



**REPUBLIC OF KENYA**

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

**LAND CASE NO. 131 OF 2013**

**ELISHA KARE BUSIENEI .....1ST PLAINTIFF**

**AGNES ROP .....2ND PLAINTIFF**

**STEPHEN KEMBOI .....3RD PLAINTIFF**

**JACKSON KIBOR .....4TH PLAINTIFF**

**VERSUS**

**JAPHET KIPYEGO CHEPKWONY (*suing as***

***the administrator of the estate of***

**ELIZABETH J. SIRMA .....1ST DEFENDANT**

**REBECCA SOY.....2ND DEFENDANT**

**GIRO COMMERCIAL BANK LTD .....3RD DEFENDANT**

**AND**

**LILIAN C. LAGAT.....1<sup>ST</sup> INTERESTED PARTY**

**EDWIN KIPLAGAT LIMO.....2<sup>ND</sup> INTERESTED PARTY**

**ERICK ROTICH NYONGIO.....3<sup>RD</sup> INTERESTED PARTY**

**JOEL KIMNGETICH ARAP KEMBOI.....4<sup>TH</sup> INTERESTED PARTY**

**WILLY ODHIAMBO SAKWA.....5<sup>TH</sup> INTERESTED PARTY**

**RUTH OKINDAH.....6<sup>TH</sup> INTERESTED PARTY**

**SOLOMON IHACHI SHIBELLENJE.....7<sup>TH</sup> INTERESTED PARTY**

**DANIEL K. SEUREY.....8<sup>TH</sup> INTERESTED PARTY**

**FESTUS M. KIPTOO.....9<sup>TH</sup> INTERESTED PARTY**

**FRANCIS BUSIENEI.....10<sup>TH</sup> INTERESTED PARTY**

**PENINAH J. KEMBOI.....11<sup>TH</sup> INTERESTED PARTY**

**HENRY OMONDI.....12<sup>TH</sup> INTERESTED PARTY**

**EDWARD MASINDE KULOBA.....13<sup>TH</sup> INTERESTED PARTY**

**JANET ANDUGU.....14<sup>TH</sup> INTERESTED PARTY**

### **R U L I N G**

1. The fourteen interested parties/applicants filed a notice of motion dated 17/8/2016 in which they sought the following reliefs:-

**1. (spent)**

**2. (spent)**

**3. That the interested parties be enjoined as parties to the suit.**

**4. That the judgement in the suit dated 18/7/2016 be reviewed and set aside.**

**5. That the plaintiffs be directed to amend the plaint to incorporate the interested parties into the suit.**

**6. That the interested parties be granted leave to file pleadings and such claims for relief in the suit.**

**7. That the Honourable Court be pleased to make any other order as it may deem necessary to achieve the ends of justice.**

**8. That the costs of this application be provided for.**

2. The applicants contend that they are all purchasers for value of part of a property known as **Eldoret Municipality Block 14/604** registered in the name of **Elizabeth Jepchoge Sirma** (deceased) whose estate is being represented by her personal representative **Japhet Kipyego Chepkwony**. The deceased died on 23/4/2002.

3. From the documents annexed to the applicants' application, they bought their respective portion between **6/8/1997** and **6/3/2015**. They contend that they took possession and some have constructed houses on their portions. Sometimes after 18/7/2016, they learnt that the plaintiffs herein had obtained judgement in their favour and that they were not made parties by the plaintiffs who were all along aware that they were in occupations of part of the land in issue in this case.

4. The applicants now want the judgement in favour of the plaintiffs reviewed and set aside so that they can be enjoined in this suit and heard on the merits.

5. The applicants' application is opposed by the plaintiffs/respondents who contend that this application has no basis in law and that the same has been brought to frustrate the plaintiffs' case which had been pending in court since 1998 and has now been concluded. The plaintiffs/respondents further contend that this court lacks jurisdiction to re-open a case which it had concluded.

6. The plaintiffs/respondents also contend that the applicants were well aware of the case in court but that they went ahead to purchase their portions with intention to defeat their claim.

7. There is already a judgement delivered on 18/7/2016 in favour of the plaintiff/respondents. It therefore follows that the applicants' prayer is for review of the judgement for that is the only way which can determine whether the applicants can be enjoined in the suit.

8. The applicants have invoked the provisions of **Section 80 of the Civil Procedure Act** which provides as follows:-

**80 "Any person who considers himself aggrieved:-**

**(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred: or**

**(b) by a decree or order from which no appeal is allowed by this Act, May apply for a review of judgement to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit".**

9. In my view, the present applicants cannot seek to come under the provisions of **Section 80 of the Civil Procedure Act**. There is already an appeal against the decree by the first defendant. Review can only be entertained if there is no appeal against the decree. I do not think that **Section 80 of the Civil Procedure Act** intended to exclude an aggrieved person who was not a party from its provisions.

10. The idea of not allowing parties or aggrieved persons from going for both review and appeal was to avoid the possibility of having conflicting decisions and providing for an orderly way of disposing of matters.

11. The applicants also invoked the provisions of **Order 45 Rule 1(2)** which provides as follows:-

**"A party who is not appealing from a decree or order may apply for a review of judgement notwithstanding the pendency of appeal by some other party except where the ground of such appeal is common to the applicant and the appellant or when, being respondent he can present to the appellate court the case on which he applies for the review".**

12. **Order 45 Rule 1(2)** seems to talk about persons who are parties and not aggrieved person. A party is defined in Black's Law Dictionary 8<sup>th</sup> Edition as one who takes part in a transaction. The applicants herein were not parties to the suit which is now the subject of appeal. They cannot therefore in my view come under this provision. However if for any reason my view is wrong then the remedy which the appellant (1<sup>st</sup> defendant) is seeking that is retention of the suit property is common to what the applicants are seeking i.e. that they ought to retain their plots which they bought. It is therefore means that they are excluded from applying for review.

13. The applicants were well aware that there was a case pending in court. If they wanted to be made parties, they would have applied to be enjoined. They cannot wait until judgement is delivered for them to come to court and claim that they were unfairly left out of the suit. There is nothing which has been going on that was not in their knowledge. Even if the first defendant loses the appeal in the court of appeal, he has his share of the suitland which can ensure that the applicants never lose out on anything.

14. The decision in **Nairobi Court of Appeal Civil Appeal No. 55 of 1986 between Ngororo and Ndutha & Another** is distinguishable from the present case. The second respondent had applied for review of judgement when there was no appeal from the judgement. This is unlike in the present case where there is already an appeal. I do not think it will be in order to allow review when there is an appeal pending in the Court of Appeal. I therefore find no merit in the applicant's application which is hereby dismissed with costs to the respondents.

It is so ordered.

Dated, signed and delivered at Kitale on this 7<sup>th</sup> day of **November, 2016.**

**E. OBAGA**

**JUDGE**

In the presence of Ms. Mufutu for 1<sup>st</sup> defendant.

Court Assistant - Isabellah.

**E. OBAGA**

**JUDGE**

**7/11/2016**