Eshikoni Auctioneers & 2 others v Kipchirchir (Miscellaneous Civil Application E097 of 2024) [2025] KEHC 11889 (KLR) (11 August 2025) (Ruling)

Neutral citation: [2025] KEHC 11889 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

MISCELLANEOUS CIVIL APPLICATION E097 OF 2024

RN NYAKUNDI, J

AUGUST 11, 2025

BETWEEN

ESHIKONI AUCTIONEERS ..... 1ST APPLICANT

MANANI, LILIAN. MWETICH & COMPANY ADVOCATES .... 2ND APPLICANT

DONALD C CHEPCHIENG ..... 3RD APPLICANT

AND

ELIJAH KIPCHIRCHIR ..... RESPONDENT

RULING

1. What is pending before me for determination is a Notice of Motion Application dated 17th February 2025 brought pursuant to sections 1A, 1B, 3A & 3B of the *Civil Procedure Act*, Order 45 of the *Civil Procedure Rules* and Article 159 of the *Constitution* of Kenya 2010 in which the Applicants are seeking the following orders:
    a. There be stay of execution of the declaratory orders for payment of money pending the hearing and determination of this application and thereafter the main miscellaneous application.
    b. The court reviews and sets aside its ruling delivered on 22.07.2024 and the miscellaneous application be heard on its merits.
    c. The ruling dated 22.07.2024 be set aside and this miscellaneous be heard on its merits.
    d. That costs of the application be provided for.
2. The Application is based on the grounds on the face of it among others; -
    a. That there is an error on the face of the ruling dated 22.07.2024.

b. That the Court in its ruling held that the respondents have not filed their responses and that the application was unopposed when indeed responses dated 3.07.2024 and 18.06.2024 both filed on 4.07.2024 and which can be confirmed through the judiciary e-filing system.

c. That the Court delivered it ruling without considering the applicants' responses despite it being on record.

d. That it is integral that the Court sets aside its ruling and gives the applicant herein a chance to be heard.

e. That the said error is an apparent error on the face of the ruling and which can and should be reviewed by this honorable Court.

f. That the orders issued by the Court herein are adverse orders which affect parties who were not parties to the main suit.

g. That it is in the interest of justice that the ruling be reviewed and set aside otherwise the applicant will suffer prejudice.

3. The Application is supported by the annexed affidavit dated 17th February 2025 sworn by Donald C. Chepchieng who avers as follows:

a. That there is an error on the face of the ruling dated 22.07.2024.

b. That the Court in its ruling held that the respondents have not filed their response and that the application was unopposed.

c. That the error on the face of the record is that indeed a responses dated 18.06.2024 and 3.07.2024 which were both filed been filed on 4.07.2024.

d. That the court delivered its ruling without considering the applicant's response despite it being on record which is an infringement of the constitutional right to be heard.

e. That it is therefore integral that the Court sets aside its ruling and gives the applicants herein a chance to be heard on their responses.

f. That the said error is an apparent error on the face of the ruling and which can and should be reviewed by this Honorable Court.

g. That the orders issued herein by the Court herein are adverse orders which affect parties who were not parties to the main suit.

h. That it is in the interest of justice that the ruling be reviewed and set aside otherwise the applicant will suffer prejudice.

4. The Application is opposed by the Respondent vide a Notice of Preliminary Objection dated 5th March 2025 based on the following grounds:

a. That the instant application dated 17th February 2025 is *res judicata* vide the ruling of this honorable court dated 22nd July 2024.

b. That the instant application dated 17th February 2025 is an afterthought, an abuse of the court process and unnecessary since the issues raised in the application were exhaustively determined in the ruling of this honorable court dated 22nd July 2024.

Analysis and Determination

5. I have read and considered the Notice of Motion Application, the Affidavit in support and the Preliminary Objection in opposition of the same. There are two (2) issues for determination as follows:

    a. Whether the application is *res judicata*;

    b. Whether the court should exercise its discretion to review and set aside the ruling of 22nd July 2024.

Whether the Application is Res Judicata

6. The principle of *res judicata* seeks to bar repeated litigation over the same subject matter.The principle of *res judicata* is enshrined in section 7 of the *Civil Procedure Act*. in particular, this provision provides as follows:

> No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

7. The doctrine of *res judicata*, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.

8. The Supreme Court in the case of *Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another* Motion No 42 of 2014 [2016] eKLR (Muiri Coffee case) held as follows regarding the doctrine of *res judicata*:

> " *Res judicata* is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights. It would appear that the doctrine of *res judicata* is to apply in respect of matters of all categories, including issues of constitutional rights."

9. It emerges that that this principle is not to stand as a technicality limiting the scope for substantial justice, the relevance of *res judicata* is not affected by the substantial-justice principle of article 159 of the *Constitution*, intended to override technicalities of procedure. *Res judicata* entails more than procedural technicality, and lies on the plane of a substantive legal concept. The learned authors of *Mulla, Code of Civil Procedure*, 18th Ed 2012 have observed that the principle of *res judicata*, as a judicial device on the finality of court decisions, is subject only to the special scenarios of fraud, mistake or lack of jurisdiction (p 293):

> " The principle of finality or *res judicata* is a matter of public policy and is one of the pillars on which a judicial system is founded. Once a Judgment becomes conclusive, the matters in issue covered thereby cannot be reopened unless fraud or mistake or lack of jurisdiction is cited to challenge it directly at a later stage. The principle is rooted to the rationale that issues decided may not be reopened and has little to do with the merit of the decision."

10. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a Judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time [emphasis supplied]. Hence, whenever the question of *res judicata* is raised, a court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a court of competent jurisdiction. This test is summarized in *Bernard Mugo Ndegwa v James Nderitu Githae & 2 others*, (2010) eKLR, under five distinct heads:

    a. The matter in issue is identical in both suits;

    b. The parties in the suit are the same;

    c. Sameness of the title/claim;

    d. Concurrence of jurisdiction; and

    e. Finality of the previous decision.

11. The courts have to be vigilant against the drafting of pleadings in such manner as to obviate the *res judicata* principle was judicially remarked in *ET v Attorney-General & another*, (2012) eKLR, thus:

> The courts must always be vigilant to guard litigants evading the doctrine of *res judicata* by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction.

12. In the present case, the Applicant has not asked the court to rehear the merits already decided but rather to review the ruling on account of an error in fact - that their responses were deemed unfiled when they were actually on record. Prima facie and based on the pleadings before this court I am not satisfied that the issue is *res judicata*.

Whether the Court Should Exercise its Discretion to Review and Set Aside the Ruling of 22nd July 2024.

13. The appellant's application for review was brought under section 80 of the *Civil Procedure Act* and order 45 Rule 1 of the *Civil Procedure Rules, 2010*. Section 80 provides: 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 judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."

    Whilst order 45 rule 1 provides:

    (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."

14. In the case of *Sanitam Services (EA) Limited v Rentokil (K) Limited & another* [2019] eKLR, this Court held that:

> "Jurisdiction to review a judgment or order of a court is donated by Section 80 of the *Civil Procedure Act* and Order 45 *Civil Procedure Rules*. By those provisions of law any person considering himself aggrieved by a decree or order from which an appeal is allowed but from which no appeal has been preferred or is aggrieved by a decree or order by which no appeal is 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 – a person who fits within those categories may apply for a review of judgment or to the court which passed the decree or made the order and this should be done without unreasonable delay"

15. In the case of *Njaanake v Wamwea* (Civil Appeal E452 of 2022) [2024] KECA 437 (KLR), this Court stated that:

> The grounds upon which a court should review its findings are enunciated in the provisions of Order 45 of the *Civil Procedure Rules*, 2010. These are: discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge or could not be produced by the applicant 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. The application should be made without unreasonable delay.

16. The Applicant's case for review is premised upon one of the grounds that there was an error apparent on the face of the record. I take note that an error apparent on the face of the record is one that is clear and obvious without requiring elaborate argument or interpretation. In this instant case, the ruling dated 22nd July 2024 proceeded on the footing that the application was unopposed. I take note that the Applicants have placed before this court e-filing evidence showing that responses dated 3rd July 2024 and 18th June 2024 which were filed on 4th July 2024, well before the date of the ruling. The court did not consider those responses, and this amounts to an error on the face of the record, one that goes to the root of the Applicant's constitutional right to a fair hearing. Notwithstanding that position this matter from the trial Court was based on jurisdiction. It's my view on looking back that the impugned decision from the Small Claims Court which then is the subject of fair trial rights was purely on jurisdictional issue. The parties were in the wrong forum. There was a presumption by this Court that the Small Claims Court had the jurisdiction to entertain the cause of action hence my decision.

17. In the case of *Nyamogo & Nyamogo v Kogo* [2001] EA 170, the court discussing what constitutes an error on the face of the record, rendered itself thus:

> "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."

18. The Supreme Court in Uganda in the case of *Edison Kanyabwera v Pastori Tumwebaze*, Supreme Court Civil Appeal No 6 of 2004 held that:

> "In order that an error may be a ground for review, it must be one apparent on the face of the record, i.e. an evident error which does not require any extraneous matter to show its incorrectness. It must be an error so manifest and clear that no Court would permit such an error to remain on record. The error may be one of fact but it is not limited to matters of a fact and includes also error of law."

19. In so far as this matter is concerned, there is an issue raised by the Small Claims Court on jurisdiction to entertain the cause of action. In the decision made on 22/7/2024 the following findings expressly stating as follows appears to confer jurisdiction to the Small Claims Court which is an error of law on the face of the record. Thus;

> "Consequently, the judgment and order of the Small Claims Court was unlawful, unenforceable, irregular, null and void *ab initio* for want of jurisdiction. The modified effect is that the Applicant is entitle for a declaration that the decretal sum paid out of a defective judgment is absolutely recoverable from the Respondents jointly and severally with costs".

20. It is trite law that a litigant should appear before the correct forum which has the jurisdiction both personam and res. It appears to me on further review of the evidence and the law on Small Claims Court jurisdiction the learned Magistrate was right in striking out the claim for want of jurisdiction. The learned author in *Words and Phrases Legally Defined* Vol. 3, John Beecroft Saunders defines jurisdiction as follows:

> By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognisance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics .... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.

21. There is also the applicable jurisprudence in *Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & Others* (2012) eKLR the Supreme Court stated as follows:

> "A Court's jurisdiction flows from either the *Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law".

22. From the foregoing, the moment the trial Court pronounced itself that it did not have jurisdiction then all other prior findings, orders and exparte judgment had no force of the law. As a consequence therefore, my follow-up decision dated 22/7/2024 purporting to confer jurisdiction upon the Small Claims Court was an error of fact and law on the face of the record. The issues of fair trial rights under Article 47, 48 and 50 of the *Constitution* must be construed and given effect when a litigant or a party to a suit approaches the forum of conveniens clothed with jurisdiction. Incidentally, this has not been the case from the word go in the adjudication of this dispute. I therefore decline to make a declaration on the right to a fair trial as invited by the Applicants to this application. The earlier protocol of the decision made on 22/7/2024 was a patent error of law.

23. It so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 11TH AUGUST 2025

.....

R. NYAKUNDI

JUDGE

Representation:

Songok & Co Advocates

Manani, Lilan, Mwetich & Co. Advocates