REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

LAND CASE NO. 420 OF 2013

DANIEL KIMELI KIPRONO.....1ST PLAINTIFF/RESPONDENT

JULIUS RONO.....2ND PLAINTIFF/ RESPONDENT

VERSUS

HOSEA KIPKORIR BUSIENEI .....1ST DEFENDANT/ APPLICANT

MATAYO BUSIENEI .....2ND DEFENDANT/ APPLICANT

NGETICH A. J. A. T/A RONBOY AUCTIONEERS.... 3RD DEFENDANT

RULING

[NOTICE OF MOTION DATED 23RD MARCH, 2021]

1. The Applicants approached this court by way of the notice of motion dated 23rd March, 2021 seeking orders that: -

(a) The ex-parte orders issued on 28th September, 2020 and 14th May, 2020 be set aside.

(b) The defendants' case be reopened to allow the 1st and 2nd Defendants/Applicants to testify and call witnesses.

(c) The Defendants/Applicants be allowed to cross-examine the Plaintiffs and all their witnesses.

(d) Costs of the Application be in the cause.

The application is based on the ten **(10)** grounds on its face, among them that the matter was last scheduled for hearing on 19th March, 2020 but could not proceed because of the Covid-19 pandemic; that the hearing notice for the 28th of September 2020, had not been served upon them, and their absence was therefore not intentional; that they are desirous of being heard, and are willing to abide by any orders the court may issue. The application is supported by the affidavit sworn by **Hosea Kipkorir Busienei**, the 1st Applicant/Defendant, in which he reiterated that no hearing notice for the 28th September, 2020 was served upon their counsel. That they should not be condemned unheard.

2. The application is opposed by the Respondents through the replying affidavit sworn by **Daniel Kimeli Kiprono**, the 1st Respondent/Plaintiff, on the 7th of May, 2021. The 1st Respondent depones that the application was *res judicata*, as similar ones dated 19th October, 2017 and 5th September 2019 had been filed by the Applicants seeking the same orders and had been decided. He deponed that in the ruling of 28th June, 2018, the Applicants' application case was re-opened, and the defendants allowed to testify and call witnesses. That the Applicants then filed another application dated the 5th September, 2019 seeking orders that they be allowed to cross-examine the Plaintiffs and other witnesses who had testified. That application was dismissed through the ruling of the 9th September, 2019 for being incompetent. That the notice for defence hearing of 28th September, 2020 was served upon all the parties' advocates by email on the 15th May, 2020 as a court order via the respective email addresses that is; chebiiadvocate@yahoo.com and office@nyairoadvocates.co by the Court Assistant. That the application before court does not seek to review the orders of the court of 28th June, 2018 which dismissed the application which had similar prayers being sought in the current notice of motion, and as such the court is *functus officio,* and cannot sit on an appeal of its own decision. That as the application is not for review of the earlier orders, it amounted to an abuse of the court process, especially considering that the Plaintiffs' case was closed on 5th October, 2017. That the application was brought after an inordinate delay, and it was clear the Applicants have no intention of testifying in the matter. The Respondents urged the court to bring this matter to a close

since it had been pending since 2013, and it is in the interests of justice that the same comes to a close.

3. That following the directions issued on the 31st May 2021, the learned counsel for the Applicants and Respondents filed their written submissions dated the 1st July, 2021 and 16th September, 2021 respectively. The Applicants submitted that justice should be done without undue regard to technicalities in accordance with **Article 159 2(d) of the Constitution**. That **Order 51 Rule 15 of the Civil Procedure Rules** allows the court to set aside orders that are made exparte. They relied on the decision of the Court of Appeal in the case of ***Karatina Garmets Limited vs David Nyanarua (1976) eKLR,*** wherein the court expressed the view that cases ought to be decided on merits, as opposed to issuing ex-parte judgments based on procedural technicalities. They also referred to the Court of Appeal case of ***Pithon Waweru Maina v Thuka Mugitia (1983) eKLR*** in which the court cited the decision in the case of ***Shabir Din v Ram Parkash Anand (1955) 22 EACA 48***, where it was held that;

> **"the discretion of the court being perfectly free and the words 'sufficient cause' not being comparable or synonymous with 'special grounds'. Whether the grounds for granting relief will be accepted, depends on the facts of the particular case, it being neither possible nor desirable to indicate in detail the manner in which the discretion should be exercised".**

The Respondents submitted that this court is functus officio and that the application dated 23rd March, 2021 is res judicata. The Respondents relied on definition of *functus officio* in The Black's Law Dictionary, 10th Edition, **Section 7 of the Civil Procedure Act**, and the Court of Appeal decision in the case of ***Independent Electoral and Boundaries Commission vs. Maina Kiai & 5 Others (2017) eKLR***, where the Court held as follows;

> **"The rule or doctrine of res judicata serves the statutory 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…**
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> **It is designed as a pragmatic and common-sensical 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……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 to disrepute and calumny's. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice."**

The Respondents also relied on the case of ***Dinesh Construction Company Limited vs. Kenya Sugar Research Foundation (2021) eKLR*.**

4. The following are the issues for determinations by the court;

> **(a) Whether the instant application is res judicata, in view of the applications dated the 19th October, 2017 and 5th September, 2019.**
>
> **(b) Whether the hearing notice for the 28th September, 2020 was served upon the Applicants.**

5. The court has carefully considered the grounds on the notice of motion, the affidavit evidence, written submissions, superior courts decisions cited thereon, and come to the following determinations;

> (a) That the principle of *res judicata* serves to promote an end to litigation by stipulating that a matter should not be adjudicated on again if it has previously been directly and substantially in issue before a court of competent jurisdiction that has rendered a final determination, or it is a matter that reasonably ought to have been in issue in the previously determined matter between the same parties. This is expressed under **Section 7 of the Civil Procedure Act, Chapter 21 of Laws of Kenya**, which explicitly provides that: -
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> > **"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." (emphasis added)**
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> (b) The principle was expounded upon in the case of ***Belize Port Authority Shipping Services Ltd CA No. 13 of 2011,*** cited with approval in ***Jackson Juma Kenga v Republic [2019] eKLR,*** wherein the court stated that;
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> **"The doctrine of res judicata in the modern law compounds three distinct components which nevertheless share the same underlying public interest that there should be finality in litigation and that a party should not be twice vexed in the same matter. The same components are:**
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> > **1. Cause of action estoppel, which, where applicable is an absolute bar to Litigation between the same parties or their privies.**
> >
> > **2. The issue estoppel, which where applicable also prevents the re-opening of particular points which have been raised and specifically determined in previous litigation between the parties, but is subject to an exception in special**

circumstances and

3. Henderson v Henderson abuse of process, which gives rise to a discretionary bar to subsequent proceedings, depending on whether in all the circumstances, taking into account all the relevant facts and the various interests of justice, a party is misusing or abusing the process of the court, by seeking to raise it, the issue which could have been raised before." (emphasis added)

That in ***Henderson vs Henderson***, the court stepped in and characterized the administrator's/plaintiff's manner of prosecuting her case as mischief wherein she brought multiple separate proceedings over matters that clearly could have been pleaded once together.

(c) That in the instant application, it is clear that the actions of the Applicants fall squarely within the characterization of abuse of court process. The Applicants had filed the application dated the 19th October, 2017 seeking for the reopening of their case by setting aside the exparte order of 5th October 2017, and to be allowed to testify and call witnesses. That application was allowed through the ruling of the 28th June 2018. The Applicants then brought the application dated the 5th September 2019, in which they sought to be allowed to cross-examine the Plaintiffs and their witnesses, and to defend the suit. The court in its ruling of 9th September, 2019 rightfully declined the said application for the reason that the Applicants ought to have sought for a review of the earlier ruling. That in view of the foregoing, the issue raised in the current application about the cross examination of the plaintiffs and their witnesses at prayer **(3),** is a matter that had been raised before in prayer **(1)** of the notice of motion dated the 5th September, 2019 and rejected vide the ruling delivered on the 9th September, 2019. That issue is therefore res judicata. The prayers for reopening of the Applicants' defence case and setting aside of exparte orders in prayers **(1)** and **(2)** may appear similar to prayers **(2)** and **(3)** of the notice of motion dated the 19th September, 2017 but are different as they are addressing orders made on different dates. The Applicants have however the duty to show the court that it should exercise its discretion in their favour.

(d) The Applicants have based their application primarily on the ground that they were not served with the hearing notice for the 28th September 2020, when their case was marked closed in their absence. The Respondents have on their part contended and demonstrated that the hearing notice was served by being sent through the emails of the two counsel on record for both sides that are, chebiiadvocate@yahoo.com and office@nyairoadvocates.co by the court in the form of a court order. The copies of the court order dated and issued on the 14th May, 2020 and a print-out of the email sent on 15th May, 2020 at 16.09 hours confirming service has been attached to the replying affidavit and has not been disputed. That the Applicants claim that their advocate had not been served with a hearing notice for the 28th September, 2020 has therefore been effectively rebutted by the Respondents, as the truth is that service had been done on the 15th May, 2020. The Applicants deliberately chose not to attend court on the 28th September, 2020 to take advantage of the order issued in their favour through the ruling of the 28th June 2018, and cannot turn around and blame the Respondents.

(e) That **Order 12 of the Civil Procedure Rules** provides for hearing and consequence of non-attendance by the parties to the court. Rule 2 thereof provides for when only the plaintiff attend on the hearing date and notice had been duly served, the court may proceed ex parte; but where the notice of hearing was not duly served, the court shall direct a second notice to be served; and if that notice was not served in sufficient time for the defendant to attend or that for other sufficient cause the defendant was unable to attend, it shall postpone the hearing. That in this case, the Applicants only attempted explanation of their failure to attend court for the hearing of the 28th September, 2020 has failed upon the Respondents proving service had been done vide the email of 15th May, 2020. The court finds that the hearing of the 28th September, 2020 therefore was with sufficient notice having been served on all counsel on record for the parties and proceeded procedurally.

(f) That having come to the finding that there was nothing irregular in the manner in which the hearing of 28th September, 2020 proceeded, the application by the Applicants dated the 23rd March, 2021 is without merit. The Applicants having failed in the application should pay the Respondents costs.

6. That flowing from the foregoing the Applicants notice of motion dated the 23rd March, 2021 is unmeritorious and is hereby dismissed with costs.

Orders accordingly.

DATED AND VIRTUALLY DELIVERED THIS 8TH DAY OF DECEMBER, 2021

S. M. KIBUNJA

ENVIRONMENT AND LAND COURT JUDGE

IN THE PRESENCE OF;

PLAINTIFFS/RESPONDENTS: ABSENT

DEFENDANTS/APPLICANTS: ABSENT

COUNSEL: M/S ODWA FOR THE PLAINTIFF

MR. KETER N. K. FOR DR. CHEBII FOR 1ST AND 2ND DEFENDANTS.

ONIALA: COURT ASSISTANT