REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ELC CASE No. 93 OF 2014

ABRAHAM KIPROP CHOGE ..... 1ST PLAINTIFF/RESPONDENT

NELSON KYEGO CHOGE ..... 2ND PLAINTIFF/RESPONDENT

ELPHAS KIPCHIRCHIR CHOGE ..... 3RD PLAINTIFF/RESPONDENT

VERSUS

THOMAS KIRWA ..... 1ST DEFENDANT/APPLICANT

ABRAHAM ROTICH ..... 2ND DEFENDANT/APPLICANT

RULING:

1. This ruling is with respect to the Defendants/Applicants' Notice of Motion Application dated 24th March, 2025 seeking the following orders:-
   (a) Spent
   (b) Spent
   (c) THAT this Honourable Court be pleased to review, vary and/or vacate orders by setting aside and/or staying ruling delivered on 18.12.2024 in this matter and the subsequent execution and consequential orders.
   (d) THAT costs of this application be provided for.

2. The Application is premised on the grounds pleaded on the face of it and on the Defendants/Applicants' joint supporting affidavit sworn on the same date. The Defendants deponed that they are dissatisfied with the ruling of this court delivered on 18th December, 2024. They claim that there is new evidence that there were no existing boundaries between the Applicants' property and the suit property, and the surveyor was asked to determine the boundaries after they were found to be in contempt.

3. The Defendants averred that without properly defined boundaries, the orders were not executable, thus the Applicants could not be in contempt. Further, that the Plaintiffs did not provide any information of the 2nd Defendant being on the suit property. They also claimed that the suit property is their only home and source of livelihood, therefore they will suffer irreparable loss if the review is not granted. They deponed that it is in the interest of justice that the orders sought herein are granted.

4. The Application was served upon the Plaintiffs/Respondents who opposed it through a Replying Affidavit sworn by Abraham Kiprop Choge, the 1st Plaintiff/Respondent on 21st May, 2025. He deponed that the Defendants were rightly found in contempt and that the instant application is just an attempt to avoid liability. He claimed that instead of mitigating, the Defendants were introducing new evidence in a matter that has already been adjudicated by the court of Appeal in ***Eldoret Court of Appeal Civil Application No. E063 of 2023, Thomas Kirwa***

& Abraham Rotich vs Abraham Kiprop Choge, Nelson Kipyego Choge & Elphas Kipchirchir Choge.

5. The 1st Plaintiff asserted that the Defendants were not resident of PLATEAU/KIPKABUS BLOCK 4(LELMOKWO)/24, the suit property herein, but they invaded the land in 2005 and destroyed the boundaries marking perimeter of the suit land that is adjacent to land belonging to the Applicants' late father. He deponed that the surveyor was invited to ensure that the Plaintiffs properly fenced and restored the boundaries that had been destroyed by the Defendants when they ploughed the suit land.

6. The 1st Plaintiff also stated that the Defendants' late father was to be registered as proprietor of PLATEAU/KIPKABUS BLOCK 4(LELMOKWO)/24 but that has not been done as no letters of administration were taken out for his estate and the land is still registered under the Government of Kenya. He asserted that as a result, the Defendants do not have capacity to prosecute a boundary dispute since they are not the registered owners of the land adjacent to the suit property. He thus concluded that the application is defective in form and substance.

Submissions:

7. The court directed that the Application be canvassed by way of written submissions. The parties were granted timelines within which to file and exchange their respective submissions. The record shows that the Defendants/Applicants filed their written submissions dated 20th October, 2025. On the part of the

Plaintiffs/Respondents however, the court was on 14th October, 2025 informed that Counsel would not be filing any submissions.

The Defendants/Applicants' Submissions;

8. Counsel contended that the ruling was delivered in the absence of the Applicants and without the benefit of full and accurate facts regarding the executability of the orders in question. Counsel explained that the Applicants had now obtained new and material evidence indicating that there were no clearly established boundaries between the suit property and their adjacent land at the time of the alleged contempt. Counsel referred to a letter from the County Surveyor dated 10th February, 2025 scheduling a boundary re-establishment exercise. Counsel argued that the orders issued on 4th November, 2022 were therefore incapable of execution in the absence of defined boundaries, thus, the finding of contempt was premature and unjust.

9. Counsel cited Order 45 Rule 1 of the Civil Procedure Rules, which allows a party to seek review of a judgment or ruling on the basis of discovery of new and important matter or evidence which was not within their knowledge or could not be produced at the time the order was made. Counsel also cited Section 80 and 63(e) of the Civil Procedure Act as well as Article 159(2)(d) of the Constitution as providing the legal framework in support of the Defendants' application. Counsel relied on ***Republic vs Public Procurement Administrative Review Board & 2 Others Ex-Parte Syner-Chemie Limited (2016) eKLR*** and

Francis Origo & Another vs Jacob Kumali Mungala (2005) eKLR which dealt with the issue of discovery of new evidence.

10. Counsel asserted that the standard for proving contempt is higher than that in ordinary civil cases, and to back up this assertion, he cited the case of ***Gatharia K. Mutikika vs Baharini Farm Ltd (1985) KLR 227***. Counsel submitted that the lack of defined boundaries rendered the orders ambiguous and unenforceable. He contended that the finding of contempt did not therefore meet the required standard of wilful and deliberate disobedience. Counsel for the Applicants also argued that the four elements of civil contempt set out in ***Samuel M. N. Mweru & Others vs National Land Commission & 2 Others (2020) eKLR*** were not satisfied.

11. Counsel urged that the Applicants stand to suffer irreparable harm if the ruling is not reviewed, as the suit property is their home and source of livelihood. He submitted that the Applicants had not wilfully disobeyed any court orders and that their actions were based on a genuine belief that they were operating within their own land. He argued that conversely, the Respondents will not suffer prejudice if the orders sought are granted, and that any inconvenience can be compensated by costs. In light of the foregoing, this Court was asked to grant the orders sought in the application and also award costs of this application to the Applicants.

Analysis and Determination:

12. The court has considered the Defendants/Applicants' Motion, the affidavit filed in opposition as well as the submissions and authorities cited therein. The court is of the view that the issues for determination are:-

    (i) Whether or not the applicant has made out a case for review, setting aside and/or vacating the ruling on contempt.

    (ii) Who bears the costs of this application?

13. The Applicants are asking this court to review, vary and/or set aside the ruling delivered on 18th December, 2024 that found them in contempt. For the record, no such ruling was delivered on the pleaded date. A perusal of the record will reveal that the ruling on the Plaintiff's application for contempt is in fact dated 19th December, 2024 and that is also the date it was delivered. I will thus proceed on the presumption that the date on the Motion was a typographical error and determine the application on its merits.

14. When it comes to review of court orders and judgments/decrees, the substantial law is Section 80 of the Civil Procedure Act which is in the following terms:-

    80. Review

    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

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

15. The procedural law on review is Order 45 of the Civil Procedure Rules. In particular, Order 45 Rule 1 reads as follows:-

1. Application for review of decree or order [Order 45, rule 1]

(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 a review of judgment to the court which passed the decree or made the order without unreasonable delay.

16. Order 45 above requires that an application for review has to be made without unreasonable delay, and the main grounds on which such an application may be premised are;

(i) Discovery of new and important matter or evidence;

(ii) Mistake or error apparent on the face of the record; and

(iii) For any other sufficient reason.

17. From the application and submissions placed before this court, the sole ground upon which the application is based is the alleged discovery of new matter or evidence. Mere discovery of new or important evidence is not sufficient ground for review (see ***Republic vs Advocates Disciplinary Tribunal Ex parte Apollo Mboya (2019) eKLR***). The qualifier on this ground is that it must be such new matter and/or evidence which was not within the Applicant's knowledge and could not be produced by him at the time when the order was made, even after the exercise of due diligence.

18. The Applicants have pointed this court to the letter dated 10th February, 2025 from the County Survey Office, Uasin Gishu County addressed to the Area Chief, Kipkabus Location. I have taken time to look the said letter, and I note that it was to inform the Chief that officers from the survey office would visit the site on 19th February, 2025 to re-establish the boundaries of suit property as per the Registry Index Map, and sought his presence at the said exercise.

19. This is contrary to the Applicants' allegation that there were no existing boundaries between the Applicants' land and the suit property. The truth is, the suit property is registered and has a title, which means that proper boundaries must have been established at the point of survey and demarcation. Which is why as indicated in the subject letter, the boundaries were to be "re-established" as per the Registry Index Map.

20. The Respondents have in fact explained that the County Surveyor was invited to the exercise only to ensure that the Plaintiffs properly fenced and restored the boundaries that had been destroyed by the Defendants when they invaded the land in 2005 and ploughed the suit land. The Applicants have not provided any evidence to disprove of the Respondent's contention.

21. My understanding of the word re-establish is ***'to bring back into existence something that was originally already there to begin with'***. Another word would be to restore. I note also that from the record, the nature of the Defendants/Applicants encroachment was not a mere moving or pushing of the boundaries. They were accused of coming into the land to plough it. I have no doubt that even though they destroyed the boundaries, the Plaintiffs/Respondents clearly knew the area of their land on the ground. I am therefore constrained to believe them when they say they only wanted to restore the fence that was destroyed by the Defendants.

22. The allegation that there were no existing boundaries has been disproved. As a result, the Applicants cannot claim that they have discovered new evidence that was not available to them at the time of the ruling. In ***D. J. Lowe & Company Limited vs Banque Indosuez (1998) KECA 108 (KLR)***, the Court of Appeal held that:-

"Where such a review application is based on fact of the discovery of fresh evidence the court must exercise greatest of care as it is easy for a party who has lost, to see the weak part of his case and the

temptation to lay and procure evidence which will strengthen that weak part and put a different complexion. In such event, to succeed, the party must show that there was no remissness on his part in adducing all possible evidence at the hearing.

In this particular case the evidence of payment of US Dollars 291,857.34 was easily available to the applicant. Hence, there was no merit in the application for review."

23. In any event, the Applicants have not shown what efforts they put in to obtain this evidence or that despite their efforts, they still could not get it at the time the orders were made. In ***Nyamunga vs Ndeda & 3 others (Environment & Land Case E030 of 2022) [2023] KEELC 16967 (KLR)***, the court explained that:-

"I am also not convinced that due diligence was exercised as required by Order 45 Civil Procedure Rules 2010. Mere discovery of a new or important matter or evidence is not sufficient ground for review. The applicant must demonstrate the efforts made to retrieve the evidence before the decision sought to be reviewed was made."

24. If the Defendants/Applicants had any doubt as to the existence of the boundaries of the suit property, this is information that was available at the time of the earlier application and the subsequent ruling. The Registry Index Map existed and it would have been very easy to find out if indeed the suit property was not demarcated on the Map. Had the Applicants even

attempted to visit the lands office or the survey office, they would have confirmed the issue of boundaries between their land and the suit property. However, no such efforts were documented in the instant application.

25. The only ground presented in support of the application for review Application was the discovery of new evidence. Evidently, the Applicants have failed to substantiate this claim.
26. I note that the Defendants/Applicants pleaded that Plaintiffs did not provide any information on the 2nd Defendant/Applicant being on the suit property. The Defendants/Applicants also submitted that the ruling was delivered in the absence of the Applicants and without the benefit of full and accurate facts regarding the executability of the orders in question. In their submissions, the Applicants further raised the issue of proof of contempt and argument made that the elements of civil contempt were not satisfied, as well as the ambiguity and unenforceability of the orders that the Applicants were found to be in contempt of. This court was also told that the Applicants had not wilfully disobeyed any court orders and that their actions were based on a genuine belief that they were operating within their own land.
27. With due respect, this court is not in a position to even consider these issues and/or allegations. To do so would in effect be re-admitting evidence on the application and sitting on appeal of the ruling dated 19th December, 2024. The Defendants/Applicants participated in the hearing of the application that resulted in the ruling herein. They ought to have raised these issues for consideration by the court at that

time, and if they wish to challenge the said ruling, then they are at liberty to appeal the same in the manner provided under law.

28. I also have no doubt that while all these issues might be good grounds for appeal, they are not sufficient grounds for review, neither is the irreparable loss pleaded by the Applicants. Since the Applicant did not demonstrate that they had come by new evidence, the effect of allowing the Application would amount to re-opening the case afresh. Such an exercise is not only in excess of the Court's jurisdiction, but is also frowned upon as deliberated by the Court of Appeal in ***Stephen Githua Kimani vs Nancy Wanjira Waruingi T/A Providence Auctioneers (2016) eKLR***, where the superior court held as follows:-

> ***"My above finding that the grounds offered by the applicant do not amount to sufficient reasons is further fortified by the holding in the case of Evan Bwire vs Andrew Nginda Civil Appeal No. 103 of 2000, Kisumu; (2000) LLR 8340 where the court held that 'an application for review will only be allowed on very strong grounds particularly if its effect will amount to re-opening the application or case a fresh. In other words, I find no material before me to demonstrate that the applicant has demonstrated the existence of new evidence which he could not get even after exercising due diligence."***

29. On the issue of time, the ruling subject matter of this Application was delivered on 19th December, 2024. The Application herein was filed on 24th March, 2025. In addition, the letter from the Survey Office is dated 10th February, 2025. The Applicants have not indicated when they came to know of the

letter. However, since the exercise was to be conducted on 19th February, 2025, then presumably it must have been served on them prior to the said date.

30. The Applicants herein were to appear before this court for sentencing on account of the finding that they were in contempt of the orders of the court. Bearing in mind the nature of orders issued against the Defendants/Applicants herein, and the implications it has on their liberty, this is one of the cases where delay for even one day may be considered inordinate. In this regard, I agree with Munyao J in ***Jaber Mohsen Ali & Another vs Priscillah Boit & Another (2014) eKLR*** where Learned judge held:-

> ***"The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter. In the case of Christopher Kendagor vs Christopher Kipkorir, Eldoret E&LC 919 of 2012 the applicant had been given 14 days to vacate the suit land. He filed an application one day after the 14 days. The application was denied, the court holding that, the application ought to have come before expiry of the period given to vacate the land."***

31. In the instant case, I find that the Defendants/Applicants have not demonstrated that they have discovered new and important matter or evidence that was not in their knowledge at the time

the orders were made so as to justify the granting of orders for review.

Who bears the costs of this application?

32. On costs, Section 27 of the Civil Procedure Act provides that: -

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

33. Two fundamental principles guide the award of costs under section 27 of the Civil Procedure Act. The first is that costs are awarded at the discretion of the court. Secondly, as a general rule, costs should follow the event, meaning that costs are awarded to the successful party. A court can only depart from this general where there is good reason for doing so.

34. In the instant suit, the Defendants/Applicants brought this application and have failed to demonstrate that they are entitled to the orders sought. In such a scenario, the Supreme

Court in ***Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others (2014) eKLR***, stated as follows:-

> ***"[18] It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs."***

35. Going by the above decision, the Defendants/Applicants having failed to show legitimate cause, they have failed. As a result, the Plaintiffs/Respondents have succeeded and are entitled to the costs of the Application.

Orders:-

36. Owing to the above deliberations, the following orders issue herein:-
    (a) The Defendants/Applicants' Notice of Motion Application dated 24th March, 2025 lacks merit and the same is dismissed.
    (b) The Plaintiffs/Respondents shall have the costs of this Application.
37. Orders accordingly.

DATED, **SIGNED** and **DELIVERED** virtually at **ELDORET** on this **13TH** day of **NOVEMBER**, **2025** vide Microsoft Teams.

HON. C. K. YANO
ELC, JUDGE

In the presence of;

Mr. Murgor for the Plaintiffs/Respondents.

Mr. Keter N. K. for the Defendants/Applicants.

Court Assistant - Laban.