



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC CASE NO 83 OF 2013

HENRY CHEPKWONY LANGAT.....PLAINTIFF

VERSUS

ELIZABETH AKINYI MUTAI..... DEFENDANT

RULING

Soon after the court delivered its Ruling in respect of the defendant's Preliminary Objection dated 1st February 2017, the Plaintiff herein filed an application dated 28th March 2017 seeking to review the order on account of an error apparent on the face of the record. The said application is brought pursuant to Order 45 Rule 1(1) of the Civil Procedure Rules and sections 1A, 1B and 3A of the Civil Procedure Act.

The application is supported by the affidavit of Patrick Kipngetch Chepkwony the duly appointed attorney of Henry Chepkwony sworn on the 28th March 2017. In essence he avers that there have been no previous proceedings in respect of land parcel number KERICHO/GETARWET/702 which was created pursuant to the judgment in Kericho PMCC Misc. Application No. 50 of 1984.

In her Replying Affidavit the respondent depones that the application is unfounded and bad in law. She further depones that there have been several suits over the same subject matter between the applicant and members of her husband's family and that the issue of ownership of the suit land was finally determined. The suit herein is therefore res judicata.

A brief background of the case in necessary in order to put things into perspective. In 1984 a dispute arose between the defendant's mother-in-law Ruth Cheptonui Kikwai - Deceased and her husband Jessy Mutai filed a case against the plaintiff (Henry Chepkwony Langat). The plaintiff claimed that he had bought land parcel no. KERICHO/GETARWET/210 from the defendant's father in law. The said dispute was decided by a panel of elders whose decision was adopted by the court in Kericho PMC Misc Application No. 50 of 1984. The judgment was to the effect that three acres be excised from the suit land and be registered in the names of Ruth Cheptonui Kikwai and Jessey Mutai both deceased who were the defendant's mother in law and husband respectively, while the remaining portion was to be registered in the name of Henry K. A Langat.

Pursuant to the said judgment the suit land was transferred to the said Ruth Cheptonui Kikwai and later sub-divided into land parcels number 702, 726 and 727. In 1998, the plaintiff filed Kericho HCCC No. 40 of 1998 against the defendant's brothers in law alleging that the said Ruth Cheptonui had fraudulently sub-divided land parcel number KERICHO/GETARWET/210 into the above-mentioned three parcels and transferred them to third parties. The case was decided on a preliminary point whereby the court held that the suit was res judicata as the dispute relating to land parcel no. KERICHO/GETARWET/210 had already been determined by the court in KERICHO RM Misc Application No 50 of 1984. Indeed, the

defendant alluded to this at paragraph 6 of his affidavit sworn on 12th June 2014 where he states as follows: “That sometimes during the year 1998, the plaintiff whom I now represent was misguided to file a fresh suit in Kericho High Court Civil Case No. 40 of 1998 which was a suit over the same subject matter of the proceedings in the said Kericho PMC Misc Application No. 50 of 1984.”

The plaintiff then instituted the present suit in which he seeks to evict the defendant from land parcel number KERICHO/GETARWET/702. It is clear from the proceedings that the suit land is derived from the subject matter in HCCC no 40 of 1998. Indeed, the plaintiff states at paragraph 6 of the plaint that the defendant’s brothers in law and late mother-in law illegally sub-divided the suit land into 3 portions. The prayers in the said Plaint specifically mention that land parcel no. KERICHO/GETARWET /702 which is one of the titles resulting from land parcel number KERICHO/GETARWET/210 was registered without following the due process of the law. It is therefore not true that the said parcel of land has never been the subject of previous proceedings. It is against this background that the court ruled once again on 14th March 2017 that the case was res judicata.

The issues for determination are as follows:

1. Whether there is an error apparent on the face of the record in the court’s ruling of 14th March 2017.
2. Whether the applicant is entitled to the orders sought.
3. Who should bear the costs of this application

The applicant’s application is anchored on the grounds that there is an error apparent on the face of the record as there have been no previous proceedings in relation to land parcel number KERICHO/GETARWET/702. In order to determine whether or not there is an error apparent on the face of the record, I rely by the case of **Anthony Gachara Ayub V Francis Mahinda Thinwa (2014) eKLR** where *the Court of Appeal held as follows:*

“An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of undefinitiveness inherent in its very nature and it must be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal”

A careful reading of the proceedings in the all the suits mentioned herein shows that the Plaintiff herein has in all the suits been either a plaintiff or defendant against the defendant herein or persons under whom the defendant claims litigating over the same parcel of land or portions of it. It is against this background that the courts have held that both this case and HCCC No 40 of 1998 are res judicata. I therefore find and hold that there is no error apparent on the face of the record.

With regard to the second issue as to whether the applicant is entitled to the reliefs sought, it follows that if there is no error apparent on the face of the record then there is no basis for review of the orders made on 14th March 2017.

The upshot is that the application lacks merit and is dismissed with costs.

DATED, SIGNED AND DELIVERED AT KERICHO THIS 10TH DAY OF OCTOBER 2017

J.M ONYANGO

JUDGE

In the presence of

Mr. Terer for Mr. Koske for the Plaintiff/ Applicant

Mr. Muthee for Mr. Biko for the Defendant

Court Assistant: Rotich