore sought to have the instant application struck out and the Firm of Khaminwa & Khamiwa be ordered to pay costs.
8. The 2nd Defendant/Respondent filed a replying affidavit to the instant application dated 25th May, 2024. The affidavit was sworn by Nalinkumar Meghji Shah the Director of Emerg Investments.
9. The 2nd Defendant/Respondent avers the application was an abuse of court process and that after the suit had abated as against the 1st and 2nd Plaintiff's name struck out, they filed a fresh suit being Kisii ELC No. 686 of 2016 between the same parties and the same subject matter which suit was heard and dismissed with costs.
10. The 2nd Defendant/Respondent further avers that the Plaintiffs in the said suit lodged an appeal at the Court of Appeal at Kisumu vide Civil Appeal Number 37 of 2018 the appeal heard and was dismissed with costs.
11. The 2nd Defendant/Respondent avers that in a bid to abuse court process the applicant filed an application dated 1st December, 2023 seeking to review the orders of 25th May, 2009 and 15th June, 2023 which he subsequently withdrew before the court could render its ruling.
12. The 2nd Defendant/Respondent avers the applicant never paid the costs he was ordered to pay in Kisii ELC No. 686 of 2016 and Civil Appeal Number 37 of 2018.
13. The 2nd Defendant/Respondent avers that the applicant has appointed a new firm of advocates so as to continue to abuse the court process to their detriment and subject their company to unnecessary legal costs and expenses.



14. The 2nd Defendant/Respondent avers that the prayer for transfer of the suit property to be canceled is not only res judicata in view of previous suit and appeal but there is no suit subsisting within which such order can be made in the first place.
15. The 2nd Defendant/Respondent avers that even if the instant application is merited the same has been overtaken by events as the Chief Registrar has already lifted the restriction pursuant to court orders made on 15th June, 2023 and that the suit property was sold to Guru Nanak Nishka Sewak Jatha and therefore the continued proceedings against them were vexatious.
16. The 1st Defendant/Respondent filed a replying affidavit dated 27th May, 2024, it was sworn by Florence Njuguna Legal Services Manager at The Cooperative Merchant Bank Limited.
17. The 1st Defendant/Respondent avers that the application was frivolous and vexatious as it seeks to stifle the 1st Defendant/Respondent's equity of redemption which arose and was exercised back in 27th April, 2006 by way of private treaty.
18. The 1st Defendant/Respondent avers that the application does not meet the threshold warranting review and that in any event the applicant had not appealed from the decision of this court delivered on 15th June, 2023. The 1st Defendant/Respondent further avers that the applicant had not demonstrated that he took any reasonable steps after the alleged discrepancies to challenge the orders of this Court.
19. The 1st Defendant/Respondent avers that the suit property was sold to the 2nd Defendant/Respondent on 27th April, 2006 in exercise of its statutory power. and therefore the applicant had no reasonable cause of action.
20. The 1st Defendant/Respondent avers that contrary to the applicants assertions the doctrine of lis pendens cannot be used to breathe life into a matter that was lifeless on account of the doctrine of res judicata.
21. I have considered the pleadings and the submissions by the parties and the issues for this court's determination is whether to review and/or set aside the court ruling delivered on 15th June, 2023.
22. The legal provisions governing review are section 80 of the [Civil Procedure Act](#) and Order 45 Rule 1 of the [Civil Procedure Rules](#) which sets out the conditions under which orders for review may be made to be as follows;
  - (a) 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;
  - (b) on account of some mistake or error apparent on the face of the record; or
  - (c) 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.
23. Having considered the relevant provisions of the law, I find that the applicant has not met any of the conditions for the grant of orders of review. Furthermore, the failure to deliver a ruling as anticipated by a litigant as in this case by the applicant, in my view cannot be said to be a mistake or an error apparent



on the face of record nor can it be a ground for seeking a review. In the case of Supreme Court No. 3 of 2014; *Robert Tom Martins Kibisu v Republic* [2018] eKLR the Apex Court observed as follows;

“(49) Be that as it may, we are inclined to consider the application before us, more so the allegations therein, so as to clearly put everything into context. In that regard, while the application before the Court is framed as one seeking review for correction of errors apparent on the face of the record, the mischief is in the details. An application cannot be said to be for correction of errors when it is anchored and replicate with allegation of discontentment with the Court’s finding and/or appreciation of legal principles and their interpretation thereof. Such dissatisfaction is normally a ground for appeal.”

[50] Further, in an application for correction of errors, the focal point is usually the judgment of the Court/tribunal which is sought to be corrected. An applicant is thus duty bound to specifically point at the particular page/paragraph and/or portion of the judgment where he opines that the alleged error is situated. Suffice it to say, an error cannot be apparent on the face of the judgment when that error requires evidence to be adduced so as to enable the Court to discern it. Needless to say, we fail to fathom why an application for correction of errors could even draw such a huge record like the one before us in this application. The precision of such an application and its clear nature is what clothes the Court with the jurisdiction to even move suo motto: for what is erroneous will occasionally be glaringly obvious.

(51) We thus reiterate that an application for review of a Court’s judgment cannot call for the changing and/or altering of the Court’s final orders and findings drawn from the reasoning in the entire judgment...”

24. Considering the grounds in support of the applicant’s application for review, I find that the application does not qualify for the grant of review on any of the grounds set out under Order 45 of the *Civil Procedure Rules*.

25. The applicant is seeking a review and/or setting aside of the ruling dated 15th June, 2023 of this court, however, I find that the application for review and/or setting aside has since been overtaken by events as the Chief Land Registrar acted on the orders of this court and discharged entry no. 24 registered on LR No. 631/60/IV IR No. 9454/17. Courts do not issue orders in vain. In *B v Attorney General* [2004] 1 KLR 431 Ojwang, J. (as he then was) observed that: “ The Court does not, and ought not to be seen to, make Orders in vain; otherwise the Court would be exposed to ridicule, and no agency of the Constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people.”

26. Consequently, the notice of motion dated 3rd May, 2024 is hereby dismissed.

**SIGNED, DELIVERED, VIRTUALLY THIS 25TH DAY OF JULY 2024.**

**J.K. SERGON**

**JUDGE**

In the Presence of:-

C/Assistant – Rutoh

Miss Ochola holding brief for Bundotich for 2<sup>nd</sup> Defendant/Respondent



Dr. Khaminwa for the Applicant

