



**REPUBLIC OF KENYA**

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

**AT ELDORET**

**CONSTITUTIONAL PETITION NO. 7 OF 2016**

**IN THE MATTER OF ARTICLES 3(1) 19, 20, 22, 23, 24, 62, 64,**

**68(c)(v) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF NATIONAL LAND COMMISSION ACT, 2012**

**AND**

**IN THE MATTER OF THE LAND REGISTRATION ACT, 2012**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL  
FREEDOMS UNDER ARTICLES 27, 40, 47, 50(1), 60(1)(b) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLE**

**68(c)(v), 232 & 249 OF THE CONSTITUTION OF KENYA**

**BETWEEN**

**JAPHETH KIPKEMBOI MAGUT.....PETITIONER**

**VERSUS**

**NATIONAL LAND COMMISSION.....1<sup>ST</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**KESTEM COMPANY LIMITED.....3<sup>RD</sup> RESPONDENT**

**RULING**

The 3<sup>rd</sup> respondent has come to court for the review of its judgment delivered on 13.7.2017 together with all consequential decrees and orders thereof and to dismiss the petition with costs to the 3<sup>rd</sup> respondent and that the 3<sup>rd</sup> respondent to be awarded costs of the application as well as costs of the suit. The application is based on grounds that this Honourable Court was misled, deliberately and or recklessly by the Petitioner/Respondent into finding that Eldoret Hccc No. 137 of 2000, Kestem Company Ltd Vs Ndala Shop Ltd and 2 Others was still pending and that by dint of that, that the proceedings then pending before the National Land Commission were sub-judice, the supposed pending case;

That based on the said misrepresentation by the Petitioner/Respondent, this Honourable Court delivered a judgment on 13<sup>th</sup> July, 2017 in favour of the Petitioner/Respondent vide which the National Land Commission was prohibited permanently from investigating the propriety of the title held by the Petitioner/Respondent in respect title No. Eldoret Municipality Block 10/48. The court also awarded the Petitioner/Respondent costs of the Petition to be paid by the respondents herein jointly and or severally;

The Petitioner/Respondent is now in the process of having his costs assessed by this Honourable court with the intention of executing against the 3<sup>rd</sup> respondent/applicant thereafter. It is fair and just that the execution of the said costs be stayed until this application is heard and determined; and It is also fair and just that the judgment herein be reviewed and set aside and costs be awarded to the 3<sup>rd</sup> respondent/applicant.

In the supporting affidavit, Stephen Kipleting Metto states that the 3<sup>rd</sup> respondent/applicant filed a suit against Ndalashop Ltd and 2 Others in the year 2000. The said suit was registered as Eldoret Hccc No. 137 of 2000 Kestem company Ltd Vs Ndalashop Ltd and 2 Others. The Petitioner/Respondent herein is a director of the said Ndalashop Ltd and has effective control over its affairs.

The said suit has never been heard on merits as the court file went missing before any hearing could be conducted. All efforts to trace it were futile, until February 2018 when same somehow resurfaced. That being aggrieved by the continued injustice and not making progress in view of the disappearance of the court file, the 3<sup>rd</sup> respondent and he filed a complaint with the National Land Commission requesting it to exercise its jurisdiction under section 14(1) of the National Land Commission Act, 2012;

The National Land Commission upon hearing the parties, found in favour of the 3<sup>rd</sup> respondent and he and directed the Chief Land Registrar to cancel the title in favour of the Petitioner and Ndala Shop Ltd and to issue one to him.

The Petitioner/Respondent was aggrieved by the proceedings before the National Land Commission and filed a Petition being Eldoret Petition No. 7 of 2016, Japheth Kipkemboi Magut Vs National Land Commission and 2 Others.

This court upon hearing the said Petition found for the Petitioner and ruled that the National Land Commission could not hear and determine the matter as there was a case outstanding before this Honourable court and consequently prohibited it from doing so. The Petitioner was also awarded the costs of the Petition.

The 3<sup>rd</sup> respondent filed an application for injunction in January, 2018. The Petitioner/Respondent objected to the same and filed a replying affidavit. This Honourable court found for the Petitioner/Respondent and established that Eldoret Hccc No. 137 of 2000 was indeed dismissed on 7<sup>th</sup> April, 2015 long before the Petition No. 7 of 2016 was filed. By dint of this ruling, the judgment delivered on 13<sup>th</sup> July 2017, in favour of the Petitioner/Respondent was erroneous and ought therefore, to be reviewed.

That sole ground upon which the court found for the Petitioner/Respondent in its judgment dated 13<sup>th</sup> July 2017 was the alleged pendency now found to be incorrect of the Eldoret Hccc No. 137 of 2000.

The Petitioner/Respondent has filed a Bill of Costs. The said Bill of Costs is pending ruling by the Deputy Registrar. Once the ruling is delivered, the said Petitioner/Respondent will execute against the 3<sup>rd</sup> respondent/applicant. Execution will occasion the 3<sup>rd</sup> respondent/applicant irreparable loss and damage.

That the interests of justice will be served by review of the judgment of the court delivered on 13<sup>th</sup> July, 2017.

The petitioner filed a replying affidavit stating that the Petition dated 25<sup>th</sup> May 2016, succeeded save for prayers (b), (c), (g), (h), and (i). In effect, therefore, it is grossly untrue that Petition solely succeeded on the issue of ELC 48 of 2012 Kestem Company Limited vs. Ndala Shop Limited & Others being Res sub-judice.

He depones that the Court formulated 5 issues on the Petition, and out of the 5 issues so formulated, the Court found for the Petitioner on 3 of the issues, such that even if issue number 2 on Res sub judice was found otherwise, the Petitioner still succeeded on issue number 3, and as consequence issue number 5.

He believes that there is no circumstance in existence that would therefore warrant dismissal of the Petition as the applicant suggests. It took the Petition for the National Land Commission to consent to nullify the offending finding, if the Petition had not been filed, the illegal and impugned finding would still stand. Accordingly, filing of the Petition, succeeded, and as such the prayers granted save for issue number 2 on Res sub judice.

That with regard to the singular issue of Res sub judice, he states that at the time of filing the Petition on 31<sup>st</sup> May 2016, he had no knowledge whatsoever that ELC No. 48 of 2012 later designated as ELC No. 95 of 2013 Kestem Company Limited vs. Ndala Shop Limited & Others had been dismissed in 2015.

Moreover, that as at the time of filing the Petition, the only information he had was that the Applicant herein had filed a suit in the year 2000, being Hccc No. 137 of 2000 Kestem Company Limited vs. Ndala Shop Limited & Other, which suit had been transitioned as ELC No. 48 of 2012 Kestem Company Limited vs. Ndala Shop Limited & Others. This is the information he laid before the Court, by showing the Plaintiff and the Defence. This indeed the information that he also laid before the National Land Commission. That it is only in the year 2018, when the Applicant herein filed an application for injunction in ELC 48 of 2012 Kestem Company Limited vs. Ndala Shop Limited & Others, when his advocates visited the Court Registry to study the Court file in order to enable them contextualize the Replying Affidavit, that they discovered that HCCC 137 of 2000, was transitioned as ELC 48 of 2012 and was then re-designated as ELC No. 95 of 2013 Kestem Company Limited vs. Ndala Shop Limited & Others which suit was dismissed on 7<sup>th</sup> of April, 2015.

The information concerning ELC No. 95 of 2013 including the Order for dismissal for want of prosecution, that this knowledge was earned between 15<sup>th</sup> of January 2018 and 30<sup>th</sup> of January 2018.

That in the Petition the court made a decision concerning ELC 48 of 2012, and not ELC 95 of 2013. There is no Order for dismissal for want of prosecution when the file was designated as ELC 48 of 2012 the dismissal was when the same court file became designated as ELC 95 of 2013. Accordingly, knowledge of existence of ELC 48 of 2012 is not synonymous with knowledge of ELC 95 of 2013 in which the Order for dismissal of suit for want of prosecution was issued.

He states that he did not mislead the Honourable Court as the Applicant suggests, he averred of matters that he knew when he filed the Petition and he averred of the new set of facts when they became known to him.

He concedes that the portion of the Court Judgment touching on Res sub judice needs to be revised in view of the fact that ELC 48 of 2012, later designated as ELC No. 95 of 2013 Kestem Company Limited vs. Ndala Shop Limited & Others had been dismissed in 2015 for want of prosecution, that such revision does not affect the final finding in the judgment regarding other framed issues.

Wherefore, he seeks of this Honourable Court to dismiss the Notice of Motion Application with costs, save for prayer 3 of the application, to the limited extent of Res sub judice as averred of hereinabove.

The applicant submits that under Order 45 of the Civil Procedure Rules a court has power to review its own orders. The Order provides: -

**“(45) (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 judgment to the court which passed the decree or made the order without unreasonable delay.”**

This legal position flows from Section 80 of the Civil Procedure Act which gives a Court power to review its own order where an appeal has not been preferred against its order for sufficient cause.

I have considered the application, response and rival submissions and do find that the court fell into error in finding that there was a suit pending before it and yet the suit was dismissed for want of prosecution. The suit being Eldoret Hccc No. 137 of 2000 which had been transferred to the Environment & Land Court and designated ELC No. 95 of 2013. Had the court been made aware that the suit was dismissed for want of prosecution then it would not have found that the proceedings before Environment and Land Court were sub-judice.

This court could have easily reviewed the petition and dismissed the petition as the suit ELC No. 95 of 2013 had been dismissed and was not pending. However, by the time the court was making its decision, the parties herein had entered consent nullifying the proceedings and the decision of the National Land Commission. The proceedings and decision of the National Land Commission having been nullified by consent, this court finds that the proper order to make is to review its judgment made on 13.7.2017 and order that the proceedings and judgment of the National Land Commission having been nullified by consent, the petition had no basis as it was overtaken by events. Each party to bear own costs.

**Dated and delivered at Eldoret this 28th day of September, 2018.**

**A. OMBWAYO**

**JUDGE**