REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 14 OF 2007

ELIJAH K. TARAGON.....PLAINTIFF

VERSUS

GEORGE KIPTANUI CHEBOI.....DEFENDANT

RULING

1. The application dated **30/1/2020** and filed in court on **6/2/2020** has been brought by the defendant who seeks an order that this court be pleased to review and set aside the judgment delivered on **13/12/2019** and that costs of this application be provided for.

2. The application is brought under **Order 45 Rule 1 (a)** of the **Civil Procedure Rules 2010, Section 63(e)** of the **Civil Procedure Act.**

3. The application is supported by the affidavit of the defendant sworn on **30/1/2020** and a supplementary affidavit dated **25/2/2020**. That affidavit reiterates the same matters set out in the grounds at the bottom of the application.

4. The principal ground the applicant relies on is that his erstwhile advocate refused to include in a list and bundle of documents the ruling of the Chief of Kibomet dated **10/11/2000** and that that ruling corroborates the evidence given in the suit to establish a defence of adverse possession in favour of the defendant. The applicant asserts that the court may have come to a different determination had the ruling of the chief been produced before court as evidence, and turning a blind eye to it would occasion a miscarriage of justice. The applicant urges the court to seize and apply the powers bestowed upon it by **Section 19** of the **Environment and Land Court Act** to do justice in the case.

5. The plaintiff who is the respondent filed grounds of opposition dated **12/2/2020** opposing the application praying that it be dismissed with costs on the grounds that the application in its entirety is incompetent and lacks merit; that the application is frivolous, vexatious and an abuse of the court process and is fatally defective both in form and substance; that the same does not comply with the mandatory provisions of the law and that there must be an end to litigation this being an old matter.

6. The plaintiff also filed two sworn replying affidavits one dated **21/2/2020** and the other dated **3/3/2020.** His response as contained in those affidavits is that there is no material on the record to warrant the review orders sought; that there is no decree on the record and none has been annexed to the application and therefore the application is premature; that the allegations against the applicant's former counsel, who is quite experienced are belated and should be rejected; that the mistakes if any, are not errors on the face of the record within the meaning of **Order 45** and should not be visited upon the plaintiff; that in any case the applicant's counsel relied on documents provided by the applicant; that upon disagreement the applicant could have changed counsel; that the defendant had at all material times custody of the document he alleges was not listed by his counsel and in any event, he never mentioned it in his evidence and also the chief was not summoned as a witness and such failure should not be visited upon the respondent; that the judgment of this court is sound and no mistake has been demonstrated to exist and further, the new cause of action in adverse possession can not be entertained at this stage, and that a notice of appeal has been filed thus ousting the application. The respondent urges a unique ground which in my view is a mere technicality that the "*supplementary affidavit*" of the respondent ought to have been a "*further affidavit*".

7. None of the parties filed any submissions in respect of the application.

8. The main issue for determination in the instant application is whether the judgment of this court should be reviewed and set aside on the basis of the grounds advanced by the applicant.

9. Section 80 of the **Civil Procedure Act** provides as follows:-

> **"Any person who considers himself aggrieved-**
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> **(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."

10. Order 45 rule 1 of the **Civil Procedure Rules** states as follows:

"(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."

11. According to the above provisions review of a judgment decree or order is therefore possible only where there is:

discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the decree was passed or the order made;

b. a. Some mistake or error apparent on the face of the record, or

c. any other sufficient reason.

12. Does the omission by the defendant to include the chief's ruling in his documents fall under any of the above grounds?

13. First this court must inquire into when the ruling came into being, and when the same became available to the defendant.

14. The defendant knew of and had possession of the ruling from the date the same was made. That is said to be sometime in the year **2000**. It must be assumed that he had a copy of it since then.

15. His further averment is that his erstwhile advocate was seized of the said ruling and upon scrutiny his opinion to the defendant was that the ruling should not be included in the list of exhibits.

16. It must be stressed here that the defendant was formerly represented by two firms in succession that is Walter Wanyonyi & Co Advocates and later by Onyancha & Co Advocates; this court finds no evidence of debate between the defendant and any of those advocates over the issue of possible inclusion of that ruling among the documents to be produced, and is being urged to take the defendant's word for the truth as none of his former advocates is in active participation in these proceedings to dispute the allegation. However even if taken that the advocate was seized of the document and failed to include it among the exhibits consciously or otherwise it remains a fact that it existed at the time of the hearing; it was not discovered after the hearing. The defendant's defence was filed on **6/9/2007** by Walter Wanyonyi & Co Advocates and later an amended defence was filed on **15/2/16** by Onyancha & Co Advocates. The ruling must have been availed to counsel between **2007** and **2016**. The hearing of this suit took place between **26/11/2018** and **7/5/2019** when the defence closed its case.

17. Should it be held that there is good ground for review since the defendant avers that he urged his advocate to include the ruling among the exhibits and the latter refused to do so?

18. First this court observes that no mistake is alleged on the part of the advocate. He made a deliberate decision to omit the ruling from the exhibits after due consideration.

19. The advocate's decision not to include the ruling among the exhibits could nevertheless be described have been a mistake even though not expressly classified by the applicant as such. However the court has on certain limited occasions relaxed its strictures in favour of litigants where a genuine mistake was shown to have occurred.

20. Ordinarily the court will set aside an ex parte judgment on the basis of a genuine mistake. The Court of Appeal for Eastern Africa observed as follows in **Shah –Vs- Mbogo & Another [1967]** EA:-

"Applying the principle that the court's discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice, the motion should be refused".

21. However unlike in the **Shah –Vs- Mbogo case (supra)** in the instant case the suit was heard and determined on its merits and the defendant's counsel applied his mind to the issue and in his wisdom failed to see the importance of production of the Chief's ruling as evidence in the case. This *may* have been a mistake on his part in assessing the value of evidence in the suit.

22. In the case of **Belinda Murei & 6 Others –Vs- Amos Wainaina [1978] KLR** Madan JA (as he then was) stated as follows:

> **"A mistake is a mistake. It is no less a mistake because it is an unfortunate step. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because of a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but ought certainly to do whatever is necessary to rectify if the interest of justice so dictate."**

23.

24. It has for long been the position that the acts of an advocate representing his client bind the latter. There is no cause shown to hold differently in the present case.

25. From the analysis above, it is clear that the document does not fall under the category of *"discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the decree was passed or the order made."*

26. Since no mistake on the record is alleged this court now has to inquire if there "***any other sufficient cause"*** to permit the review orders sought. One of the issues that the applicant raises and which must be addressed in this regard is that had the ruling in question been produced the same would have afforded him the defence of adverse possession.

27. First it must be recalled that the phrase any other sufficient cause must be addressed *ejusdem generis*, that is, within the context of and in relation to the specific grounds provisions of **Order 45 rule 1** of the **Civil Procedure Rules**. In other words the ground for review that warrants to be classified so requires to be a ground closely associated with the other two grounds namely, whether there is :

> **(a) discovery of new and important matter or evidence which after the exercise of due diligence was not within an applicant's knowledge and which could not be therefore produce at the time the order was made, or**
>
> **(b) Some mistake or error apparent of the face of the record;**

28. In the instant case since there was no claim of mistake or error on the face of the record this court will deal with the issue whether the ground raised, that is, the claim that "*had the ruling in question been produced the same would have afforded the defendant the defence of adverse possession"* can be construed to be *ejusdem generis* relative to *"discovery of new and important matter or evidence."*

29. Mativo J in **Stephen Gathua Kimani -vs- Nancy Wanjira Waruingi T/A Providence Auctioneers [2016] eKLR** cited the case of **Ajit Kumar Rath -vs- The State of Orisa & Others, 9 Supreme Court Case 596**:

> **"Discussing the scope of review, the Supreme Court of India in the case of Ajit Kumar Rath vs State of Orisa & Others had this to say:-**
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> > **"The power can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression "any other sufficient reason" used in Order 47 Rule 1 means a reason sufficiently analogous to those specified in the rule."**

30. Later on in his judgment in that case he stated as follows:

> **"In other words I am not persuaded that the reason offered amounts to "sufficient reason" within the meaning of the rules cited above nor is it an analogous or *ejusdem generis* to the other reason stipulated in Order 45 rule 1."**

31. I do not find the ground under discussion in the instant application to be *ejusdem generis* to the other grounds in **Order 45(1)** of the **Civil Procedure Rules**.

32. However I also find that that ground is bound to run afoul of the ***res judicata*** doctrine. Parties are also bound by their pleadings and in order to determine whether this ground is valid, this court must examine the amended defence in the suit filed on **15/2/2016**. The closest the defendant came to pleading adverse possession is in **paragraph 14** when he stated as follows:

> **"The defendant avers that he has occupied and worked the suit land since 1986 without any secrecy, evasion or interruption for over 30 years."**

33. It is obvious that the defence of adverse possession is not raised in this matter. It may also be presumed that the defendant's counsel was only interested in impressing upon the court on the length of time the defendant claimed to have resided on the suit land and no more. It is not for the court to impute to any party in a suit what he has not pleaded in their documents. parties are deemed to know best how to frame their case and the court will only deal with the case as framed in the pleadings and no more, for to do otherwise would be tantamount to wading into the arena of the parties' conflict.

34. This court is all too aware of dicta in past decisions regarding ***res judicata***. The matters which could have otherwise been pleaded but were not pleaded by the parties are deemed as *res judicata* under the provisions of **Section 7** of the **Civil Procedure Act**. a plethora of authorities emphasize that when parties bring their case before court whether as plaintiffs or as defendants they must bring forward the whole case and nothing less. Courts are unwilling to address such matters in subsequent litigation as doing so would be contrary to the provisions of **section 7** of the **Civil Procedure Act**. This position applies not to civil suits but also to petitions. Which are deemed weightier matters by dint of the fact that they usually address violations of the bill of rights or other infringements of the supreme law of the land. In the petition **Okiya Omtatah Okoiti v Communications Authority of Kenya & 14 others [2015] eKLR** the court had this to say:

> **"I am in agreement would only add that it is not proper for parties to have piecemeal Litigation. A party ought to litigate in one suit all matters that belong to that subject in controversy and it is not sufficient therefore for the Petitioner to allege now that the issues he has raised for interpretation were not covered by the previous suit more so when he, Mr. Okoiti, admitted that he was in the Court of Appeal during the proceedings before that Court and knew what issues were in contest. In so finding I am also guided by the decision of the Court of Appeal in Pop In (Kenya) Ltd & 3 Others vs Habib Bank AG Zurich (1990) KLR 609 where the Court held that:**
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> > **"But there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings. The *locus classicus* of that aspect of res judicata is the judgment of Wigram VC in Henderson v Henderson (1843) Hare 00, 115, where the judge says:**
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> **Where given matter becomes the subject of litigation in, and of adjudication by, court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, only because they have, from negligence, inadvertence, or even accident omitted part of their case. The plea of res judicata applies, except in special cases, not only to points which the court was actually required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time".**
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> **Simply, put therefore, in the circumstances, the present complaints, excluding the suitability and competence of the and 2nd -14th Respondents to hold office, could have been made and should have been raised in the earlier petitions in the High Court, Court of Appeal and Supreme Court."**

35. In the case of **A N M v P M N [2016] eKLR** the court observed as follows:

> **"In essence therefore, the doctrine implies that for a matter to be res judicata, the matters in issue must be similar to those which were previously in dispute between the same parties and the same having been determined on merits by a Court of competent jurisdiction. The Court in the English case of HENDERSON VS HENDERSON (1843-60) ALL E.R.378, observed thus:**
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> > **"…where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time."**

36. In the case of **Apondi vs. Canuald Metal Packaging [2005] 1 EA 12 Waki, JA** stated as follows:

> **"A party is at liberty to choose a forum which has the jurisdiction to adjudicate his claim, or choose to forego part of his claim and he cannot be heard to complain about that choice after the event and it would be otherwise oppressive and prejudicial to other parties and an abuse of the Court process to allow litigation by instalments".**

37. In the light of the line of relevant cases cited above and the pleadings and evidence in the instant case, the argument that the inclusion of the chief's ruling in the matter could have swayed this court into determining the issue of adverse possession in the defendant is not only speculative but also irrelevant in the instant application, and it does not amount to a proper ground for review or setting aside of the judgment. It is also obvious that such an issue could not have been determined while it was not pleaded.

38. Notwithstanding what is observed in the immediately preceding paragraph, it is not clear how, perchance the judgment was set aside as proposed by the applicant, the hearing would proceed without a further amendment of the defence to include adverse possession. If this court were to allow the application and possibly thereafter further allow an amendment of the defence, there is no indication that the plaintiff would also not wish to amend his pleadings. The process may go on *ad infinitum*, and it may amount to the re-trial of the entire suit all over again with the result that the situation may not be any different from dealing with a new suit on the same matter.

39. Consequently the application dated **30/1/2020** is dismissed with costs to the respondent.

It is so ordered.

Dated, signed and **delivered** at **Nairobi via Teleconference** on this **14th** day of **May, 2020**.

MWANGI NJOROGE

JUDGE

Ruling read in the presence of:
Hon Mercyline Lubia, DR;

Mr Chebii for the Respondent/Plaintiff.

N/A for the Applicant/Defendant.