



**REPUBLIC OF KENYA**

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

**ELC NO. 415 OF 2012**

**RAIPLY WOODS (K) LIMITED ..... PLAINTIFF/APPLICANT**

**VERSUS**

**ERICK KIRONGET NGEYWO ..... 1<sup>ST</sup> DEFENDANT**

**BEATRICE JUMA UTA ..... 2<sup>ND</sup> DEFENDANT**

**AUGUSTINE MAKHOHA NAMUCADA ..... 3<sup>RD</sup> DEFENDANT**

**COUNCILLOR JUMA ..... 4<sup>TH</sup> DEFENDANT**

**ENOCK OLUOCH ..... 5<sup>TH</sup> DEFENDANT**

**FRANCIS KAMONDIA ..... 6<sup>TH</sup> DEFENDANT**

**PETER WAITHAKA ..... 7<sup>TH</sup> DEFENDANT**

**OYULA JOSEPH ..... 8<sup>TH</sup> DEFENDANT**

**KIBIEGO SAMMY ..... 9<sup>TH</sup> DEFENDANT**

**HOLY REDEEMED CHURCH (Sued through its official**

**CHARLES M. BARASA ..... 10<sup>TH</sup> DEFENDANT**

**SINGHB ENGINERRING ..... 11<sup>TH</sup> DEFENDANT**

**SPRING OF HOPE CHURCH (Sued through its officials**

**CHARLES GITONGA, JESTUS OYOMBDA and**

**CHALO LITIEMA ..... 12<sup>TH</sup> DEFENDANT**

**RAMJI D VEKARIA ..... 13<sup>TH</sup> DEFENDANT**

**RULING**

This ruling is in respect of an application brought by way of a Notice of Motion dated 27<sup>th</sup> March 2018 by the Plaintiff/applicant for orders for stay of taxation or any other proceedings until this application is determined and a review, variation or setting aside of an order made on 16<sup>th</sup> October 2017 dismissing the plaintiff's suit for non-attendance.

Counsel for the plaintiff/applicant argued the application and relied on the grounds on the face of the application and the supporting affidavit of Juma Kiplenge Advocate and Mercyline Njoroge Advocate. Counsel prayed for the review of the courts orders dismissing the plaintiff's suit and allow the suit to proceed on merit.

Counsel stated that the plaintiff's suit was dismissed on 16/10/17 for non-attendance and the plaintiff filed an application for reinstatement of the suit but the same was also dismissed for non-attendance. He stated that upon dismissal of the said application for non-attendance the plaintiff filed another application for reinstatement which was dismissed after Counsel argued and a ruling was rendered.

It was Counsel's submission that they now pray for a review of the initial orders dismissing the suit for non attendance. He stated that this is a land matter which has not been determined and therefore the court should review its orders. Counsel further stated that no man should be condemned unheard and it would be in the interest of justice that the plaintiff's application be allowed as it would not prejudice the defendants. He also submitted that this application is not *res judicata* and the same should be allowed.

### **Defendant's Counsel's submissions**

This application was vehemently opposed by counsel for the defendants. Counsel stated that this application is *res judicata* as the court had rendered a ruling on it therefore making the court *functus officio*. That the application is brought under the same provisions of the law and same prayers with a cut and paste supporting affidavit.

Mr. Njuguna submitted that the court delivered a ruling dismissing the two applications for reinstatement of this suit and the current application is not for the review of those orders. He stated that this is an abuse of the court process as this is the 3<sup>rd</sup> time the plaintiff is bringing the same application for reinstatement.

It was Counsel's further submission that the application does not meet the threshold of Order 45 for review as there are no new issues advanced or any error apparent on the face of the record. Counsel stated that the application is prompted by the service of a bill for taxation and not a proper ground.

Miss Soita for the 8<sup>th</sup> defendant also opposed the application and associated herself with the submissions of Mr. Njuguna for the other defendants. She stated that the plaintiff did not come to court in three instances to prosecute this case and this was the basis on which this suit was dismissed and the plaintiff was given an opportunity to prosecute an application to reinstate the case but failed to attend twice. There are no new issues to warrant a review and the issue of this case being interlinked with 1/13 and 9/14 is neither here nor there as the court had already rendered a ruling that this is an independent suit. She urged the court to dismiss the application as this is an old matter and an abuse of the court process.

Mr. Aseso Counsel for the 15<sup>th</sup> defendant also opposed the application and associated himself with his colleagues' submissions. He stated that counsel for the applicant purported to distinguish this application with the previous ones but argued that there is no such distinction and as such the current application is an abuse of the court process. That the dismissal of the application was on merit as parties were heard and a ruling rendered by the court. He also urged the court to dismiss the application with costs to the defendants.

### **Analysis and determination**

I will not belabor much on this application as I have rendered my ruling previously on the application. This is the third application that the plaintiff has brought to try and reinstate a dismissed suit. The plaintiff was given an opportunity to argue an application which they had filed under certificate to reinstate the suit, the court certified the matter as urgent and ordered that the application be served within seven days of which they served although not within the prescribed time.

The defendants filed their responses and came to court for the hearing of the application but neither the plaintiff nor its Counsel were present. The respondents argued the application and urged the court to dismiss the application of which the court did and gave a ruling dismissing the application.

Counsel for the plaintiff filed another similar application which was also heard and determined. I am surprised that the applicant has come back with a similar application but now clothed it with an additional prayer for review and stay of taxation of the bill of costs.

The threshold to be met under Order 45 for review are very clear and I need not repeat. The applicant has not shown that there are any new issues that were not within its knowledge and an error apparent on the face of record.

The Petitions 1/13 and 9/14 have no bearing on this case and earlier attempts by the plaintiff to consolidate this case with others were denied by the court. The cases mentioned are new cases while this is an old matter dating back to 2008.

I also agree with Counsel for the defendants that this is an abuse of the court process as the court is *functus officio*. If the applicant was aggrieved by the ruling of the court then the best option was to file an appeal to challenge the same. That is why there is a hierarchy of courts and right of appeal. I find that the applicant is clogging the court with applications which should not be in court as they have already been determined. I am of the view that this should be the last time a similar application is being brought by the applicant in respect of the same issue before this court as its remedies lies elsewhere.

With that I find that the plaintiff/applicant's application dated 27<sup>th</sup> March 2018 is an abuse of the court process, lacks merit and is therefore dismissed with costs to the defendants.

Dated and delivered at Eldoret this 20<sup>th</sup> day of June, 2018.

**M.A ODENY**

## **JUDGE**

Ruling read in open court in the presence of Mr. Aseo for the 13<sup>th</sup> defendant, Mr Cheptarus holding brief for Mr. Kiplenge for Plaintiff. Miss Soita for 8<sup>th</sup> defendant and in the absence of Mr. Njuguna for the 1<sup>st</sup> to 7<sup>th</sup> and 9<sup>th</sup> to 12<sup>th</sup> defendants.