IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L NO. 786 OF 2012

Formerly HCC 212 OF 2011

Formerly Nakuru HCC 81 of 2008

SAMUEL KIPLAGAT NAMINI.....1ST PLAINTIFF

MARK KIMUTAI YAGAN.....2ND PLAINTIFF

ISAAC KIPRUTO BETT.....3RD PLAINTIFF

VS

THE TOWN COUNCIL OF ELDAMA RAVINE.....1ST DEFENDANT

MARY KEMBOI..... 2ND DEFENDANT

SMITH KIPLECH TANUI..... 3RD DEFENDANT

JOSEPHAT KIYENG.....4TH DEFENDANT

ERIC MALEL.....5TH DEFENDANT

UCHUZI SUPERMARKET LTD.....6TH DEFENDANT

CYRUS THUKU.....7TH DEFENDANT

MAMA KIUMBA ….....8TH DEFENDANT

MAINA.....9TH DEFENDANT

(Application for review; principles to be applied; suit having proceeded for hearing with plaintiffs closing their case; 1st defendant's counsel stating that defendant has no evidence to offer and closing defence case; 1st defendant later applying to re-open the suit inter alia on the ground that they had evidence which counsel failed to adduce and further that counsel failed to seek instructions; strict proof required of such allegations; no proof tendered; even if proof tendered first remedy ought to be against advocate for negligence; whether suit against defunct local authority ought not to have proceeded without substitution; statutes not requiring such substitution; on strict technicality application does not reach the threshold of Order 45; where exceptions can be made on the basis of Article 159 (2) (b) Constitution; public interest; subject matter alleged to be a bus park and hence public utility; need to give the public a hearing; application allowed on the exception of Article 159 (2) (b); application for review allowed subject to throw-away costs)

RULING

1. The application before me is that dated 15 November 2013 filed by the defendant. It is an application stated to be brought pursuant to the provisions of Order 45 Rule 1 (a), Order 51 Rule 1 of the Civil Procedure Rules and Section 1, 1A and 1B of the Civil Procedure Act. It is seeking the following two principal orders :-

(i) That Honourable Court be pleased to review, vacate or set aside the judgment, decree and all consequential orders of the court herein.

(ii) That the Honourable Court do order the defence case be reopened for purposes of adducing new and/or important evidence which could not be produced by them at the time the decree was passed.

2. The application is supported by the affidavit of Lilian J. Sadalla, the County Executive for Lands, Housing and Urban Development of Baringo County, and the same is opposed by the plaintiffs. Before I go to the gist of what is set out in the affidavit and reply, I think it is best that I set out the background that led to this application.

3. This suit was commenced by way of plaint filed on 13 May 2008. The case of the plaintiffs as set out in the plaint is that the 1st and 2nd plaintiffs are the registered proprietors of the land parcels L.R No. 498/654, whereas the 3rd plaintiff, is the registered proprietor of the land parcel L.R No. 498/655. Both of these two parcels of land are located within the area of jurisdiction of the then Eldama Ravine Town Council which was named as the 1st defendant. The case of the plaintiffs is that the Eldama Ravine Town Council had authorized the 2nd-9th defendants to operate various businesses and erect structures within their said parcels of land. The plaintiffs thus sought declarations that they are the lawful owners of the suit properties, orders of eviction, mesne profits and a permanent injunction to restrain the defendants from the said properties.

4. On 24 June 2008, the 1st defendant filed a Statement of Defence and Counterclaim through the law firm of M/s Arusei & Company Advocates. It was their position that the plaintiffs obtained letters of allotment and titles to the suit lands by way of fraud, mistake and/or misrepresentation. It was inter alia pleaded that the suit properties are public utility plots, not available for alienation to the plaintiffs. In the counterclaim, the 1st defendant sought orders of declaration that the suit properties are public utility plots, and that the allotment and acquisition of the said plots by the plaintiffs, violated the Government Land Act CAP 280 (now repealed). They also sought orders for the cancellation of the title of the plaintiffs and for an order of permanent injunction to restrain the plaintiffs from the suit lands. The other defendants, save for the 7th defendant, did not file any Defence. The defence of the 7th defendant was that his occupation of the suit lands was with the authority of the 1st defendant. The 2nd - 9th defendants are represented by the law firm of M/s Mongeri & Company Advocates.

5. On 28 June 2010, a Notice of Change of Advocates was filed, vide which, the law firm of M/s Onkoba & Company Advocates came on record for the 1st defendant in place of the law firm of M/s Arusei & Company Advocates. The said firm thereafter actively participated in the matter including filing of replying affidavits in respect of some interlocutory applications and attending court.

6. The suit was eventually fixed for hearing on 15 May 2013. On that day, Mr. B.N. Kipkoech appeared for the plaintiff, whereas Mr. Mwaka and later Mr. Omboto, held brief for Mr. Onkoba for the 1st defendant. There was no appearance on the part of M/s Mongeri & Company Advocates for the 2nd-9th defendants. It is on this day that the matter proceeded for hearing. The 1st and 3rd plaintiffs testified to support their position that they are the rightful owners of the suit land and were duly cross-examined by Mr. Omboto. They then closed their case.

7. Called upon to tender evidence for the defence, Mr. Omboto stated as follows :- *"The 1st defendant is not going to call any witness. I close the 1st defendant's case."*

8. The hearing of the matter closed and I invited parties to file written submissions. Counsel for the

plaintiff filed his submissions, and so too the firm of M/s Onkoba & Company Advocates, for the 1st defendant. No submissions were filed by the 2nd-9th defendants. I then read the judgment on 17 July 2013. In my judgment I noted that no evidence had been called forth by the defendants to challenge the plaintiff's evidence and I held that as between the plaintiff and defendants, the plaintiffs are the lawful owners of the two suit lands.

9. On 15 November 2013, the law firm of M/s Z.K. Yego Law Offices came on record for the 1st defendant, in place of M/s Onkoba & Company Advocates. They also filed the subject application. In the supporting affidavit, Lilian Sadala has averred that she was served with the decree herein on 12 November 2013. She has deponed that the functions of the 1st defendant were taken over by the Baringo County Government following the elections of 4 March 2013. She has stated that the County Executive was sworn in June 2013. She has averred that the County Government did not receive any updates from Mr. Onkoba on the conduct of the matter until the decree was served on 12 November 2013. After being served with the decree, she rushed to court to peruse the court file whereupon she discovered that the defence case was closed without a witness. She has stated that when the matter proceeded on 15 May 2013, Mr. Onkoba had not been furnished with any instructions since the Town Council of Eldama Ravine ceased to exist on 4 March 2013. She has deponed that the matter proceeded against a non-existent party who was represented by an advocate who had not received any instructions from the Baringo County Government. She has averred that there is crucial evidence which they intend to produce to demonstrate that the suit properties are public utility plots. She has stated that the County Government of Baringo stands to suffer irreparable harm since they will be deprived of a crucial bus park in Eldama Ravine Town.

10. The plaintiffs filed Grounds of Opposition and a Replying Affidavit sworn by Mark Yagan, the 2nd plaintiff. They have inter alia stated that the reasons advanced for re-opening the case are baseless and that the 1st defendant has no claim at all. They have expressed surprise at the allegation that the Town Council of Eldama Ravine did not exist yet they continued to issue business permits even after 4 March 2013. It is their view that it is in the greater public interest and the interest of justice that litigation be brought to an end.

11. Mr. Yego for the applicant, and Mr. Kipkoech for the plaintiffs, submitted in respect of the positions. Mr. Yego inter alia submitted that there first needed to be substitution before the matter could proceed, since the Town Council of Eldama Ravine ceased to exist after the elections of 4 March 2013. He submitted that the 15 May 2013 was a transition period as the County Governments had hardly put their houses in order. Mr. Kipkoech on the other hand submitted that there need not have been any need to amend since under S. 59 of the Urban & Cities Act, Act No. 13 of 2011, all causes of action pending in court against local authorities are to be continued as filed. He submitted that there was no good reason set out that could support an application for review. He submitted that all along, the 1st defendant was represented by counsel, and wondered what action the 1st defendant has taken against Mr. Onkoba, if at all he acted without instructions. He averred that it was not clear whether the 1st defendant wants to apply for review or to set aside a judgment. He also contended that no good defence has been displayed by the 1st defendant. He submitted that there was no new and important evidence to be produced by the 1st defendant. He relied on various authorities which I have looked at.

12. I take the following view of the matter.

13. First, I take it that this application is an application for review brought pursuant to the provisions of Order 45, for that is the provision of the law cited in the body of the application. It is not strictly an application for setting aside judgment, although a review can at times result in the setting aside of a judgment. Applications for review are covered by the provisions of Order 45 and the grounds for review are contained in Rule 1 thereof which provides as follows :-

Application for review of decree or order [Order 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 a review of judgment to the court which passed the decree or made the order without unreasonable delay.

A party who is not appealing from a decree or order may apply for a review of judgment (2 notwithstanding the pendency of an 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.

14. From the above, it will be seen that one can apply for review of an order or decree if :-

(i) There is discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or order made.

(ii) There is some mistake or error apparent on the face of the record.

(iii) For any other sufficient reason.

15. The basis of this application is that counsel for the applicant, Mr. Onkoba, proceeded with the hearing without taking any instructions and therefore closed the defence case without adducing evidence, yet, according to the applicant, it has ample evidence to support its contention in the defence that the suit properties are public utility plots. There is also the argument that the matter ought not to have proceeded without there being a substitution of the County Government of Baringo for the Town Council of Eldama Ravine. It is probable, that the applicant is attempting to fit himself into the first and second grounds of review.

16. I will first deal with the argument that the matter ought not to have proceeded without first there being a substitution. County Governments were envisioned in the Constitution of Kenya that was promulgated on 27 August 2010 and were to come into being after the first elections of the new Constitution, which elections were held on 4 March 2013. Before then, the country operated a system of local governments created under the Local Government Act (Cap 265) Laws of Kenya (repealed by the County Government Act, Act No. 17 of 2012). Local governments comprised of Municipal Councils, County Councils and Town Councils. When this suit was filed in the year 2008, County Governments of course did not exist, and the 1st defendant as described, was a Town Council created by the Local Government Act. The Local Government Act ceased operations on 13 March 2013 which was the date of the final announcement of all results of the 2013 elections in line with the provisions of Section 134 of the County Government Act. Thereafter County Governments took over the functions of the defunct local authorities.

17. In so far as litigation is concerned, Section 59 of the Urban Areas and Cities Act, 2011 provides as follows :-

59. *Any legal right accrued, cause of action commenced in any court of law or tribunal established under any written law in force, or any defence, appeal, or reference howsoever filed by or against any local authority shall continue to be sustained in the same manner in which they were prior to the*

commencement of this Act against a body established by law.

The interpretation of the above provision was comprehensively done in the cases of ***Kumenda & Another vs The Clerk, Municipal Council of Kisii & 6 Others, Kisii ELC Miscellaneous Civil Application No.3 of 2013 (2013) eKLR*** and the case of ***Titus Gatitu Njau v Municipal Council of Eldoret (Eldoret E&L No 207 of 2012).*** The reasoning in those two decisions, of which I have no reason to depart from, is that litigation against the defunct local authorities ought to be continued in the manner filed and there is no need to amend the pleadings to substitute the County Government for the defunct local authorities. Instead the suit is automatically assigned by operation of law to the County Government that has taken over the particular defunct local authority.

18. It follows therefore, that if the applicant is basing its application on the reason that there needed to be an amendment before the matter could proceed, which I take it to be an argument that there is an error apparent on the face of the record, that argument must fail.

19. The other issue raised, was that Mr. Onkoba closed the case of the applicant without first seeking instructions, and therefore, the applicant lost the opportunity to adduce critical evidence in support of its case. None of the counsels furnished me with any direct authority on this point. Mr. Kipkoech relied on the case of ***Reverend Jackson Mutune v The Trustees Redeemed Church (2012) eKLR*** but I think the issue therein was a little different from the situation before us. In the said case, there was an argument that counsel did not avail evidence in a supporting affidavit to an application. The learned judge, Kimondo J, was not too impressed with this argument, since, the applicant had himself signed the affidavit, and therefore he could not argue that the affidavit did not avail all the evidence that he intended to tender. Neither is the applicant herein stating that it wants to adduce evidence which it did not have at the time of the hearing of the suit. According to the applicant, the evidence was ready and available, only that the advocate did not bother to contact the applicant so that the applicant can tender it. The applicant has also cited the reasons that at that point in time, the County Government had hardly settled down.

20. It is not clear to me if Mr. Onkoba ever sought instructions but did not get any, owing to the reason that the County Government was at that time not properly grounded, or whether Mr. Onkoba never bothered at all to contact the County Government. There is no affidavit from Mr. Onkoba himself to shed light on what exactly transpired. However, Ms. Sadalla in paragraph 7 of her affidavit, deponed that, *"we did not receive any updates from the 1st defendant's then advocates Mr. Onkoba on the conduct of this case until when the decree was served upon us on the 12th November 2013."*

21. This seems to suggest that Mr. Onkoba never contacted the applicant for instructions and never contacted them to advise them of the judgment. It will also be discerned that one of the grounds upon which this application is founded is that counsel for the applicant proceeded to close the defence case without instructions from the County Government of Baringo.

22. These are no doubt serious allegations being laid against an advocate. I would have expected some sort of communication, in the form of a protest or even a complaint to the Law Society of Kenya, that counsel proceeded to act without instructions, for if the allegations are true, they clearly point at professional misconduct. But as correctly pointed out by Mr. Kipkoech for the respondents, there is no evidence that the County Government of Baringo were not happy with the conduct of Mr. Onkoba.

23. Generally, it is presumed that where counsel is on record, then he has full instructions in the matter, and that what he presents to court is the actual position of his client. This of course can be rebutted by the tabling of evidence by the client that the advocate did not act according to instructions. In our case, there is really no such evidence.

24. It is serious to accuse an advocate of having acted without instructions without placing on the table hard and concrete evidence. For the situation at hand, I am not convinced that it has been demonstrated that Mr. Onkoba actually proceeded to act unprofessionally by closing the defence case without calling a witness.

25. Barring stark evidence, I do not think that a litigant ought to be given an easy avenue to set aside judgment on the basis that his advocate failed to adduce evidence, which he had instructions to adduce, but failed to do so. If the courts are not very strict on this, then it will be easy for a litigant fishing for evidence, to simply say that his advocate failed to adduce evidence despite having instructions to do so. I think there needs to be an exceptionally high threshold before a litigant can succeed on this ground. But even where it is demonstrated that an advocate has acted without instructions, it should not automatically follow that the proceedings must be set aside. In my view, it is incumbent upon the court to weigh the circumstances of the case, and the prejudice that will be caused to the parties, and decide whether the remedy of the litigant lies in suing the advocate for professional misconduct or in having the litigation re-opened. If the litigant can be compensated by damages through a suit against his advocate, then this probably ought to be the avenue to take, rather than prejudicing the other party, who where it can be avoided, ought not to be caught in the cross-fire between the complaining litigant and his advocate.

26. It was also said that the County Government of Baringo was at its infant stage when this matter proceeded. It is highly probable, as deponed by Ms. Sadalla, that systems had not been put in place including systems on how to instruct counsels who were conducting litigation for the defunct local authorities. But the fact remains that the County Government was in existence and it must have had some sort of governance. They ignored litigation at their own peril.

27. If we were to proceed on the strict technicality of the provisions of Order 45, I think the applicant is destined to lose this application.

28. The above said, I am however alive to the contention of the applicant, that the subject matter of the suit is public land, the only bus park in Eldama Ravine for that matter, and that it is the wish of the applicant to retain it for the benefit of the public. Giving an opportunity to the applicant to be heard on its counterclaim will really not be giving a personal benefit to the applicant, but rather a benefit to the public, to have the public heard on whether or not the suit lands belongs to the public or to the plaintiffs. If it was a personal benefit, that was capable of compensation by way of damages, I would probably have held that the remedy of the applicant would be to sue his counsel for negligence, if at all he proceeded without instructions. The challenge in this case is that the subject matter is said to be public land, and there is clearly no personal benefit to the applicant.

29. I am finding it extremely difficult to shut my eyes to the counterclaim of the applicant, and in my view I feel strongly that the applicant ought to be given an opportunity to present that evidence, given the totality of the surrounding circumstances.

30. Considering the apparent great public interest in the subject matter involved, I think this is a fit case, in which to make an exception and invoke the provisions of Article 159 (2) (d) of the Constitution. The same provides as follows :-

159 (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles -

(a)…

(b)…

(c)…

(d) justice shall be administered without undue regard to procedural technicalities.

31. It is this public element that has swayed me. If it were not for this public element, I do not think that I would have allowed this application. Any court ought to be slow before shutting out the public. The justice of this case demands that the public be given a hearing. I am ready to give the public that hearing. I therefore do hold that there is sufficient reason to review the judgment herein. The judgment of 17 July 2013 is therefore hereby reviewed and set aside.

32. Order 45 Rule 5 allows the court either to re-hear the case or make such order as to the re-hearing of the case as it thinks fit. In the circumstances of this case, the plaintiffs had closed their cases. It is the defendant who was yet to table the evidence. I therefore re-open the defence case in respect of the 1st defendant only.

33. However, the above order is subject to the applicant paying throw-away costs to the plaintiffs. The plaintiffs cannot be blamed for prosecuting their suit and neither can they be blamed for the apparent failures of the 1st defendant. They have indeed been greatly inconvenienced. They had in fact moved to execute the judgment in the hope that the litigation is closed. They must be paid throw-away costs which in my discretion I assess at Kshs. 30,000/=. This sum should be paid to counsel for the plaintiffs within 30 days or else this order for review will automatically be set aside.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 9TH DAY OF OCTOBER 2014

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Delivered in the presence of:

Delivered in the presence of:

Mr. M.J. Omusundi holding for Mr. B.B. Kipkoech of M/s Gordon Ogolla & Associates for the plaintiffs/respondents.

Mr. Z.K. For M/s Mongeri & Co for 2nd - 9th defendants.