



**REPUBLIC OF KENYA**

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

**AT ELDORET**

**E & L CIVIL SUIT NO. 136 OF 2013**

**JOYCE ESERI MISIKO alias ESERI OMUSINDOBOLE.....PLAINTIFF**

**VERSUS**

**MARTIN BARASA.....1<sup>ST</sup> DEFENDANT**

**PRISILLA MALESI.....2<sup>ND</sup> DEFENDANT**

**JOSEPH LUVISIA.....3<sup>RD</sup> DEFENDANT**

**VIOLET KHAKESA.....4<sup>TH</sup> DEFENDANT**

**RINA OMBOKO.....5<sup>TH</sup> DEFENDANT**

**KUUGUNI WEIKEDABA.....6<sup>TH</sup> DEFENDANT**

**SAMUEL KIPTISIA.....7<sup>TH</sup> DEFENDANT**

**MARTIN KUUDU.....8<sup>TH</sup> DEFENDANT**

**TEELA KIPSANGA.....9<sup>TH</sup> DEFENDANT**

**THOMAS KHAYALA.....10<sup>TH</sup> DEFENDANT**

**ELISHA KIBERENGE.....11<sup>TH</sup> DEFENDANT**

**SAMSON KIBIWOTT KILACH.....12<sup>TH</sup> DEFENDANT**

**RULING**

1. The defendants seek vide the Notice of Motion dated the 2<sup>nd</sup> August, 2019 filed through M/s Kenei & Associates Advocates for the said firm to be granted leave to come on record for them after the judgment, stay of execution of the judgment delivered on the 7<sup>th</sup> September 2018, review of the said judgment so as to enter judgment for the defendants or make an order to review the suit and costs. The application is based on the seventeen (17) grounds summarized as follows;

(a) That the Plaintiff filed this suit in 2013 seeking to be declared the legal owner of the suit land and for the eviction of the defendants.

(b) That the court's judgment delivered on the 7<sup>th</sup> September 2018 allowing the Plaintiff's claim upon finding that the late Kili Arap Rono had sold the suit land to the late Eseri Omusindobole Mbjunjiro had the following errors;

- That the court erroneously concluded that the Plaintiff was the registered proprietor of the suit land while it was still under the name of Settlement Fund Trustee.
- The Court erred in finding that the suit land had been transferred from Eseri Omusindobole Mbjunjiro to Lydia Maliatso

- Misiko without evidence in support.
- The court erred in finding that the Plaintiff was not a party in Eldoret CMCC No. 422 of 1996, while she and David George Losyio are siblings and suing as personal representatives of the late Lydia Maliatso Misiko.

(c) That the court failed to consider and determine whether the suit was time barred and bad in law for non-joinder of the Settlement Fund Trustees.

(d) That the court failed to abide by the rules of evidence that the Plaintiff had the burden of proving her case.

That application is supported by the affidavit sworn by Samson Kibiwott Kilach, the 12<sup>th</sup> defendant, on the 2<sup>nd</sup> August, 2019.

2. The application is opposed by Joyce Eseri Misiko alias Eseri Omusindobole, through the replying affidavit sworn on the 26<sup>th</sup> September, 2019 in which she among others depones to the following:

(a) That upon delivery of the Judgment on the 7<sup>th</sup> September 2018, a statutory notice was served upon the defendants and the decree executed on the 6<sup>th</sup> August, 2019 through M/s Eshikhoni Auctioneers with assistance of the police. That there is therefore nothing to stay as the execution has been completed.

(b) That the Judgment was entered after hearing the suit on merit. That the defendants were represented by counsel at all material times and are now attempting to re-open their case through the back door.

(c) That there are no errors apparent on the Judgment and the defendants should have preferred an appeal if dissatisfied, and not a review application.

(d) That the land was registered in her name by transmission as administrator of the estate on the 25<sup>th</sup> April, 2012 and suit filed on the 28<sup>th</sup> September, 2012 and therefore not time barred. That the suit land was previously in the name of Settlement Fund Trustees.

(e) That Eldoret CMCC No. 422 of 1996 was not determined on merit and this court has already determined that the Plaintiff was not a party in that suit.

(f) That the defendants' application has no merit and should be dismissed with costs.

3. The application came up for inter-partes hearing on the 1<sup>st</sup> October, 2019 when Mr. Kenei and Mwinamo Advocates for the Defendants and Plaintiff respectively, made their oral submissions for and against the application.

4. The following are the issues for the Court's determination;

***(a) Whether the Decree has been executed and if not whether the Defendants have made a reasonable case for stay order to be issued.***

***(b) Whether the Defendants have established the existence of errors on the face of the Judgment upon which review of the Judgment can issue.***

***(c) Whether the Defendants have made a reasonable case for re-hearing of the suit.***

***(d) Who pays the costs?***

5. The court has after considering the grounds on the Motion, the affidavit evidence by both sides, and the oral submissions by both counsel come to the following determinations;

(a) That the record shows that this proceedings was commenced by the Plaintiff against 17 Defendants vide the Plaintiff dated the 27<sup>th</sup> September, 2012 and amended on the 6<sup>th</sup> May, 2013 through which the 12<sup>th</sup>, 15<sup>th</sup>, 16<sup>th</sup> and 17<sup>th</sup> Defendants were left out of the suit.

(b) That 1<sup>st</sup> to 11<sup>th</sup>, 13<sup>th</sup> and 14<sup>th</sup> Defendants entered appearance through the Memorandum dated the 16<sup>th</sup> October, 2012 and filed defence dated the 30<sup>th</sup> October, 2012 through M/s Keter, Nyolei & Company Advocates. That through the Notice of Change of Advocates dated the 26<sup>th</sup> July 2017, M/s Mwaka & Company Advocates came on record for the said Defendants and among others filed the Amended defence dated the 26<sup>th</sup> July, 2017.

(c) That further, the Defendants participated in the hearing of the Plaintiff's case and cross examined the witness. That their defence was heard when they had counsel to lead them in their evidence in chief and re-examination. That the Counsel also filed written submissions after close of oral evidence. That therefore, the Defendants, just like the Plaintiff, had their legal representative all through the filing of the pleadings and hearing who could have taken instructions or advised their respective parties on any necessary party or parties to be enjoined to the proceedings, but no such application was ever made before the court.

(d) That it is therefore too late for the Defendants to seek to enjoin the Settlement Fund Trustees as a party. That in any case the failure to enjoin the Settlement Fund Trustee or any other party does not amount to an error on the Judgment of 7<sup>th</sup> September, 2018 which was delivered after hearing the suit on merit, in view of ***Order 1 Rule 9 of Civil Procedure Rules***, which provides that ***“No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy as far as regards the rights and interests of the parties actually before it.”***

(e) That the matters the Defendants refers to as errors on the Judgment relates to the trial Court’s findings on matters of facts and the law and cannot qualify to be the basis of review. That the recourse for the Defendants in law is through the appeal process and it appears no appeal has been filed to date.

(f) That from the affidavit evidence presented to the court, the Decree has been executed and in the absence of any pending proceedings in this matter or appeal, there would be no legal basis of seeking for stay of execution orders.

(g) That having found no basis for review of the Judgment delivered on the 7<sup>th</sup> September 2018, the prayer for an Order to rehear the suit also fails.

(h) That the Defendants having failed in all their prayers, they are obligated under **Section 27 of the Civil Procedure Act Chapter 21 of Laws of Kenya** to pay the Plaintiff’s costs of the application.

6. That in view of the findings in (5) above, the Defendants’ Motion dated 2<sup>nd</sup> August, 2019 is without merit and is dismissed with costs.

Orders accordingly.

**Dated and delivered at Eldoret this 13<sup>th</sup> day of November, 2019.**

**S. M. KIBUNJA**

**JUDGE**

Ruling read in open court in the presence of:

M/s Tirop for Mwinamo for Plaintiff.

No appearance for Defendants.

Christine: Court Assistant