



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAKURU

ELC CASE NO. 532 OF 2013

HEZRON KAMAU GICHURU.....1ST PLAINTIFF
KIBIHI KIGEN KIPLEGO.....2ND PLAINTIFF
KIPKOECH CHEBET CHERUTICH.....3RD PLAINTIFF
JOHN KIBIIEGON CHERUTICH.....4TH PLAINTIFF
SAMUEL KIPKELEI CHELELGO.....5TH PLAINTIFF
JACKSON CHEPKIENG TUITOEK.....6TH PLAINTIFF
SIMON KIPCHUMBA KANDIE.....7TH PLAINTIFF

(SUING AS MEMBERS OF SOLAI RUYOBEI FARM LTD)

VERSUS

RICHARDSON KIPKOECH BUNDOTICH.....1ST DEFENDANT
CHARLES OLARE CHEBET.....2ND DEFENDANT
JOSEPH KIPYEGON CHEBET.....3RD DEFENDANT
KOILEL LAMARATAK HELP GROUP.....4TH DEFENDANT
LARI NYAKINYUA (SOLAI RUYOBEI FARM LTD).....5TH DEFENDANT
JATA HOUSING COMPANY.....6TH DEFENDANT

RULING

INTRODUCTION

1. This ruling is in respect of the 1st and 2nd Defendant's Notice of Motion application dated 30th January 2019. The said application is expressed to be brought under Section 159(2)(d) of the constitution of Kenya, Section 1A, 1B, 30, 63 (e) and 80 of the Civil procedure Act and Order 10 Rule 11, Order 51 Rule 1 of the Civil Procedure Rules CAP 21 Laws of Kenya and all other enabling provisions of the law.

2. The application is filed under certificate of urgency and seeks the following orders:

i. Spent.

ii. Spent

iii. THAT a temporary injunction do issue restraining the Plaintiffs whether by themselves, their agents or servants from interfering in any manner with the property known Title No. I.R67258 L.R20229/1 and from constructing, developing, leasing charging, Transferring, selling property or erecting any building or structure thereon or any part thereof on all property known as Title No. I.R67258 L.R20229/1 pending the hearing and determination of this application.

iv. THAT this Honourable Court be pleased to review, set aside, vary and/ or vacate the orders issued by this Honourable Court on the 1st February, 2018.

v. THAT the cost of this application be provided for.

3. The application is based on the grounds on its face and supported by the affidavits sworn by one Richardson Kipkoech Bundotich, on 30th January, 2019.

FACTUAL BACKGROUND

4. It is necessary to offer a brief background of the events and circumstances giving rise to the present application which seeks, substantially, orders to review, set aside, vary and/ or vacate the orders issued by this Honourable Court on the 1st February 2018.

5. This suit was filed in the year 2013 by members of Solai Ruyobei Farm Ltd against the defendants seeking orders of permanent injunctions to prohibit them from selling, alienating, transferring, registering, charging, mortgaging entering, occupying or in any way interfering with Title No. I.R67258 L.R20229/1 until the suit is determined.

6. In the intervening period several interlocutory applications were filed and determined. One particular order, issued on 3rd October, 2013 is of importance and sets pace for the current application. The said order directed that the title deed of the suit property, copy of the seal, Cheque book and certificate of incorporation be deposited in court by the 1st and 2nd Defendant. The 1st and 2nd Defendant deposited the said documents in court on 14th October, 2013.

7. Subsequently, the Plaintiffs filed a notice of withdrawal of suit dated 22nd December, 2017 and on the strength of this notice of withdrawal, one Kipkoech Chebett Cherutich (3rd Plaintiff) and Simon Kipchumba Kandie (7th Plaintiff) wrote a letter to the Deputy Registrar to release the title deed to the suit parcel which had been deposited in court. The letter attached a copy of the form CR 12 dated 19th December, 2017. The CR 12 lists the names of the directors as; -

a. **Cheruiyot Arap Chemgwony**

b. **Kipkoech Chebett Cherutich**

c. **Kipkutol Korir**

d. **Kiptingilen Kiberenge**

e. **Silas Kiprotich Chepketei**

f. **Jackson Tuitek**

g. **Kipkilei Chelelgo**

h. **Magusa Onyango**

i. **Cherutich Cherop**

j. **Grace Jematur Chelegat**

k. **James Tomno**

l. **Veronica Mangare**

m. **Simon kipchumba Kandie**

n. **Philip Sirma Cheptumo**

Kipkoech Chebett Cherutich signed the letter as the chairman and Simon Kipchumba Kandie as the secretary.

8. Before the notice of withdrawal of suit was filed, an application dated 26th July, 2017 was filed by the 1st and 2nd Defendant seeking to dismiss the suit for want of prosecution and for return of the company instruments. A ruling was delivered on this application. This is the ruling of 1st February, 2018 which is subject of review.

9. In the ruling of 1st February, 2018, very briefly, the Learned Judge ruled that the issue of dismissing the suit for want of prosecution had been overtaken by events because the suit had since been withdrawn. What was left was a determination on whom the instruments of the company were to be returned. The Learned Judge made reference to the CR12 dated 19th December, 2017 from the Registrar of Companies and observed that neither the 1st nor 2nd Defendant's name is on the list. He also observed that the name of the 1st, 3rd and 6th Plaintiffs are on the CR12. He, therefore, ordered that the instruments of the company be released jointly to the 1st, 3rd and 6th Plaintiffs. Simon Kandie, Kipkoech Chebet Cherutich, and Jackson Chepkieng Tuitoek.

10. Sometime on 30th August, 2018 another court order was issued directing the Chief Land Registrar Nairobi to issue a Provisional Certificate of title as the original title I.R67258 L.R20229/1 was lost while in court custody. The chief Land Registrar was further directed to deposit the provisional title in court upon issuance.

11. The Provisional Certificate was eventually released to the 1st, 3rd and 6th Plaintiffs on 8th October, 2018.

12. The present application seeks, among others, and order compelling the 1st 3rd and 6th Plaintiffs to deposit forthwith the Provisional Title Deed of the suit parcel in court. The net effect of this prayer would culminate in reviewing the order issued by this court on the 1st February, 2018.

13. It is also important to also note that while this Application is pending hearing on the 28th October, 2019, the Learned Judge gave an order for maintenance of status quo as the outcome of the High Court matter involving the directorship of the company and holding of elections is resolved. The Learned Judge went on to order that in the interim there would be no interference with the suit land in any manner and that the title documents of the suit land were not to be utilised for any purpose until further orders of the court.

14. The importance of setting out the background in the preceding paragraph is to ensure that facts are not lost in responses and submissions filed in respects to the present application.

15. I will now proceed to interrogate the application, affidavits in support, annexures and responses thereto.

1ST AND 2ND DEFENDANTS /APPLICANTS CONTENTION.

16. The 1st and 2nd Defendants contend that the suit was withdrawn by the Plaintiffs and a ruling delivered on 1st February 2018. It is their contention that they are the bonafide directors of the **SOLAI RUYOBEI FARM LIMITED**. They state that the original title deed of the suit land i.e. Title No. I.R67258 L.R20229/1 was deposited in court and could not be traced and as a result, a Provisional Title Deed of the said property has been issued to the Plaintiffs.

17. It is their contention that the 1st 3rd and 6th Plaintiffs are not the directors of **SOLAI RUYOBEI LIMITED** and they should therefore return the Provisional Title Deed to the 1st and 2nd Defendants who are the directors of **SOLAI RUYOBEI FARM LIMITED**.

18. The 1st and 2nd Defendants contend further that on 18th May, 2018 the Registrar of Companies cancelled the CR12 erroneously issued to the Plaintiffs after they had allegedly conducted a General meeting in contravention of a court order and appointed the 1st 3rd and 6th Plaintiffs as the directors of **SOLAI RUYOBEI LIMITED**.

19. It is their contention that the 1st, 3rd and 6th Plaintiff's are not directors of **SOLAI RUYOBEI LIMITED** and they need to deposit the Provisional Title Deed to court.

20. They contend that they (the 1st and 2nd Defendant) are the bonafide and present directors of the company as is evident in the CR12 forms from the Registrar of Companies and are therefore the only individuals authorised to carry out the functions and duties of the company as provided for in the Memorandum and Articles of Association.

21. The affidavit in support of the application annexes documents in support of the application and contains depositions by one Richardson Kipkoech Bundotich (the 1st Defendant).

22. He deposes that they have since instructed the firm of Hassan N. Lakicha to take over the conduct of the matter in place of the firm of Olonyi. He goes on to depose that they are the bonafide directors of the company and annexes a copy of CR 12 of the company.

23. He deposes that on 18th May, 2018 the Registrar of companies cancelled the CR12 that was unlawfully issued to the Plaintiffs after an illegal general meeting. A copy of the letter from the Registrar is annexed.

24. 1st Defendant makes depositions on the matters set out in the factual background, in the preceding paragraphs, pertaining to deposit of the company instruments in court, the loss of the Title deed, and issuance of the provisional title deed to the 1st 3rd and 6th Plaintiffs who he describes as purported directors, clarifying that they are not directors.

25. The 1st Defendant deposes that the actions of the Plaintiffs are detrimental to them and the company as the bonafide directors and shareholders of the company.

26. The documents annexed to the supporting affidavit are

i. Minutes of an extraordinary meeting of the company appointing and giving authority to the 1st Defendant to sign pleadings, appointing the law firm of Hassan N. Lakicha to act on behalf of the company and a special resolution thereof.

ii. The CR12 dated 19th July, 2012

iii. Letter from the Registrar of Companies revoking the CR12 dated 19th December, 2017

iv. The court order dated 2nd October, 2013 directing the company documents be deposited in court for safe keeping

v. Letter from Olonyi & Co. Advocates forwarding the documents to court for safe keeping.

vi. Copy of the ruling dated 1st February, 2018

vii. Letter to Chief Lands Registrar asking that 1st 3rd and 6th Plaintiffs be assisted in getting a Provisional Title Deed.

27. The Defendants also filed a supplementary affidavit sworn on 22nd March, 2019 by the 1st Defendant. He deposes that one of the orders sought in this application was for the provisional title deed to be deposited in court. He deposes that on 12th February, 2019 when the application came up before this honourable court for mention for direction, counsel for the Plaintiffs intimated to court that the provisional titles had not been released to his clients i.e. the 1st, 3rd and 6th Plaintiffs.

28. The 1st Defendant deposes that on account of the statements by counsel for the Plaintiffs that the title had not been released to his clients, the court vacated the order requiring the 1st, 3rd and 6th Plaintiffs to deposit the provisional title in court.

29. The 1st Defendant further deposes that on 15th February, 2019 their advocate wrote to the Deputy Registrar requesting a confirmation whether or not the Provisional Title to the suit land had been released to the 1st, 3rd and 6th Plaintiffs as per the court order of 1st February, 2018. He deposes further that on 20th February, 2018 the Deputy Registrar wrote confirming that the provisional title had been released to the 1st, 3rd and 6th Plaintiffs.

30. He ends his deposition by stating that the act of the Plaintiffs in misleading the court borders on contempt.

31. There is further Supplementary Affidavit sworn by the 1st Defendant on 26th September, 2021. In the said affidavit he deposes to the fact of a judgement in Judicial Review No. 14 in the High Court of Kenya at Nakuru and the copy of the Judgement is annexed.

32. The 1st Defendant deposes that the Judgement in JR No. 14 of 2018 ordered, among other things, that persons who were on the management Board of the Company as at 23rd March, 2015 call for a Special General Meeting to elect new officials as per the Company's Charter.

33. He deposes that a Special General Meeting was held pursuant to the courts order in JR No. 14 of 2018 and new officials were elected. He annexes a copy of the Minutes of the meeting of 29th October, 2019. He avers that the minutes of the meeting were filed with the Registrar of Companies and annexes a copy of CR 12 dated 3rd August, 2020.

34. The 1st Defendant deposes that on account of Judgment in JR No. 14 of 2018 and the CR 12 attached, the 1st, 3rd and 6th Plaintiffs who were issued with the title documents i.e. Title No. I.R 67528 L.R No. 20229/1 Solai Ruyobei Farm Limited and other company instruments are not Directors of the said company.

35. The 1st Defendants end his deposition by stating that it is important that the court gives directions that the title documents given to the Plaintiffs is set aside and/or reviews its earlier direction since the matter was not settled in finality adding that the bonafide directors of the said Solai Ruyobei Farm Limited would be greatly prejudiced and suffer huge economic loss if the said title and the Company's instruments are not returned to them.

RESPONDENTS RESPONSE.

36. In response to the application, The Respondents filed a Relying Affidavit sworn by one Simon Kipchumba Kandie - the 1st Plaintiff. The Replying Affidavit is sworn on the 27th February, 2019. They also filed Grounds of Opposition dated 5th February, 2019 and 14th December, 2020.

37. The 1st Plaintiff deposes that he is the secretary and has authority to swear the affidavit on behalf of the other Plaintiffs. His starting point is that the application is incompetent, bad in law and hence an abuse of court process.

38. He goes on to depose that the Applicants are not directors of **SOLAI RUYOBEI FARM LTD** as purported in the affidavit in support of the application. He explains that during the year 2004-2015 the directors were Morogo Chebet, Cheruiyot Arap Chengwony and Kiprono Chebet. A copy of CR 13 dated 5th May, 2015 addressed to the CID County Commander Nakuru is annexed

39. The 1st Plaintiff deposes that the CR12 dated 19th July, 2012 which is an annexure to the application is under investigation and should be

expunged from the record. It is his deposition that it is forged and hence an abuse of the court process.

40. It is the 1st Plaintiff's deposition that on 23rd March, 2015 a meeting was convened and new directors elected. A notice was circulated to all members communicating this information.

41. The 1st Plaintiff deposes that the application *Res Judicata* adding that the suit was withdrawn. He deposes further that counsel for the Defendants (the firm of Hassan N. Lakicha & Co) once acted for **SOLAI RUYOBEI FARM LTD** and there is therefore conflict of interest in him acting for the Defendants.

42. The 1st Defendant ends his deposition by praying that the application be dismissed with costs to the Defendant.

43. The Grounds of Opposition dated 14th December, 2020 in summary state that the application is an afterthought and filed without inordinate delay as it was filed a year after the ruling was delivered. It states further that the Defendants have not met the required threshold to warrant this court to exercise its residual jurisdiction to review its own decision.

44. The grounds of opposition further state that Defendants are mischievously inviting this Honourable Court to sit on appeal on its decision and further that the claim is *res judicata*.

45. The Plaintiff's state that the suit stands withdrawn on account of the provisions of Order 25 Rule 1 and by hearing the application they shall be denied the benefit of the said provision of the law.

46. The grounds of opposition also make reference to misapprehension by the court of certain facts that misled it to believe that the 1st and 2nd Defendants are the bonafide directors when the CR12 dated 19th June, 2012 had been overtaken by events by the judgement in JR No. 14 of 2018. That the said decision directed that the person who were on the management of board of the company as at 23rd March, 2015 to call for a Special General Meeting within 30 days of the judgement to elect new officials of the company as per its charter.

47. It is stated in the grounds of opposition that JR No. 13 of 2020 bears the name of the 1st and 2nd Defendants and makes reference to two impugned CR12 dated 3rd August, 2020 and 7th August, 2020 and that any reliance on the CR12 of 19th July, 2012 is grossly misconceived.

48. It is finally stated that the application is a waste of precious judicial time and that I should find that the application is not merited or warranted and therefore dismiss it with costs.

49. Annexed to the grounds of opposition are judicial decisions meant to fortify the questions of law raised and importantly, the Judgement in Judicial Review No. 14 of 2018 is also annexed.

50. The Plaintiffs filed a supplementary Ground of Opposition in response to the Defendant's supplementary affidavit sworn on 26th September, 2021.

51. It is stated that the Judgement in JR No. 14 of 2018 is irrelevant since the suit was withdrawn voluntarily by the Plaintiffs.

52. It is further stated that there is a ruling by the Learned Judge recognising the 1st, 3rd and 6th Plaintiffs as the officials and that the determination was based on the letter dated 19th December, 2017 by the Registrar of Companies.

53. Lastly the Grounds of Opposition state that the Defendants have not placed any evidence before the court to show that they were officials of Solai Ruyobei Farm Limited as at 23rd March, 2015 to counter the letter dated 19th December, 2017 from the Registrar of Companies; which recognised the 1st, 3rd and 6th Plaintiffs as directors of the company and which formed the basis for the ruling on 1st February, 2018.

ISSUES FOR DETERMINATION.

54. Both the Defendants/ Applicants and Plaintiffs/Respondents filed their submissions on 29th September, 2021 and 21st July, 2021 respectively.

55. The Defendants/Applicants have identified the following issues for determination:

a. Whether or not the court can review, set aside, vary and/or vacate the orders issued by this court on 1st February, 2018.

b. Whether or not this matter is Res Judicata.

56. The Plaintiffs/Respondents have identified the following issues for determination:

a. Whether the Application for review to set aside, vary and/or vacate the order issued by this Honourable Court on 1st February, 2018 lacks merit and ought to be dismissed.

b. Whether the 1st and 2nd Defendants are the bonafide directors of Solai Ruyobei Farm Limited.

c. Whether the Plaintiffs /Respondents are entitled to costs and incidentals to the application

57. After perusal of the Application, Supporting Affidavit, Replying Affidavit, Supplementary Affidavits, Grounds of Opposition and Submissions filed in respect of this Application, my considered view is that the following are the issues for determination:

a. The Legal doctrine of Res judicata and its effect on this application.

b. The legal effect of a Notice of Withdrawal

c. Whether the Defendants/Applicants have met the criteria for grant of orders of Review as set out in Section 80 of the Civil Procedure Act read together with Order 45 of the Civil Procedure Rules.

d. Which party bears the cost of the application?

58. I will commence my analysis and determination by addressing issue (a) and (b) above. Should I find that they determine the application, there will be no need in addressing (c) and (d)

ANALYSIS AND DETERMINATION.

A. The Legal doctrine of Res judicata and its effect on this application.

59. The Plaintiffs/Respondents in their Grounds of Opposition and submissions contend that the suit is *Res judicata* and that the application should not be entertained. It is their contention that the applications seek to revive this suit and that it would offend the legal doctrine of *Res judicata*. The Plaintiffs/ Respondents have referred me to a host of judicial decisions on the meaning and effect of this doctrine. I have read and considered them all.

60. The Defendants/Applicants have also identified the doctrine of *Res judicata* as an issue for determination and have very briefly stated in their submissions that the suit is not *Res judicata* because the issues in contention were not settled on merit. They say that no harm will be occasioned to the defendants if the orders sought are granted.

61. The law relating to Res Judicata is found in section 7 of the Civil Procedure Act. The wording of the sections is as follows:

7. Res judicata

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.

Explanation. — (1) The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. — (2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. — (3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. — (4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. — (5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. —(6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

62. This legal doctrine has been explained in a plethora of legal decisions in and outside of Kenya. I do not intend to write about it no more than I would be willing to write about The Ten Commandments for the reason that they are, in my view, quite well understood. I, however, will refer to the decision in **Independent Electoral and Boundaries Commission- Vs - Maina Kiai and 5 others, Nairobi CA No. 105 OF 2017 [2017] eKLR** which sets out the elements that must be satisfied for a bar of Res judicata to be effectively raised and upheld. We are reminded that the elements are not in disjunctive but conjunctive. Meaning that they must be read together.

a. The suit or issue was directly and substantially in issue in the former suit.

b. That 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.

63. As rightly observed in that decision, the doctrine of *Res judicata* is intended 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.

64. The Plaintiffs/Respondents have referred me Judicial Review No. 14 of 2018 as the former suit adding that the issues in this application were directly and substantially in issue in JR. 14 of 2018.

65. I have looked at the Judgement in JR. No. 14 of 2018. The orders sought in that suit appear on the face of the Judgement and are as follows:

a. That an order of prohibition be and is hereby issued to restrain the Respondent from acting upon its motion/ decision dated 18th May, 2018 to revoke the CR12 dated 19th December, 2017

b. That an order of Certiorari be and is hereby issued to bring to the court and quash the motion dated 18th May, 2018 to revoke the CR12 dated 19th December, 2017

The orders sought in this application are:

i. Spent.

ii. Spent.

iii. THAT a temporary injunction do issue restraining the Plaintiffs whether by themselves, their agents or servants from interfering in any manner with the property known Title No. I.R67258 L.R20229/1 and from constructing, developing, leasing charging. Transferring, selling property or erecting any building or structure thereon or any part thereof on all property known as Title No. I.R67258 L.R20229/1 pending the hearing and determination of this application.

iv. THAT this Honourable Court be pleased to review, set aside, vary and/ or vacate the orders issued by this Honourable Court on the 1st February 2018

v. THAT the cost of this application be provided for.

66. The parties in JR. No. 14 of 2018 are Solai Ruyobei Farm Limited as the ex-parte applicant and the Registrar of Companies as the Respondent, quite clearly not the same parties as in the present application. I am also not convinced that they are litigating under the same title.

67. Having set out the orders sought in JR. No. 14 of 2018 and the orders sought in the present application, I am not persuaded that the issues raised in the present application, being a review of the orders issued on 1st February, 2018, directing the Title deed of the Suit parcel and instruments of power of Solai Ruyobei Farm Limited be returned to the Plaintiffs/Respondents are not the same as the orders sought in JR. No 14 of 2018- which are to quash the decision of the Registrar of the Companies to revoke the CR12 dated 19th December, 2017 and prohibit the Registrar from acting upon the decision.

68. The decision in *Uhuru Highway Development Ltd Vs Central Bank of Kenya [1999] eKLR* also offers me useful guidance on the element of *Res judicata*. It rendered the elements as;

“(a) the former judgment or order must be final;

(b) The judgment or order must be on merits; (emphasis is mine)

(c) It must have been rendered by a court having jurisdiction over the subject matter and the parties; and

(d) There must be between the first and the second action identity of parties, of subject matter and cause of action.”

To this extent I agree with the submissions of the Defendant/Applicant that this suit was not heard on merits and the doctrine of *Res judicata* would not be applicable and does not stand in the way of the present application.

69. For the reasons set out in the foregoing paragraphs, I find that this application is not *Res judicata*. I will, consequently, lend my mind to the second issue for determination.

B. THE LEGAL EFFECT OF A NOTICE OF WITHDRAWAL.

70. The Plaintiffs/Respondents in their Grounds of Opposition and submissions contend that allowing the application would be denying them the advantage of Order 25 Rule 1 of the Civil Procedure Rules.

71. The Defendants/Applicants submit that there are certain instances when the Plaintiff's right to withdraw a suit ought to be curtailed or fettered. They refer to the decision in **Beijing Industrial Designing and researching** and cited in **Kofinaf Company Limited and Another Vs Nahashon Ngige Nyagah & 20 others [2017] eKLR**. In this case the plaintiff was facing a contempt of court application and on the date scheduled for hearing of the application, the plaintiff filed a notice of discontinuation of suit, which was adopted by the high court. The court of appeal reacted as follows

“... As has consistently been stated by the courts, the law will not countenance a person befitting from his wrong doing or alleged wrong doing.”

72. The circumstances here are different and I distinguish them from those cited in the decisions above. This suit was withdrawn and that was acknowledged by the learned judge. The parties to this suit were happy to have the suit withdrawn and there were no objections raised or registered in respect of its withdrawal. However, one thing remained to be done i.e. the return of the instruments of power of the company.

73. I need to point out that the application dated 26th July, 2017 was filed seeking dismissal of the suit for want of prosecution and return to the Applicant various documents which had been deposited in court for safe keeping. The learned Judge gave a ruling on this application on 1st February, 2018. In his ruling, he acknowledges that since the Plaintiffs have withdrawn the suit, there is no issue of dismissal of the suit for want of prosecution. He proceeds to make a finding on the remaining limb; the return of the company instruments.

74. The provisions of Order 25 Rule 1 are as follows;

At any time before the setting down of the suit for hearing the Plaintiff may by notice in writing, which shall be served on all parties, wholly discontinue his suit against all or any of the Defendants or may withdraw any part of his claim, and such discontinuance or withdrawal shall not be a defence to any subsequent action.

75. In their submissions, Plaintiff/Respondents have referred to a host of decisions which I have read and agree with to the extent that a Plaintiff has every right, at any stage before judgement is delivered to withdraw his suit or any part of claim. I concur that no act is required to be done by the court to complete or effectuate a Plaintiff's withdrawal of his suit. Withdrawal of a suit is itself its end. The judicial decisions also point to the fact that a Plaintiff is nevertheless liable for such costs as the court may award. The decisions I have been referred to also speak to the role of the court after filing of a notice of withdrawal and it is rightly observed that a notice of withdrawal is written information given by the Plaintiff to the court. The court may pass an order such as “allowed to be withdrawn” or “dismissed as withdrawn” but this has no greater effect than simply writing “seen” or “noted”- **Gulkandi Lal vs. Mani Lal, (1901) ILR 23 All 219.**

76. In Kenya the Judicial decision in **Bahati Shee Mwafundi Vs Elijah Wambua [2015] eKLR** is instructive of the legal effect of a notice of withdrawal

“I have considered the Appellants’ application. The notice to withdraw this Appeal was filed under the provisions of Order 25 of the Civil Procedure Rules. As rightly submitted by the Respondent there is no provision under that order for withdraws of the notice to withdraw an Appeal. Order 25 envisages that once a party withdraws or discontinues a suit such a party may file another suit and such withdrawal or discontinuation cannot be raised as a defence in a subsequent suit. (Emphasis is mine)

Under Order 25 once a suit is withdrawn or discontinued the court shall enter judgment for costs against the Plaintiff...

...The following is what the learned author Stuart Sime in the book “A Practical Approach to Civil Procedure” 9th edition stated:

“Notice of discontinuance takes effect and brings the proceedings to an end as against each Defendant, on the date it is served upon the Defendant.”

77. It is evident that a notice of withdrawal has the legal effect of:

- i. Bringing a suit to an end.**
- ii. A party who withdraws/discontinues a suit may file another suit.**
- iii. The withdrawal of a suit cannot be raised a defence in a subsequent suit.**
- iv. Once a suit is withdrawn/discontinued the court shall enter judgement for costs against the Plaintiff.**

78. The Plaintiff has an absolute and untrammelled right to withdraw a suit. What then is left is a determination on costs and in my view, any other matter which may remain unresolved as at the time of withdrawal or after such withdrawal.

79. In the instance case what remained unresolved after the notice of withdrawal of the suit was the issue of return of the Title deed for the suit property and the company's instruments of power that had been deposited in court for safe keeping. The learned Judge in his ruling dated 1st of February 2018 directed that the said documents be returned to the 1st, 3rd and 6th Plaintiffs. That ruling is the subject of this application. I do not agree that it would have the effect of reviving this suit.

80. For purposes of clarity, I must point out that this suit was for orders of permanent injunction against the Defendants from selling, alienating, transferring, registering any transfer, executing a transfer, charging, mortgaging or in any way interfering with ***Title No. I.R67258 L.R20229/1***

81. The Plaintiffs/Respondents seems to believe, as read from their submissions, that the instant application is reviving the suit and he prays that the ***“the application to revive this case by the Defendants be dismissed in its entirety”***. Based on the analysis in the foregoing paragraphs, I do not agree that the present application is for revival of the suit. The suit came to an end with the filing of the Notice of withdrawal and the court acknowledged the fact of withdrawal. Certain other things were pending resolution as at the time withdrawal and those are the things addressed in the ruling dated 1st February, 2018.

82. The present application is for review of the orders that were issued by this Honourable Court on the 1st of February 2018. The said order of 1st February, 2018 pertains to release of documents that had been deposited in court for safe keeping. Therefore, the provisions of order 25 Rule 1 have no bearing on the instant application.

83. Having analysed the first two issues which were presented as questions of law and having found that they are not merited. I proceed to make a determination on the last two.

C. Whether the Defendants/Applicants have met the criteria for grant of orders of Review as set out in Section 80 of the Civil Procedure Act read together with Order 45 of the Civil Procedure Rules.

84. The Plaintiffs/Respondents have not submitted on this point.

85. The Defendants/ Applicants submission on this point is that the ruling of 1st February, 2018 was as a result of an application dated 26th July, 2017 and that the court relied on the CR12 dated 19th December, 2017 which had been attached to the application and made an order for the release of the Company instruments to the 1st 3rd and 6th Plaintiffs.

86. It is also important to note that the Learned Judge in his ruling observed as follows:

“ Mr. Olonyi has not tendered anything before me to demonstrate that his clients are company officials. I was referred to orders made in two cases i.e. HCC No. 18 of 2015 and JR No. 10 of 2015. I have called for and perused these files. HCC No. 18 of 2015 was filed by Mr. Olonyi's clients and dismissed. JR. No. 10 of 2015 has never had any movement since 2015 and most importantly, I have no determination made in those two cases that the persons named in the list of 17 December 2017 are not directors of the company.

I therefore order that the company instruments be released jointly to the 1st 3rd and 6th Plaintiffs.”

87. I note that the Ruling has a typo. The list is of 19 December 2017 and not 17 December 2017. Mr. Olonyi's clients are the 1st, 2nd and 3rd Defendants.

88. The Defendants submit that this Honourable Court relied on the CR12 of 19th December, 2017 which had been revoked by the registrar vide a letter dated 18th May, 2018. They submit that the Revocation was on an account of an order issued by Lady Justice A. Mshila on 19th March, 2015 which stopped the Annual General Meeting held on 23rd March, 2015. It on the basis of this Annual General Meeting that the CR12 of 19th December, 2017 was issued.

89. I am quick to note that the letter revoking the CR12 dated 19th December, 2017 was written after the ruling of 1st February, 2018. The later is dated 18th May, 2018.

90. The submissions by the Defendant/Applicants is that if this Honourable Court had been made aware of the decision of Lady Justice A. Mshila that had the effect of stopping the Annual General Meeting pursuant to which the CR12 was issued, the ruling of 1st February, 2018 would have been different and rightly so. The question is why this wasn't done.

91. The fact of the matter is that the Leaned Judge did not have this information and would not have had it since the revocation of the CR12 happened after his ruling was delivered on 1st February, 2018. I mention and note again, that the revocation of CR12 dated 19th December, 2017 happened on 18th May, 2018 yet the ruling subject of review was rendered on 1st February, 2018. The decision in Judicial Review No. 14 of 2018 was also rendered after the ruling of 1st February, 2018. To be precise, it was delivered on 30th May, 2019.

92. Based on the circumstances set out, Can the ruling of 1st February, 2018 be reviewed? What does the law provide?

93. Section 80 of the Civil Procedure Act gives the power of review while Order 45 sets out the rules. Section 80 provides as follows:

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 judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

94. Order 45 Rule 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 review of judgement to the court which passed the decree or made the order without unreasonable delay.”

95. In Nyamogo & Nyamogo – V - Kogo {2001} EA 170, discussing what constitutes an error on the face of the record, the court rendered itself as follows: -

“An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of undefinitiveness inherent in its very nature and it must be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was possible. Mere error or wrong view is certainly no ground for review though it may be one for Appeal.”

96. It is doubtful that the Defendants/Applicants have brought this application for reason of there being an error on the face of the record. They however are making reference to JR. No. 14 of 2018 which introduces new evidence to the effect that the CR12 that the learned Judge relied on to render his ruling had been revoked and as such the persons to whom the Instruments of power were released are not the bonafide directors of the company.

97. I do not intend to and cannot make a determination on who the bonafide directors of Solai Ruyobei Farm Ltd are at present as that, obviously, does not fall within the subject matter jurisdiction of this Honourable Court.

98. I find useful guidance in the decision in **Republic - Vs - Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR**. It sets out principles which the learned Judge called out from numerous decisions that were placed before him to aid in making a determination on the application. The principles speak to circumstances under which a court may review its decision and the Learned Judge sated as follows:

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. (Emphasis is mine)
- 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. (Emphasis is mine)
- 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. (Emphasis is mine)

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.

99. I am not persuaded that the reasons offered by the Defendants/Applicants meet the criteria for the grant of orders of review. The material which was placed before the Learned Judge was the CR12 dated 19/12/17. This formed the basis of him making an order of release of the company instruments to the 1st, 3rd and 6th Plaintiffs. In his ruling, he observes that the defendants have not tendered anything before him to demonstrate that they are company officials. He says(I repeat):

“Mr. Olonyi has not tendered anything before me to demonstrate that his clients are company officials. I was referred to orders made in two cases i.e. HCC No. 18 of 2015 and JR No. 10 of 2015. I have called for and perused these files. HCC No. 18 of 2015 was filed by Mr. Olonyi’s clients and dismissed. JR. No.10 of 2015 has never had any movement since 2015 and most importantly, I have no determination made in those two cases that the persons named in the list of 17 December 2017 are not directors of the company”.

100. In the decision of Republic Vs Advocates Disciplinary Tribunal Ex parte Apollo Mboya [Supra] it is stated that 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.

101. The subsequent revocation of the CR12 on account of the Order by Justice A. Mshilla or the decision in JR. No 14 of 2018 (delivered on 30th May, 2019) cannot also be taken into account in reviewing the ruling of 1st February 18. It has, also, been pointed out in the decision of Republic Vs Advocates Disciplinary Tribunal Ex parte Apollo Mboya that 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.

102. The deduction from the foregoing is that the ruling made by the learned Judge was sound, bearing in mind the material that was placed before him for consideration at the time of making the ruling of 1st February, 2018.

D Which party bears the cost of the application?

103. On the question of costs of the application, the general rule is that costs shall follow the event in accordance with the provisions of Section 27 of the Civil Procedure Act (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. This was the holding in Hussein Jannomohamed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287.

104. The Upshot of the foregoing is that the Notice of Motion Application dated 30th January, 2019 lacks merit and is dismissed with costs to the Plaintiffs/ Respondents.

105. I am aware that there are other avenues available to the Defendants/Applicants to obtain the Instruments of Power from the 1st, 3rd and 6th Plaintiffs should they wish to do so and the Defendants/Applicants are free to pursue those other avenues.

106. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 6TH DAY OF DECEMBER, 2021

L. A. OMOLLO

JUDGE

In the presence of: -

Mr. Opar for the Plaintiffs/Respondents

Mr. Ndege for the 1st and 2nd Defendants/Applicants

Court Assistant; Monica.