



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERICHO**

**JUDICIAL REVIEW APPLICATION NO. 6 OF 2018**

**IN THE MATTER OF AN APPLICATION BY BENEDETA CHERUTO MABWAI FOR**

**LEAVE TO APPLY FOR JUDICIAL REVIEW**

**AND**

**IN THE MATTER OF THE LAND DISPUTES TRIBUNAL ACT NO. 18 OF 1990**

**AND IN THE MATTER OF THE SOTIK LAND DISPUTE ARBITRATION TRIBUNAL SOTIK DIVISION**

**KERICHO/KIPSONOI S.S/ 513 DATED 11/10/2002**

**IN THE MATTER OF THE SOTIK PRINCIPAL MAGISTRATE'S COURT**

**LAND CASE NO. 13 /2010**

**BENEDETA MABWAI.....APPLICANT**

**VERSUS**

**WILLIAM KIPLANGAT RONO.....RESPONDENT**

**RULING**

**Introduction**

1. The Applicant moved the court by way of Chamber Summons pursuant to Order 53 Rules (1), (2) and (4) of the Civil Procedure Rules and the Law Reform Act, Cap 26 of the Laws of Kenya seeking leave to apply for an order of certiorari to remove into the ELC and quash the verdict of the Sotik Land Disputes Arbitration Tribunal on 11/10/2002 and later adopted as a judgment of the court vide Sotik Principal Magistrate's Court Case No. 13 of 2010. He also sought that the said leave do operate as a stay of the judgment /verdict in question until the determination of the application for the order of certiorari.

2. The application is based on the statutory statement and the Applicant's affidavit sworn on the 2<sup>nd</sup> October 2018. In the said affidavit she depones that she is the registered owner of land parcel no KERICHO/KIPSONOI S.S/513. She further depones that by the proceedings of the Sotik Land Disputes Tribunal dated 11.10.2002, the Tribunal ordered that the Respondent was entitled to 5.5 acres from the said parcel of land. The said verdict was adopted as a judgment of the court in Sotik PMCC no. 13 of 2010.

3. Being aggrieved by the said judgment she appealed to the Provincial Appeals Tribunal but the Land Disputes Tribunal Act was repealed before the appeal was heard and determined. It is her contention that the Tribunal had no powers to order a transfer of title to the Respondent and to entertain the suit filed by Jane Rono as she had not applied for letters of administration. She depones that she filed Kericho ELC Case No. 60 of 2015 but she was advised that it was unprocedural to file a fresh suit.

4. The application is opposed by the Respondent through his Replying Affidavit sworn on the 8<sup>th</sup> February 2019. His contention is that the Applicant failed to file an appeal against the Tribunal verdict within the prescribed period. The Applicant further depones that this application is defective as it was filed before the determination of Kericho ELC Case No. 60 of 2015 and it is merely intended to prevent the respondent from enjoying the fruits of his judgment or scuttle the cause of justice.

5. The Respondent subsequently filed a Notice of Preliminary Objection on the ground that the suit is sub-judice/res judicata.

6. The application was canvassed by way of written submissions and both parties filed their submissions.

**Issue for determination**

7. The main issue for determination is whether the applicant ought to be granted leave to apply for an order of certiorari.

**Analysis and determination**

8. Counsel for the Respondent submitted that the suit herein is res judicata or sub-judice as a similar application was filed vide Kericho ELC Case No. 60 of 2015 and the same was dismissed. It has also been submitted that the application is defective as the Magistrate’s Court has not been enjoined in the application as required by law.

9. At paragraph 11 of his verifying affidavit, the Applicant admits that he filed ELC Case No. 60 of 2015 though he states that his lawyers have realized that it was not procedural to file a fresh suit. What he fails to disclose is that this suit is still pending for hearing as what was heard was only application for stay of execution which was dismissed.

10. The principle of *res sub- judice* is found in the provisions of section 6 of the Civil Procedure Act which states as follows:

*“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”*

11. This principle requires the court to stay any suit or application where a previous suit or application is pending determination by a court of competent jurisdiction. It is common ground that the issues raised in this suit are similar to those raised in Kericho ELC Case No. 60 of 2015 as they both relate to the verdict of the Sotik Land Disputes Tribunal in respect of land parcel no. KERICHO/KIPSONOI S.S 513. In the said case the Applicant has sued Respondent and one Jane Chebwogen Kimeto.

12. The rationale for this principle was restated in the case of **Nyanza Garage v Attorney General, Kampala HC Civil Suit no. 450 of 1993** cited with approval in the case of **Republic v Registrar of Societies –Kenya & 2 Others Ex-parte Moses Kirima & 2 Others (2017) eKLR** where the court held that:

*“In the interest of parties and the system of administration of justice, multiplicity of suits between the same parties and over the same subject matter is to be avoided. It is in the interest of the parties because the parties are kept at a minimum both in terms of time and money and money spent on a matter that could be resolved in one suit. Secondly a multiplicity of suits clogs the wheels of justice, holding up resources that would be available to fresh matters and creating and/or adding to the backlog of cases courts have to deal with. Parties would be well advised to avoid a multiplicity of suits.”*

13. From the forgoing, it is clear that the application herein is sub-judice and ought to be stayed.

14. Regarding the defect in failing to enjoin the Magistrate’s court, I am guided by the case of **Republic Ex-parte Minister for Finance & the Commissioner of Insurance as Licensing and Regulating Officers v Charles Lutta Kasamani T/A Kasamani & Co Advocates & Another Civil Appeal (Application) No. Nai 281 of 2005** where the Court of Appeal stated as follows:

*“Suffice is to say that a defect in form in the title or heading of an appeal or misjoinder or non-joinder of parties are irregularities that do not go to the substance of the appeal and are curable by amendment. Is the form or title to the appeal as adopted by the Attorney General in this matter defective? We think not, we find that it substantially complies with the guidelines set out by this court”.*

15. However, Odunga J in **Kiscoba Association (Acting through John Maina- Chairman James Ndiba, Organizing Secretary v Nairobi City County Government (2018) eKLR** observed as follows:

*“However, I must state that failure by a party to properly intitle the proceedings may lead to denial of costs in the event that the party in default succeeds in the application or even by being penalized in costs”*

16. The upshot is that the application is stayed as the matter is sub-judice.

17. Each party shall bear their own costs.

**Dated, signed and delivered at Kericho this 25<sup>th</sup> day of June, 2019.**

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**J.M ONYANGO**

**JUDGE**

**In the presence of:**

1. Mr. Bii for the Respondent
2. No appearance for the Applicant
3. Court clerk - Rotich