



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MAKUENI**

**ELC SUIT NO. 315 OF 2017**

**KITUKU KALUU**

**DAUDI NZOMO alias DAVID NZOMO.....PLAINTIFFS/RESPONDENTS**

**VERSUS**

**JOSIAH KITUKU & 13 OTHERS.....DEFENDANTS/RESPONDENTS**

**AND**

**SAMUEL WAMBUA KAMUYA.....APPLICANT**

**R U L I N G**

1. The application for ruling before this Court is the one dated 11<sup>th</sup> June, 2020 and filed in court on 16<sup>th</sup> June, 2020 by the Applicants' Counsel under certificate of urgency. It seeks the following orders: -

**(1) Spent.**

**(2) THAT the orders of the court issued on 29/05/2020 declaring that the applicant herein is not properly on record in this suit be reviewed, vacated and or set aside.**

**(3) THAT costs be in the cause.**

The application is predicated on the grounds on its face and is supported by the affidavit of Samuel Wambua Kamuya, the Applicant herein sworn at Machakos on 11<sup>th</sup> June, 2020.

2. The application is expressed to be brought under sections 1A, 1B, 3A of the Civil Procedure Act, Oder 45 Rule 2 of the Civil Procedure Rules (2010) and all other enabling provisions of the law.

3. Kituku Kaluu, the Plaintiff/Respondent herein, has opposed the application vide his replying affidavit sworn at Machakos on 09<sup>th</sup> July, 2020 and filed in court on 13<sup>th</sup> July, 2020.

4. The 1<sup>st</sup> to 12<sup>th</sup> Defendants/Respondents do not oppose the said application.

5. The application was canvassed by way of written submissions.

6. The Applicant has deposed in paragraphs 3, 4, 5, 6, 7, 8, 9, 10 and 11 of his supporting affidavit that this Court rendered its judgement on the 29<sup>th</sup> May, 2020 which declared that the Applicant was not properly on record (**annexture SWK-1**) that he had earlier successfully applied to be enjoined as a plaintiff in this suit via an application dated 07<sup>th</sup> May, 2014 in Nairobi ELC case No.1248 of 2013, that a ruling in respect to the application was delivered by Justice M. Gitumbi on 01<sup>st</sup> April, 2016 where the application was allowed whereby the Applicant was allowed to be enjoined as a plaintiff in the suit to take care of the interests of the estate of his late father (**annexture SWK-2**), that he is advised by his Advocates on record, which advise he verily believes to be true that the order to enjoin him as a plaintiff in this matter was made by a Court of parallel jurisdiction with this Court, that he is advised by his Advocates on record, which advise he verily believes to be true that the effect of the impugned ruling dated 29<sup>th</sup> May, 2020 is to set aside an order of court of parallel jurisdiction, that he is advised by his Advocates on record, which advice he verily believes to be true that this is an error apparent on the face of the record, that he is therefore properly on record unless and until the ruling dated 01<sup>st</sup> April, 2016 is successfully appealed at the Court of Appeal, that the Respondents will not suffer any prejudice if the Court allows this application and that it is in the interest of justice that this application be allowed as

prayed.

7. On the other hand, the Plaintiff/Respondent has deposed in paragraphs 2, 3, 4, 5, 6, 7, 8, 9 and 10 of his replying affidavit that the application has been read and explained to him by his Advocates on record and wishes to respond that on the 22<sup>nd</sup> November, 2017 or thereon, the Applicant was directed to file an amended plaint which he never did, that on the 12<sup>th</sup> March, 2018, the Applicant was granted an extension of time to file an amended plaint within 14 days which he never did, that on the 09<sup>th</sup> May, 2018, the Plaintiff/Respondent was granted leave to file an amended plaint within 14 days in compliance with court orders, that subsequently, his Advocates forwarded his approved amended plaint to the Advocates for the Applicant who approved it by signing on the same, that however, his Advocates informed him that the Applicant did not attach a verifying affidavit thus they filed the plaint with if (sic) verifying affidavit, that as such, he has been informed by his Advocates that the Applicant did not file an amended plaint within the timelines set by the court thus the leave lapsed by operation of the law, that he has also been informed by his Advocates that without verifying affidavit by the Applicant, he could not be a plaintiff under the law in addition to leave granted to him having lapsed, that the Applicant has not filed any application for extension of that leave thus the application is misplaced, and that the Plaintiff/Respondent has sworn the affidavit in opposition to the application herein and prays that the same be dismissed with costs.

8. In their submissions, the Counsel for the Applicant pointed out in a ruling delivered by Justice M. Gitumbi in **Nairobi ELC case No.1248 of 2013** on 01<sup>st</sup> April, 2016, the Applicant herein was enjoined in the suit to take care of the interest of the estate of his father. That the ruling whose copy was annexed to the supporting affidavit was delivered by a Court of parallel jurisdiction with this Court. The Counsel went on to submit that as was stated by Justice Lesiit in the case of **David Ngugi Mbuthia & Another vs. Fina Bank Ltd [2007] eKLR**, orders of one court cannot be varied and or set aside by another court of parallel jurisdiction and that the only avenue can be pursued through an appeal to the Court of Appeal. The Counsel pointed out that this Court made an error in its ruling that the Applicant was not a party to this suit.

9. The Counsel further relied on the case of **Rajab Oundo Tabiro vs. Rukiya Nechesa Tabiro [2016]** where Justice S. Mukunya stated that:-

*“in such a parallel decision would arise because, I have no jurisdiction to interfere with a succession cause and have no jurisdiction to vary the orders of a competent court of equal and parallel jurisdiction. Such a situation would not be in the interest of justice as the court would be open to ridicule and parties would be left confused, a situation that would not be desirable. Such a decision would put the court into disrepute.”*

10. Regarding the issues raised by the 1<sup>st</sup> Plaintiff's/Respondent's replying affidavit, the Counsel submitted that **Article 159(2)(d) of the Constitution** provides that justice shall be administered without undue regard to technicalities. The Counsel pointed out that when a case is decided in accordance with substantial justice, as provided for under the aforementioned Article, justice is not only seen **to be done** (*emphasis are mine*) but is seen to have been done.

11. The Applicant's Counsel further cited the case of **Phillip Chemwolo & Another vs. Augustine Kibende [1986] eKLR** where Apaloo, JA (*as he then was*) stated thus;

**“Think a distinguished equity Judge has said;**

*“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merits.”*

Apaloo JA went on to state;

*“I think in the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as it often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.”*

12. The last authority that the Counsel for the Applicant cited is **Republic vs. District Land Registrar, Uasin Gishu & Another [2014] eKLR** where Justice Ochieng' held thus: -

*“To my mind, justice is not dependent on Rules or technical procedures, justice is about the right thing.”*

Pursuant to **Article 159(2) (d) of the Constitution;**

*“in exercising judicial authority, the courts and tribunals shall be guided by the following principles -.....*

*(d) Justice shall be administered without undue regard to procedural technicalities.”*

13. On the other hand, the Counsel for the Plaintiff/Respondent submitted that pursuant to the orders of 1<sup>st</sup> April, 2016 where the Applicant was enjoined as a Plaintiff, he was directed to file an amended plaint so as to bring to the court the grievances he had against the defendants herein but he never did. That as a result of his failure to do so, on 09<sup>th</sup> May, 2018, the Plaintiff/Respondent was granted leave to file his own amended plaint in compliance with the court order. That when the Plaintiff/Respondent forwarded the amended Plaint to the Advocate for the Applicant, the latter approved it by signing but failed to attach a verifying affidavit as required by law. That as a result of this; the

amended plaint was filed with only the verifying affidavit by the Plaintiff/Respondent.

14. That the provisions of **Order 4 Rule 1(2) of the Civil Procedure Rules** are couched in mandatory terms as hereunder: -

*“The plaint shall be accompanied by an affidavit sworn by the Plaintiff verifying the correctness of the averments contained in rule 1(1) (f) above.”*

15. The Counsel was of the view that after the Applicant failed to file an amended plaint with a replying affidavit within the timelines set by the court, leave lapsed by operation of the law. That since there is no application for extension of leave to file suit by the Applicant after lapse of leave, the application herein is misplaced and should be dismissed with costs.

16. Having considered the submissions filed together with the application and the replying affidavit, it is common ground that a ruling was delivered on 01<sup>st</sup> April, 2016 enjoining the Applicant herein as a plaintiff in this suit. The ruling in question was delivered by my sister Gitumbi, J. No appeal was filed against the said ruling. It is therefore clear to me that when this Court rendered its ruling of 29<sup>th</sup> May, 2020 where it indicated that the Applicant herein was not properly on record, the Court was in effect trying to set aside an order of another court of parallel jurisdiction. In so doing, the Court did not have jurisdiction and as was found by Mukunya, J in the case of **Rajab Oundo Tabiro vs. Rukiya Nehesa Tabiro [2016] eKLR**, the net effect was to open this court to ridicule and to leave the parties herein confused.

17. In as much as the Applicant herein did not comply with the orders of 01<sup>st</sup> April, 2016, 22<sup>nd</sup> November, 2017 and 12<sup>th</sup> March, 2018 to amend the plaint so as to bring the grievance he had against the defendants herein, his failure to do so are blunders which should not stop this Court from hearing this case on merits. There is no evidence of intention to overreach by the Applicant and his error or default to comply can be put right by payment of costs. I would, therefore, agree with the Counsel for the Applicant that the Court should concentrate of substantive justice rather than procedural technicalities that the Plaintiff/Respondent seeks to rely on.

18. The upshot of the foregoing is that there is an apparent error on the face of the record and this is a proper case for review. Consequently, the application has merits and I proceed to grant prayer 2. The Applicant shall bear the costs of the application.

**Signed, dated and delivered at Makueni via email this 26<sup>th</sup> day of August, 2020.**

**MBOGO C.G.,**

**JUDGE.**

**Court Assistant: Mr. G. Kwemboi**