**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**E & L CIVIL SUIT NO. 71 OF 2013**

**KENYA INDUSTRIAL ESTATES LTD......................PLAINTIFF**

**VERSUS**

**ANNE CHEPSIROR..............................................1ST DEFENDANT**

**SAMACK GENERAL SUPPLIES LIMITED....2ND DEFENDANT**

**ULTRA EUREKA FARM LIMITED.................3RD DEFENDANT**

**CUSTOM CREDIT MANAGEMENT LTD.......4TH DEFENDANT**

**TAJAKOS ENTERPRISES................................5TH DEFENDANT**

**ATTORNEY GENERAL....................................6TH DEFENDANT**

**HOSEA KIBET RUTO.......................................7TH DEFENDANT**

**RULING**

By Notice of Motion dated 29.10.2018, Hosea Kibet Ruto ***(hereinafter referred to as the applicant)*** prays that this honourable court does set aside the court proceedings and the judgment on 30.8.2015 in its entirety and consequently, the applicant, be enjoined as the 7th defendant and be allowed to file statement of defence.

The application is based on grounds that the applicant is the registered owner of land known as L. R. No. Eldoret Municipality Block 8/595 and was registered after following the required procedures. He is an innocent purchaser for valuable consideration without any notice of irregularities or encumbrances.

The applicant states that his rights are protected under the land laws and the Constitution of Kenya. He laments that by its judgment of 30.8.2015, the court ordered cancellation of the five titles issued from the original title number L. R. No. Eldoret Municipality Block 8/53 including the applicant's parcel of land L. R. No. Eldoret Municipality Block 8/595 and further order for the eviction from the properties.

The applicant was not enjoined as a defendant in the suit hence the applicant was condemned un-procedurally, unfairly and unlawfully. The applicant's right to a fair hearing and due process shall be violated unless the application is allowed.

The applicant claims to have a good defence to the plaintiff's claim and that it is fair and in the interest of justice that the judgment be set aside and the suit be heard de novo on merit.

The applicant claims that he will suffer immense injury, loss and damage unless the reliefs sought herein are granted because the respondent has issued an eviction notice purportedly in execution of the decree herein and it is likely to follow through to the detriment of the proprietors including the applicant.

According to the applicant the plaintiff shall not suffer any prejudice or inconvenience that cannot be remedied by way of **"thrown away costs".** That this application is made in good faith and it is merited. The application is supported by the affidavit of Hosea Kibet Ruto and Ann Chepsiror that reiterate the grounds above stated.

Kenya Industrial Estates **(hereinafter referred to as the respondent)** through Charity Ndeke states that the application is an abuse of court process and is aimed at delaying the execution of the judgment of the court given on 30.1.2015.

According to the plaintiff, the Proposed 7$^{th}$ Defendant/Applicant actively participated in the now concluded suit. That she is aware of her own knowledge that the Proposed 7$^{th}$ Defendant/Applicant testified before the Honourable Court as the Defendants' 5$^{th}$ witness and made the very same arguments that have been advanced in the present application; and from which, the Court made well-reasoned findings. The Court's record is clear; and the facts speak for themselves.

That she has been advised by their Advocates on record, which advice she verily believes to be true and sound in law that in light of the foregoing, the Proposed 7$^{th}$ Defendant/Applicant's application is res-judicata as it raises the same issues that were the subject of the Court's determination as is evidenced by the judgment of this Honourable Court given on 30$^{th}$ January, 2015.

The Proposed 7$^{th}$ Defendant/Applicant has failed to establish basis for an order of review of the judgment under Order 45 of the Civil Procedure Rules and that; if the Proposed 7$^{th}$ Defendant/Applicant was aggrieved by the judgment of 30$^{th}$ August, 2015, his remedy was against the 5$^{th}$ Defendant, from whom he acquired his purported interest in the suit property, and not the Plaintiff/Respondent.

The plaintiff believes that Order 1 Rule 10 of the Civil Procedure Rules permits joinder of a party before trial and not after judgment; and where judgment is entered, the Court is adjudged functus officio. The Proposed 7$^{th}$ Defendant/Applicant had adequate notice of the Plaintiff's suit in respect of the suit property, but he still failed to apply to be made a party to the suit before judgment was entered, and only made his representations as a witness.

That in observance of the principles of natural justice and the Constitution, the Proposed 7$^{th}$ Defendant/Applicant was rightly accorded an opportunity to be heard and that previous litigation herein has established that the suit land in dispute belongs to the Plaintiff/Respondent and the matter should end there. The attempt by the Proposed 7$^{th}$ Defendant/Applicant to reverse this situation by the present applicant is futile.

The applicant submits that the court cancelled his title and ordered his eviction without affording him a hearing. He cites Section 3 of the Environment and land court Act that sets out the overriding objective of the statute and its principle is to enable the court to facilitate just fair, expeditious proportionate and accessible resolution of disputes. The applicant further relies on Article 159 of the Constitution of Kenya 2010 that provides that courts should strive to determine matters on merit and not technicalities. He believes that this is a matter that the court should set aside the judgment ***ex debito justitiae.***

***The applicant relies on Onyango v Attorney General (1986-1989) EA 456*** wherein it was held that the principle of natural justice applies where ordinary people who would reasonably expect those making decisions which will affect others to act fairly. A decision in in breach of the rules of natural justice is not cured by holding that the decision would otherwise been right. If the rules of natural justice are breached it matters not that the same decision would have been arrived at.

The applicant argues that as long as the issue in dispute has not been completely adjudicated, the court can set aside proceedings judgment and decree and order that a person be enjoined as a party for complete adjudication to be made by the court.

The plaintiff on the hand argues that this court lacks jurisdiction to entertain the application as it is ***functus officio*** having made a final decision. It is argued that once a decision is made by the court it is final and conclusive. Such a decision cannot be reviewed by the decision maker.

The plaintiff further argues that the application seeks to re-determine the circumstances under which the proposed 7$^{th}$ defendant acquired interest in the suit properties or part thereof and that the applicant was given an opportunity to be heard. That the prayers sought cannot be granted as the orders sought are in respect of setting aside of a judgment made on 30$^{th}$ August 2015 which judgment does not exist as the only judgement on record is dated 30$^{th}$ January 2015. The provisions of law relied upon for the setting aside are irrelevant and therefore the court should not create reliefs for litigants.

The plaintiff further argues that the applicant has not demonstrated that he is entitled to the orders sought under section 80 of the Civil Procedure Act and order 45 of the civil procedure rules cap 21 laws of Kenya. He has not met the thresh hold to be granted an order for review under order 45 of the Civil Procedure Rules. Moreover, that there is unreasonable delay as it was made after the lapse of 3 years 9 months and an appeal was filed and served but was struck out for failure to file a notice of appeal within 2 years.

The Attorney General argues that the applicant was afforded a hearing as a witness as he ventilated his case and was at liberty to seek the courts permission to be enjoined as a party. Moreover, that the applicant is guilty of Laches having brought the application more than 3 years after judgment. The Attorney General further submits that the court is functus officio having determined the matter on merit.

In a nutshell, the 2$^{nd}$ and 3$^{rd}$ defendants argue that the applicant was not given fair hearing contrary to the provisions of Article 50 (1) of the Constitution of Kenya.

I have anxiously considered the application, responses and rival submissions and do find that it is a fact that the applicant was affected by the decision of the court but was not given an opportunity to be heard as a party was heard as a witness.

***Order 1 Rule (10) 2 of the Civil Procedure Rules*** empowers the court at any

any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just,

order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added. ***Sarkaer's Code of Civil Procedure (11th Edition Report 2011, Volume 1P. 887)*** state that;

***"The section shall be interpreted severally and widely and should not be restricted merely to parties involved in the suit but all persons necessary for a complete adjudication should be made parties."***

In ***Central Kenya Ltd Vs Trust Bank CA No. 222 of 1998***, the Court of Appeal held on amendment of pleadings and joinder of parties that;

***"all amendments should be freely allowed and at any stage of proceedings provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot be property compensated for in costs."***

This court finds that joinder of parties cannot be allowed where there are no proceedings pending in court. In this matter there are no proceedings pending.

In ***Tang Gas Distributors Ltd Vs Said & Others (2014) EA 448***, the Court of Appeal held that the power of the court to add a party to proceedings can be exercised at any stage of the proceedings. That a party can be joined even without applying and that the joinder may be done either before or during trial, that it can be done even after judgment where damages are yet to be assessed. That it is only when the suit or proceeding has begun finally disposed of and there is nothing more to be done. That the rule becomes inapplicable and that a party can be added even at the appellate stage. In this matter there is no pending appeal.

The applicant applies not only to be enjoined but to review and set aside the judgment and the suit be heard *de-novo*.

I do find that after judgment there are no pending proceedings before court, any person who wishes to be heard on grounds that he was a necessary party but was not made party can only apply for review under Order 45 of the Civil Procedure Rules.

The applicant has heavily relied on the case of ***JMK V MWM AND MFS(2015) eKLR.*** The distinction between the case of ***JMK*** and this case is that in the former, the applicant was not a witness in the case and only became aware of the judgment after delivery but in the current matter the applicant was all through aware of the case and judgment and took too long to make the application for joinder after the proceedings had terminated.

This court finds that the applicant cannot be enjoined in the proceedings under order 1 rule 10 but can only apply for review under order 45 Rule 1 of the Civil Procedure Rules 2010.

The applicant has applied to set aside the judgment herein under order 10rule 11 of the civil procedure rules 2010. This section provides for the setting aside of default judgment and therefore does not apply in this case as the judgment made herein is not default judgment or exparte judgment but a judgment made after inter parte hearing.

Having said the above, I do it is clear that the judgment herein can only be set aside under order 45 rule 1 of the Civil Procedure Rules 2010 however, the applicant should meet the test in granting an order for review under Section 80 of the Civil Procedure Act Cap 21, Laws of Kenya and Order 45 of the Civil Procedure Rules, 2010. For the court to grant the order for review under order 45 of the Civil Procedure Rules, 2010 there must be discovery of a new and important matter that after exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order made. The applicant was aware of the suit and the decree and therefore does not qualify for review under this ground. There is no demonstration of mistake or error apparent on the face of record. There could have been sufficient reason if the applicant was not aware of the judgment more than three years before filing the application but the application is vitiated by a delay of more than three years which I find to unreasonable delay. The application is found without merit and is dismissed with costs.

**Dated and delivered at Eldoret this 31st day of May, 2019.**

**A. OMBWAYO**

**JUDGE**