REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUNGOMA

CIVIL CASE NO. 150 OF 2014 (O.S)

IN THE MATTER OF THE LIMITATION OF ACTION ACT CAP 22 LAWS OF KENYA

AND

IN THE MATTER OF REGISTRATION LAND ACT 2012 LAWS OF KENYA

AND

IN THE MATTER OF LAND PARCEL NO. ELGON/KAPKATENY/115

AND

IN THE MATTER OF ADVERSE POSSESSION

BETWEEN

MICHAEL WAFULA KHAEMBA.....PLAINTIFF

VERSUS

PATRICK CHEPKONDOLI MUSTUNI....DEFENDANT/RESPONDENT

AND

NICHOLAS WANYONYI WAFULA .....APPLICANT

R U L I N G

On 18th October 2018 this Court delivered a ruling on an application dated 12th July 2017 by the Applicant herein **NICHOLAS WANYONYI WAFULA** who sought the main prayer that he be substituted as the plaintiff in place of the deceased plaintiff **MICHAEL WAFULA KHAEMBA**.

In dismissing the said application, I held that the suit having abated, there was no suit upon which the Applicant could be substituted as plaintiff in place of **MICHAEL WAFULA KHAEMBA** (the deceased). In the said ruling, I made the following observation: -

> **"The Applicant is however not entirely without a remedy. Order 24 Rule 7 (2) of the Civil Procedure Rules provides him with an avenue to breath life into the suit by way of an application for it's revival. That is what he ought to have done first or simultaneously with this application. In the absence of a suit, there is nothing upon which the application for substitution can be anchored. The Applicant should first move to have this suit revived after which he can apply to be substituted in place of the deceased."**

The Applicant appears not to have heeded this Court's advise and instead, he has again moved this Court by his Notice of Motion dated 24th October 2019 in which he seeks the following prayers: -

a. Spent

b. That this Honourable Court be pleased to review, vary or set aside its orders made on 18th October 2018.

c. That this Honourable Court be pleased to extend time and grant leave to the Applicant to substitute one MICHAEL WAFULA KHAEMBA (deceased) with NICHOLAS WANYONYI WAFULA out of time.

d. That upon granting prayer (c) above, this suit be heard to it's conclusion on merit.

e. Costs of this application be provided for.

The application is premised on the grounds set out therein and also supported by the Applicant's affidavit dated 24th October 2019 to which are annexed the Certificate of Death in respect of the deceased, a limited grant of Letters of Administration ad litem issued to the Applicant for purposes of filing a suit in respect to the Estate of the deceased and a copy of my ruling dated 18th October 2018.

The gravamen of the said application is that the deceased had filed this suit against the defendant seeking orders in adverse possession but died on 20th August 2016 when the suit was still pending. Due to insecurity reasons in **MT ELGON**, this Applicant was not able to obtain the Letters of Administration in respect to the Estate of the deceased until 2017. That the deceased had a strong case against the defendant and the Applicant and his family have lived on the land subject of this suit for the last 44 years and have no other alternative land to which they can relocate. That the Applicant and deceased's family have acquired the ownership of the land in dispute by virtue of the doctrine of adverse possession and the Court should therefore set aside it's order dismissing this suit as that has denied the Applicant the right to be heard.

When the application came up before me on 11th December 2019, **MR R. WAMALWA** holding brief for **MS NATWATI** counsel for the Applicant informed the Court that the application was not opposed and should therefore be allowed. The Court directed however that although the application was not opposed, I would consider it on it's merits. With hindsight, that was a proper decision because upon perusal of the record, I have discovered that whereas there was an affidavit of service dated 4th December 2019 showing that the defendant had been served in person, he has infact a counsel by the name **KENNETH KOWINOH ADVOCATE** who entered appearance to act for the defendant on 29th May 2018. It is not clear therefore why the said counsel was not served.

That notwithstanding, I have considered the application dated 24th October 2019 on it's merit.

With regard to the prayer to review, vary or set aside this Court's orders dated 18th October 2018, **Order 45 Rule 1(1) of the Civil Procedure Rules** which is among the provisions cited in the said Notice of Motion provides as follows: -

"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 <u>new and important matter or evidence</u> 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 <u>on account of some mistake or error apparent on the face of the record, or for any other sufficient reason</u>, 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 <u>without unreasonable delay</u>." Emphasis added

It is clear that a party moving the Court for orders of review must establish any of the following: -

1: Discovery of new and important matter or evidence which was not within his knowledge or could not be produced when the order was made or;

2: On account of some mistake or error apparent on the face of the record or;

3: For any other sufficient reason and finally

4: The application must be made without unreasonable delay.

The importance of moving the Court without un – reasonable delay was emphasized by the Court of Appeal in the case of **FRANCIS ORIGO & ANOTHER V JACOB KUMALI MUNGALA C.A CIVIL APPEAL NO 149 OF 2001 [2005 2KLR 307]** where in considering the then **Order XLIV rule 1 of the Civil Procedure Rules**, it held:-

"From the foregoing, it is clear that an applicant has to show that there has been discovery of new and important matter or evidence which after due diligence, was not within his knowledge or could not be produced at that time or he must show that there is some mistake or error apparent on the face of the record or that there was any other sufficient reason. <u>And most importantly, the applicant must make the application for review without un – reasonable delay</u>." Emphasis added

This Court's ruling sought to be reviewed was delivered on 18th October 2018 in the presence of **MR AMANI** then holding brief for **MS NATWATI** counsel for the Applicant. This application dated 24th October 2019 was filed on 7th November 2019 some 13 months later.

There is no explanation for that delay which is clearly in – ordinate and has not even been explained. On that ground alone, the application must be dismissed.

But that is not the only hurdle that the Applicant has failed to surmount. There is no mention either in the Notice of Motion itself or the Applicant's supporting affidavit of discovery of new and important matter, mistake or error apparent on the face of the record or any other sufficient reasons to warrant a review of the orders issued on 18th October 2018. The Applicant confines himself to the reasons why he could not apply for a grant of Letters of Administration in respect of the deceased's Estate in good time, the fact that he has a strong case against the defendant in adverse possession having lived with his family on the land in dispute for close to 44 years and that he has the right to be heard. No doubt the Applicant has a right to be heard. **Article 50(1) of the Constitution** is clear on that. But it is obvious to me that the Applicant and his counsel failed to grasp the gist of my ruling sought to be reviewed. It is also clear to me that the Applicant has failed to meet the threshold set out in **Order 45 Rule 1(1) of the Civil Procedure Rules** to warrant a review of this Court's orders issued on 18th October 2018 and instead of addressing the Court on the new and important matter or evidence, same mistake or error apparent on the record or any other sufficient reason, he has confined himself essentially on the strength of his claim and the right to be heard which unfortunately, are not the basis upon which orders for review can be grounded. There is also not any single reason why this Court's ruling dated 18th October 2018 should be varied or even set aside.

The Applicant also seeks that time be extended to grant him leave to substitute the deceased herein. He relies on the provisions of **Order 24 Rule 7 of the Civil Procedure Rules**. This is substantially the same prayer that he sought in his application dated 12th July 2017 and which culminated in my ruling delivered on 18th October 2018. To the extent that the Applicant seeks the same prayers that this Court has previously heard and determined, this application offends the provisions of **Section 7 of the Civil Procedure Act** which provides as follows: -

> **"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."**

The application to substitute the Applicant in place of the deceased was first filed by the Applicant on 14th February 2018 although the Notice of Motion itself is dated 12th July 2017. It was canvassed and a ruling delivered on 18th October 2018. The rule of res – judicata bar the Applicant from filing the same application and this Court is equally barred from considering it. Res – judicata applies not only to suits but also to applications. In **UHURU HIGHWAY DEVELOPMENT LTD.V. CENTRAL BANK OF KENYA & OTHERS 1996 eKLR** the Court of Appeal posed the question whether the principle of res – judicata applied to applications heard and determined in the same suit and stated as follows: -

> **"There must be an end to applications of similar nature, that is to say further, widen principles of res – judicata apply to applications within the suit. If that was not the intention, we can imagine that the Courts could and would be inundated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation. It is this precise problem that Section 89 of our Civil Procedure Act caters for."**

See also **MARGARET NJOKI MIGWI .V. BARCLAYS BANK OF KENYA LTD 2016 eKLR (C.A CIVIL APPEAL NO 68 OF 2015 NYERI)** and **KANORERO RIVER FARM LTD & OTHERS .V. NATIONAL BANK OF KENYA LTD H.C.C.C NO 699 OF 2001 (NBI)** where **RINGERA J** as (he then was) held that:-

> **"As I understand the law, the doctrine of res – judicata applies to both suits and applications, whether they be final or interlocutory. Indeed Section 2 of the Civil Procedure Act defines a suit to mean any civil proceeding commenced in any manner prescribed. And prescribed is defined by rules. Applications for temporary injunction are prescribed for by Order 39 of the Civil Procedure Rules. It follows that the determination of such an application by a Court of competent jurisdiction would in appropriate circumstances operate as a plea in bar called res – judicata."**

That decision has been followed by superior Courts in this country and whereas **RINGERA J** (as he then was) was dealing with an application for injunction, there is no doubt that the arguments advanced apply with equal force to any other applications which are equally barred by the principle of res – judicata. It is clear therefore that the application seeking to substitute the deceased with the Applicant, having been previously heard and determined by this Court, cannot again be canvassed.

The up – shot of the above is that the Notice of Motion dated 24th October 2019 and filed herein on 7th November 2019 is devoid of any merit. It is accordingly dismissed with no orders as to costs.

Boaz N. Olao.

J U D G E

30th January 2020.

Ruling dated, delivered and signed in Open Court this 30th day of January 2020 at Bungoma.

Applicant present

Joy/Okwaro – Court Assistants

Boaz N. Olao.

J U D G E

30th January 2020.