



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 467 OF 2019

STEPHEN NJUGUNA MWENDAPLAINTIFF/PLAINTIFF

VERSUS

PETER MWICIGI MWANGI.....DEFENDANT/RESPONDENT

RULING

There are **two** matters for determination. One is the Notice of Motion Application dated **3rd October 2019**, by the Plaintiff/ Applicant and the **2nd** matter is the **Notice of Preliminary Objection** dated **16th October 2019**, by the Defendant/ Objector.

In the Notice of Motion Application the Plaintiff/ Applicant sought for orders that ;

- 1. That the Honourable Court be pleased to enter the firm of M/S Waweru Nyambura & Company Advocates on record for the Plaintiff/ Applicant after Judgment.***
- 2. That this Honourable Court be pleased to stay any Decree or consequential Orders emanating from Judgment read on 28th June 2019, by Hon. Lady Justice L. Gacheru.***
- 3. That this Honourable Court be pleased to review the Judgment dated 12th June 2019, and read on 28th June 2019, by Hon. Lady Justice L. Gacheru .***
- 4. That the costs of this Application be provided for.***

The Application is premised on the facts that the suit was dismissed for being Res Judicata. That there was misrepresentation of facts and the Order dated **8th June 2012** ,was misrepresented.

In his Supporting Affidavit, **Stephen Njuguna Mwenda**, averred that he was the Plaintiff in Civil Suit **No. 644 of 2021**, in Thika Law Courts . That around **2011**, the file went missing from the Court's registry and he sought for leave to reconstruct the file which was allowed. That after reconstruction of the file, he filed an Application and he was issued with an Order allowing the **Executive Officer** to sign all necessary documents to transfer land parcel Number **Chania/Kanyoni/ 2214**, in his name. That he was issued with the Title in reference to the enforcement of the order and on **28th March 2012**, the Defendant/ Respondent filed an Application seeking to set aside the said orders and that the matter never proceeded for hearing as the Court lacked jurisdiction.

That he never objected to the said Application and the Court allowed the said Application. Further that the Defendant/ Respondent extracted the Order dated **31st May 2012**, emanating from the Application filed on **29th March 2012**, and in the extraction of the said Order the Defendant's/Respondent's extracted the same wrongly since prayer (e) was never extracted fully. That the said order was primarily used by the Court to claim **Res Judicata**, wherein the suit was dismissed for want of jurisdiction. That the file was reconstructed and not everything was brought before Court to assist in just determination That the suit is not Res Judicata and the Judgment ought to be reviewed.

The Application is opposed and the Defendant/ Respondent filed Grounds of Objections, and averred that the Application is fatally defective. That the Advocate of the Applicant has not sought leave to come on record for the Applicant as no leave has been granted. That the Application is Res Judicata. Further that the Application is vexatious, frivolous oppressive and does not raise any cause of action

The **2nd** matter is the Notice of Preliminary Objection by the Defendant / Objector dated **16th October 2019**, on the grounds that;

- 1. That no appeal has been filed in this case***

2. That the Application is defective

3. The Advocate of the Applicant has not sought leave to come on record for the Applicant in other words no leave was granted

4. The Application is Res Judicata

5. The Application and its Affidavit in support is misleading in all aspects

The Applications were canvassed with by way of written submissions which the Court has carefully read and considered. The Court has also read and considered the pleadings in general, the Affidavits and the annexures thereto and the relevant provisions of law and finds that the issues for determination are;

1. Whether The Notice of Preliminary Objection, dated 16th October 2019, is merited

2. Whether the Notice of Motion Application dated 3rd October 2019, is merited

As the Court makes a determination on the issues in question, it has noted that the Application is the one seeking for a Review. However, the Judgment sought to be reviewed though delivered by this Court, the same was determined by my brother **Hon. Justice O.A Angote** at the time based in Machakos Environment and Land Court. The Court notes that this case was one of the cases that were heard during the service **weeks** and therefore the said Honourable Judge is not based in Thika ELC. While Application for review ought to be heard by the Court which determined the matter and passed the Decree, the provisions of **Order 45 2(2)** empowers this Court to determine the said review if the Judge who passed the Decree is no longer attached to the said Court. See Order 45 (2(2))

(2) If the judge who passed the decree or made the order is no longer attached to the court, the application may be heard by any other judge who is attached to that court at the time the application comes for hearing.

1. Whether The Notice of Preliminary Objection dated 16th October 2019, is merited?

The Principles to guide a Court in determining whether a Preliminary Objection is merited were set out when the Court defined what a Preliminary Objection entails in the case of **Mukisa Biscuits Manufacturing Co. Ltd v...Vs... West End Distributors Ltd [1969] E.A. 696** where it was held;

“So far as I am aware a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Sir **Charles Newbold** in the same matter stated thus:

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increases costs and, on occasion, confuse the issue. The improper practice should stop.”

Is what has been raised by the Defendant/ Objector amounts to a Preliminary objection and is the same are merited?

One ground is that no appeal has been filed in this case, and the Plaintiff/ Applicants is seeking for Review of the Court’s Judgment. **Order 45** of the **Civil Procedure Rules**, provides that a Review is only sought where the party has not appealed against the decree being sought to be reviewed. Therefore, the Court finds that this ground is **not** merited.

The other ground of is that he Applicant’s Advocate has not sought leave to come on record and or in other words no leave has been granted. The Court having perused the Notice of Motion Application notes that the Applicant’s Advocate has sought leave to come on record. While it is true that the provisions of **Order 9 Rule 9** of the Civil Procedure Rules requires an Advocate coming on record after Judgment has been delivered need to seek leave, the provisions of **Order 9 of the Civil Procedure Rules**, allow the said prayer to be combined with other prayer. See **Order 9 Rule 9 and 10** of the **Civil Procedure Rules** provides:

Rule 9. When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

(a) Upon an application with notice to all the parties; or

(b) Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

Rule 10. An application under rule 9 may be combined with other prayers provided the question of change of advocate or party intending to act in person shall be determined first.

The Court finds that the said ground is also **not** merited.

The Preliminary Objection has also averred that the Application is Res judicata. As noted above, a Preliminary Objection should not be raised on issues that would require the Court to prove evidence and ascertain facts. In order for the Court to make a determination on whether the Application is **Res judicata**, the Court is called upon to probe evidence and ascertain facts and therefore the Court finds that an issue of res Judicata is not a Preliminary objection properly raised. See the case of **George Kamau Kimani & 4 Others...Vs...County Government of Trans Nzoia & Another (2014), eKLR**, where the Court held that:-

“I have considered the points raised by the 1st Defendant. All those points can be argued in the normal manner. They do not qualify to be raised as Preliminary Points. One cannot raise a ground of res judicata by way of Preliminary Objection. The best way to raise a ground of res judicata is by way of Notice of Motion where pleadings are annexed to enable the court to determine whether the current suit is res judicata. Professor Sifuna did not raise the issue of res judicata by way of Notice of Motion. Professor Sifuna only annexed a ruling in respect of a case which was struck out. This is not a proper way of issues which require ascertainment of facts by way of evidence. They cannot be brought by way of Preliminary Objection”.

Finally the Defendant/ Objector has stated that the suit is fatally defective , vexatious, frivolous and does not raise any cause of action. It is the Court’s considered view that to be able to come to such a conclusion, the Court must first probe the evidence and ascertain facts and therefore the said grounds are not Preliminary Objections properly raised.

Consequently, the Court finds and holds that the Notice of Preliminary Objection is not merited.

3. Whether the Notice of Motion Application dated 3rd October 2019 is merited

In his Application the Plaintiff/ Applicant has sought for leave of its Advocate to come on record. The Provisions of **Order 9 Rule 9** of the **Civil Procedure Rules** provides:

Rule 9. When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

(a) Upon an application with notice to all the parties; or

(b) Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

A party is entitled to representation by an Advocate of their own choice and without any reason being advanced as to why the said Advocates should not be allowed to come on record and with an Application having been duly filed, the Court finds no reason to deny the same and therefore leave is so granted.

The Plaintiff / Applicant has also sought for a review of the Court’s Judgment dated 12th June 2019 . The jurisdiction of the Court to Review its Judgment are to be found under the provisions of **Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules** which provides as follows:-

Section 80. Review

“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.”

[Order 45, rule 1.] Application for review of decree or order.

“1. (1) 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”

In the case of Republic...Vs...Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR

“ 15. The Indian Supreme Court^[7] made a pertinent observation that is it has to be kept in view that an error apparent on the face of 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.

16. In *Attorney General & O’rs v Boniface Byanyima*,^[8] the court citing *Levi Outa v Uganda Transport Company*,^[9] held that the expression “mistake or error apparent on the face of record” refers to an evident error which does not require extraneous matter to show its incorrectness. It is an error so manifest and clear that no court would permit such an error to remain on the record. It may be an error of law, but law must be definite and capable of ascertainment.”

29. I am not persuaded that the reasons offered by the applicant amounts to ‘sufficient reason’ within the meaning of the rules cited above nor is it analogous or ejusdem generis to the other reasons stipulated in Order 45 Rule 1. My finding is fortified by the holding in the case of *Evan Bwire vs Andrew Nginda*^[20] where the court held that ‘an application for review will only be allowed on very strong grounds particularly if its effect will amount to re-opening the application or case a fresh.

30. The principles which can be culled out from the above noted authorities are:-

i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.

ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.

iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.

iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.

v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.

vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.

vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.

viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.

ix. Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.

x. The power of a civil court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1.”

Guided by the above, the Court will then determine whether the Plaintiff/ Applicant has shown sufficient reasons to warrant the Court review the Judgment on record. Having gone through the Judgment by the Court dated 12th June 2019, and delivered on 28th June 2019, the Court notes that the suit was dismissed on the basis that the same was **Res Judicata** and the same stems from an order dated 29th March 2012. It is on this basis that the Court had found that the issue of ownership had already been heard and determined and therefore the Court had no jurisdiction to hear and determine the matter.

Under Paragraph 16 of the Judgment, the Court further noted that the lower Court’s record seems to have been interfered with. This Court having perused the lower Court record agrees with the said observation.

The issue by the Plaintiff/ Applicant in the instant Application is that the order that was presented to the Court is not a true reflection of the Orders that were granted by the lower Court. That it is indeed true that the suit was dismissed, however, the same was dismissed for want of jurisdiction and not because the parties had been heard on merit. This Court has seen the annexures produced in evidence by the Plaintiff/ Applicant, one of them being the Application dated 26th March 2012 by the Defendant/ Respondent and the Order that was sought under paragraph (e) was that ;

“ That there be a final order dismissing this suit since the Court had declared lack of jurisdiction”

The Court has further seen the Ruling dated 31st May 2012, that allowed the said Application and the learned magistrate stated;

“ I find the Application merited and the same is allowed as prayed.”

It is not in doubt that in allowing the Application the learned Magistrate allowed the dismissal of the suit for want of jurisdiction. The order that was presented before the Court issued on 8th June 2012, presented the prayer as the one being allowed simply as;

“That the suit be and is hereby dismissed.”

Therefore, it follows that the Order that was issued was not a true reflection of the Ruling delivered by the learned magistrate.

The Scope of *Res Judicata* is to be found under the provisions of Section 7 of the Civil Procedure Act that provides that

“No court shall try any suit or issue 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 the 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.

In the case of *Enock Kirao Muhanji ... Vs..Hamid Abdalla Mbarak [2013] eKLR* the Court held that;

18. It is true, as argued by the Applicant that when a suit is dismissed, one might not be allowed to file a fresh suit unlike in a situation where a suit has been struck out.

19. The words “dismissed” and struck out” are terms of art and are not supposed to be used interchangeably in a Ruling or Judgment. However, more often than not, the terms are used interchangeably by the litigants and the courts.

20. It is therefore incumbent that when the court is called upon, like in this case, to determine whether a party can file a fresh suit after the first one has been dismissed or struck court, the court should look at the circumstances of each case to arrive at a decision. The mere fact that the trial court uses the words “dismissed” does not expressly mean that a fresh suit cannot be filed if indeed the court meant that the suit should have been “struck out” so as to allow a party to file a fresh suit.

21. For me to determine if the current suit is *res judicata*, the only question that I have to ask myself is whether the issues which were before the lower court between the Plaintiff and the Defendant herein were determined by the court.

22. The issue as to the ownership of parcel of land number Kilifi/Township/Block III/1095 was never heard and determined by the Magistrate in the lower court.

23. Before the matter could proceed for the hearing for the determination of the said issue, the parties consented that the lower court did not have the jurisdiction to hear the matter. The Magistrate proceeded to dismiss the suit on that ground alone.

24. It is trite law that a court without jurisdiction cannot hear a matter. It therefore follows that the court in RMCC No. 711 of 2009 could not hear the issues raised in the said suit and even if it had proceeded to hear and determine the issues, the determination would have been null and void.

25. Despite the fact that the Magistrate erroneously “dismissed” instead of “striking out” the suit for want of jurisdiction, I find that the suit before me is neither *res judicata* nor an abuse of the court process. The issues before the court in RMCC No. 711 of 2006 were never heard and determined.

The suit having been dismissed for lack of jurisdiction, it cannot be said that the instant suit was **Res Judicata** as the issues in dispute were not determined on merit. This Court takes the position of the Court in the above matter and notes that the suit herein having not been determined on merit, a party is in a position to file a fresh suit. It therefore cannot be said that the suit was **Res Judicata**

The Court dismissed the matter for being **Res Judicata**. It is quite clear from the above analysis that the matter was **not Res Judicata**. Further, the Court had noted that the record of the lower Court file had been interfered with and therefore these issues would not have been properly dealt with in the absence of certain documentation. Therefore, this Court finds and holds that the Plaintiff/Applicant has satisfied it to exercise discretion in its favour and allow the Application for Review. Consequently, the Court finds and holds that the Notice of Motion Application dated 3rd October, 2019 is merited and the same is allowed.

The Upshot of the foregoing is that the Court finds that the Notice of Preliminary Objection dated 16th **October 2019**, is **not** merited and the same is dismissed entirely with costs.

However, the Court further finds that the **Notice of Motion Application** dated 3rd **October 2019**, is merited and the same is allowed entirely with costs to the Plaintiff/Applicant.

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 8TH DAY OF OCTOBER, 2021.

L. GACHERU

JUDGE

Court Assistant – Lucy