



**REPUBLIC OF KENYA**

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

**LAND CASE NO. 208 OF 2017**

**LILIAN JEROBON KIMUTAI.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**TIMOTHY KIMUTAI.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**ARON CHIRCHIR.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**ABRAHAM KIMUTAI.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**STANLEY KIMUTAI.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**THE LAND REGISTRAR, UASIN GISHU COUNTY....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

This ruling is in respect of an application dated 30<sup>th</sup> November 2017 brought by way of Notice of Motion by the Plaintiff/ applicant seeking for orders that the court be pleased to review the order made on 1/11/17.

Counsel relied on the grounds set on the face of the application and the supporting affidavit sworn by himself. Counsel submitted that there are some mistakes or errors apparent on the face of the record which have emerged after careful consideration of the ruling. He further submitted that the errors and mistakes spell serious consequences upon the plaintiffs.

Mr. Miyienda submitted that the dispute in this suit is ownership of two parcels of land namely plot No. 65 & 66 at Kikorgot within Eldoret described as Kaptagat/Kaptagat /1 (Uasin Gishu) No. 65 & 66. He further submitted that if this suit reverts to the Succession Court where there is a pending Succession Cause, it will mean that the court will be asked to determine the ownership of the 2 parcels of land. The High Court lacks jurisdiction to determine ownership of land matters which is vested in the Environment and Land Court.

Counsel also submitted that the defendants are sued in their individual capacities and the only reference to them as administrators is in paragraph 13 as they are interfering with the suit property. He urged the court to look at the issue that the two parcels of land do not form part of the estate of the deceased. He stated that the Keiyo Housing Limited only had records that the suit plot was in the name of the deceased. He urged the court to find that these are important issues that can be relooked into and allow the application for review.

**Respondent's Counsel's Submission**

The application was opposed by the respondents who filed grounds of opposition. Counsel submitted that the application does not meet the threshold under Order 45 of the Civil Procedure Rules. He stated that the application is asking the court to sit on Appeal of its own ruling.

Counsel further submitted that there were two grounds upon which the application was dismissed being jurisdiction and locus standi. He stated that the application has not dealt with the issue of locus. The plaintiff did not have authority to institute this suit and that the error was not cured by a further affidavit annexing an authority.

Mr. Nyarotso submitted that it is not true that the dispute is about ownership as the parcel of land was bought by the deceased in his own name and not in the name of the 2<sup>nd</sup> plaintiff. He further stated that even if the parcels of land are not in the list of properties the same can be amended in the succession cause. He stated that the succession cause has power to deal with this issue. Counsel therefore urged the court to dismiss the application with costs.

**Analysis and determination.**

This is an application brought under Order 45 for review of court orders earlier issued in this suit. The main issues for determination are as to whether the applicant has met the threshold under Order 45 of the Civil Procedure Rules and whether the circumstances of this case are of such a nature as to warrant this court to invoke the overriding objective of the Civil Procedure Act as provided for under Section **1A & 1B** of the Civil Procedure Act.

There is a distinction between grounds of appeal and review. From the submission of the Counsel for the applicant it seems to me like he is arguing the application that was dismissed afresh and fortifying it in his arguments. The arguments do not show the error apparent of the face of the record. It seeks the court to sit on its own ruling and come up with a different decision in favour of the applicant.

In the case of *National Bank of Kenya Ltd vs Ndungu Njau* the court held:-

*“In my discernment, an order cannot be reviewed because it is shown that the judge decided the matter on a foundation of incorrect procedure and or that his decision revealed a misapprehension of the law, or that he exercised his discretion wrongly in the case. Much less could it be reviewed on the ground that the other judges of coordinate jurisdiction and even the judge whose order is sought to be reviewed have subsequently arrived at different decisions on the same issue? In my opinion the proper way to correct a judge’s alleged misapprehension of the procedure or the substantive law or his alleged wrongful exercise of discretion is to appeal the decision unless the error be apparent on the face of the record and therefore requires no elaborate argument to expose.”*

If the applicant is aggrieved by the decision of the court, then the rightful recourse is to move to the next level on appeal.

In the same case cited above the court stated that

*A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”*

I also associate myself with that finding that an error or omission must be self-evident and should require no elaboration as was done in this case where Counsel sought to explain the issues that had already been dealt with in the ruling.

Order **45** Rule **1** of the Civil Procedure Rules, 2010 provides as follows:-

**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 review of judgement to the court which passed the decree or made the order without unreasonable delay.”

There was no new evidence that has been tendered that was not within the knowledge of the applicant. The issue that the dispute in this suit was an ownership of the suit land is not new evidence. This had been canvassed during the application. The other issue that the submissions of the applicant’s Counsel’s exact words were not captured is neither here nor there as Counsel relied on the grounds on the face of the application and the supporting affidavit. His highlights were hinged on the supporting affidavit which the court had an opportunity to look at and analyse.

From the foregoing, I find no material before me to determine that the applicant has demonstrated the existence of new evidence which he could not get even after exercising due diligence. There is no compelling evidence or material brought before the court that warrants the court to invoke the overriding objective of the Civil Procedure Act as provided for under Section **1A & 1B** of the Civil Procedure Act.

The upshot is that the application is dismissed with no orders as to costs.

**Dated and delivered at Eldoret on this 13<sup>th</sup> day of February, 2018.**

**M.A ODENY**

**JUDGE**

Ruling read in open court in the presence of Mr. Miyenda for Plaintiffs/Applicants and Mr. Kibii holding brief for Mr. Chepkonga for 1<sup>st</sup> to 3<sup>rd</sup> defendants and in the absence of the Attorney General for the 4<sup>th</sup> defendant.

Mr. Koech: Court Assistant.