REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERICHO

ELC CASE NO. 84 OF 2017

JOHN K. CHEPKWONY.....PLAINTIFF

VERSUS

MATHEW KOECH (Sued as the Administrator of

the estate of Kipkoech Arap Chepkwony- Deceased).....DEFENDANT

RULING

1. This suit was commenced by way of a way of Originating Summons dated 18th July 2017 wherein the Plaintiff sought for a *declaration that the deceased was holding one acre in L.R No. Kericho/Chemoiben/269 in trust for him and therefore there be an order terminating the trust.*

2. Despite the Defendant having been served he neither filed any Replying Affidavit nor did he attend court for the hearing. The matter proceeded ex-parte wherein judgment delivered on the **30th May, 2019** wherein the court held that the Plaintiff had proved his case on a balance of probabilities and granted him the prayers sought in his Originating Summons.

3. Vide an application dated the 16th April 2021 the Plaintiff/Applicant now seeks for the court to review its judgment and all consequential orders and correct the errors apparent on the face of the record to the effect that the deceased was holding 1.2 acres in *L.R No. Kericho/Chemoiben/269,* in trust for him and not 1 acre as decreed.

4. **The Application** is supported by the sworn affidavit of John **K. Chepkwony** the Plaintiff herein as well as the grounds filed in support thereof. There was yet no response to the application which was heard ex-parte and which the Plaintiff deponed that at the time of filing suit he had misplaced important evidence that proved ownership of a further 0.25 acres out of the suit land and therefore could not plead the same in the suit in support of his claim. That it was while he was executing the order of the judgment that he had recovered the said evidence, which was a sale agreement of 12th July 1988 between him and the deceased, **Kipkoech Arap Chepkwony,** for the purchase of a further portion measuring 0.25 acres comprised in *L.R No. Kericho/Chemoiben/269*.

5. Order 45 Rule 1 of the Civil Procedure Rules provides as follows:-

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."

6. Section 80 of the Civil Procedure Act provides as follows:-

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.

7. From the above provisions, it is clear that whereas Section 80 of the Civil Procedure Act gives the court the power to review its orders, Order 45 Rule 1 of the Civil Procedure Rules sets out the rules which restrict the grounds upon which an application for review may be made. These grounds include;

i. 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 the order made or;

ii. *on account of some mistake or error apparent on the face of the record, or*

iii. *for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.*

8. The main grounds for review are therefore; **discovery of new and important matter or evidence; mistake or error apparent on the face of the record; or for any other sufficient reason and most importantly, the application has to be made without unreasonable delay.**

9. The document that the Plaintiff seeks to rely on as having been his ''new evidence'' is a sale agreement of 12th July 1988 between him and the deceased, **Kipkoech Arap Chepkwony, a document that could only be admitted and/or rejected** by the court at the trial, although such document would have made no difference in the court's finding the matter having been based on ownership by adverse possession. This document, respectively cannot be deemed as a **discovery of new and important matter as it had all along been within the knowledge of the Plaintiff and further, it did not f**orm part of the record during the trial.

10. Indeed in the case of **National Bank of Kenya Limited v Ndungu Njau (1997) eKLR** the Court of Appeal Court had held that:

"A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter".

11. The court, on its part is bound by the pleadings of the parties. The duty of the court is to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings. The court would be out of character were it to pronounce any claim or defence not made by the parties as that would be plunging into the realm of speculation and might aggrieve the parties or, at any rate, one of them. A decision given on a claim or defence not pleaded amounts to a determination made without hearing the parties and leads to denial of justice.

12. The proposition was expressed as follows by the former Court of Appeal for Eastern Africa in **Gandy vs Caspar Air Charters Limited [1956] 23 EACA, 139*:***

"[T]he object of pleadings is, of course, to secure that both parties shall know what are the points in issue between them; so that each may have full information of the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent. As a rule relief not founded on the pleadings will not be given"

13. In the present scenario, the Plaintiff did not seek leave to adduce additional evidence, but filed an application for review on which he purported to introduce new evidence. I find that no additional evidence can be allowed in the present application unless it had formed part of the pleadings during the trial. Having looked at the reason herein advanced by the Plaintiff/Applicant seeking that this court reviews its judgment of **30th May, 2019**, the same does not constitute the discovery of new evidence which was not within his knowledge or could not be produced by him at the time of hearing of the suit.

14. I find that this application does not meet the threshold set out under Order 45 Rule 1 of the Civil Procedure Rules and thus is not a proper case for the court to exercise its discretion in favour of the Plaintiff/Applicant. Accordingly, I proceed to dismiss the application dated 16th April 2021 with no costs.

Dated and delivered via Teams Microsoft at Kericho this 10th day of March 2022.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

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