



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL SUIT NO. 1655 OF 1996**

MOUNT KENYA INVESTMENT LIMITED.....PLAINTIFF

- V E R S U S -

ALLAN NG'ETHE..... 1<sup>ST</sup> DEFENDANT

MWANGI GAITHO ..... 2<sup>ND</sup> DEFENDANT

CITY COUNCIL OF NAIROBI .....3<sup>RD</sup> DEFENDANT

**RULING**

1) This ruling is the outcome of the motion dated 23<sup>rd</sup> September 2016 taken out by Mt. Kenya Investment Ltd, the plaintiff/ applicant herein, whereof it sought for the following orders *inter alia*:

***1. The ruling of the Honourable Mr. Justice J. K. Serгон given herein on 16<sup>th</sup> August 2016 be reviewed and/or set aside.***

***2. In the alternative to prayer 3 above, the decretal sum awarded to the plaintiff/applicant in the sum of kshs.220,141,338.00 as at the date of service of the Notice to execute the decree be deposited in court.***

***3. Costs of this application be provided for.***

2) The motion is supported by the affidavit of Eliud Matu Wamae. When served, the City Council of Nairobi, the 3<sup>rd</sup> defendants/ respondent herein, filed the replying affidavit of Dr. Robert Ayisi to oppose the motion.

3) I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support and against the application. I have also considered the oral submissions of learned counsels appearing in this matter. It is the submission of Mr. Wamae, learned advocate for the plaintiff that there are errors and/or mistakes apparent on the face of record which should prompt this court to review and set aside its ruling delivered on 16.8.2016. It is pointed out that this court made the following findings in error:

First, that the plaintiff had failed to show that it served the 3<sup>rd</sup> defendant with summons to enter appearance and the plaint.

Secondly, that there was no evidence of stamp or signature of M/s M. N. Ngethe on the reverse side of the summons to enter appearance as deposed in the affidavit of service.

Thirdly, that the 3<sup>rd</sup> defendant's assertion that it has a good and strong defence against the plaintiff's claim is merited because the plaintiff did not deem it fit to respond to the assertion.

Fourthly, that the only party who filed written submissions in respect of the motion dated 20.9.2011 was the 3<sup>rd</sup> defendant.

Fifthly, that the 3<sup>rd</sup> defendant had been locked out of the door of justice by the inertia and actions of its officers.

4) The 3<sup>rd</sup> defendant's learned counsel was of the view that the aforesaid findings were made by mistake because the plaintiff had filed its submissions and had specifically responded to the 3<sup>rd</sup> defendant's assertion that it had a good and strong defence. It is also argued that the burden of proving service rests on the party who alleges that there was no service that is the 3<sup>rd</sup> defendant and not the party who alleges that there was service, that is the plaintiff. It was pointed out that G. K. Meenye attended court to testify to show that service was effected and that the 3<sup>rd</sup> defendant failed to summon its legal officer M/s M. N. Ng'ethe to testify to state otherwise. The lack of clarity in the stamp and signature of the reverse side of the summons to enter appearance was cured by the unchallenged oral evidence of G. K. Meenye advocate. It is also argued that the plaintiff can only act through its officers. It is submitted that had the court taken into account the above facts it is likely that the ruling on the 3<sup>rd</sup> defendant's application dated 20.9.2011 could be different.

5) The plaintiff/respondent vehemently opposed the motion by filing a replying affidavit of Dr. Robert Ayisi, the 3<sup>rd</sup> defendant's county secretary. It is the submission of Mr. Odungo that the plaintiff misapplied itself to the provisions of Order 45 rules 1(1) and 2(1) of the Civil Procedure Rules, 2010 and that there is no evidence on record to warrant a review of the orders made by this court. It is argued that the plaintiff has failed to show that its submissions formed part of the court's record at the time of writing the ruling which is now being challenged. The learned advocate further argued that where submissions are missing from the court file as a result of either the mistake on the part of the officer of the court at the registry or due to foul play, the same cannot by itself, without evidence of the same by the applicant be deemed as an error apparent on record and therefore cannot meet the required threshold stated under Order 45 rules 1(1) and 2(1) of the Civil Procedure rules to warrant a review.

6) Having set out in detail the submissions of both side, I now proceed to determine the issues raised. In my humble appreciation of the plaintiff's application, it is apparent that the plaintiff has sought for two orders in alternate. The first prayer is for the setting aside of this court's ruling delivered on 16.8.2016 by way of review. If the prayer is granted, then it will mean that the motion dated 20.9.2011 would instead be dismissed. The second prayer is to the effect that if this court deems it fit to maintain the orders issued on 16.8.2016, then it should issue an order directing the 3<sup>rd</sup> defendant to deposit the decretal sum of kshs.220,141,338/= as a condition to defend the suit.

7) The first question is whether the plaintiff/applicant has made out a case to warrant this court to issue an order for review. The principles to be considered in an application for review are well settled. It suffices to cite the case of **National Bank of Kenya Ltd =vs= Ndungu Njau, Nairobi C.A no. 211 of 1991** in which the Court of Appeal stated *inter alia* as follows:

**“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 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. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. misconstruing a statute or other provisions of law cannot be a ground for review.**

8) I have already set out the plaintiff's submissions in which it is argued that this court did not take into account the fact that its written submission had already been filed. The plaintiff presented a court receipt which indicates the filing and receipt of the plaintiff's submissions. The plaintiff went further and supplied this court a copy of the plaintiff's submissions. The 3<sup>rd</sup> defendant is of the view that the plaintiff has not tendered credible evidence to show that its submissions were on record at the time of writing this ruling. It is also important to take note of the fact that the court's discretion to make orders for review appears to be unfettered in that it can make the order if any sufficient reason is given. A fact which cannot be contested is that at the time of writing its ruling delivered on 16.8.2016, the plaintiff's submissions were not in the court file. However, it has now been brought to the attention of this court that the same had been filed and even served upon the 3<sup>rd</sup> defendant's advocate. This may not appear to be an error on the face of record but it is a sufficient reason to enable this court to exercise its discretion of review so that it opens the way to enable it take into account the plaintiff's submissions. In my view, it is not necessary for the plaintiff to demonstrate further that the submissions were in the court file. It is sufficient for it to merely show that it filed and served those submissions. It is the duty of the registry staff to ensure that the document is placed in the relevant court file.

9) The other important point which the plaintiff has pointed out is the question as to whether or not the plaintiff had contested the 3<sup>rd</sup> defendant's assertion that it has a good and strong defence. The plaintiff avers that it contested the 3<sup>rd</sup> defendant's assertion in paragraphs 32 and 33 of the replying affidavit of Eliud Matu Wamae. It also stated that it did so in its written submissions. A careful perusal of paragraph 32 and 33 of the replying affidavit of Eliud Matu Wamae does not clearly reveal that the plaintiff contested the 3<sup>rd</sup> defendant's assertion that it has a good and strong defence. However a reading of the plaintiff's submissions which were missing from record will show that the plaintiff devoted a whole paragraph to address the assertion. In my view the main issue which falls within the purview of an application for review in this motion is the singular question of the failure to consider the plaintiff's written submissions. The other issue relating to this court's appreciation of the question as to the burden of prove of service and the 3<sup>rd</sup> defendant's legal person are issues which can only be taken up on appeal but not by way of review. The plaintiff has also complained that this court has failed to appreciate that the lack of clarity in the stamp and signature on the reverse side of the summons to enter appearance was cured by the unchallenged oral evidence of G. K. Meenye advocate. In my humble view, this is a matter which cannot be determined by an application for review but on appeal.

10) Having come to the conclusion that the 3<sup>rd</sup> defendant's application for review can be entertained on the basis that its submissions were not considered, the next question is what is the way forward? I am of the considered view that this court is entitled at this stage to take into consideration the 3<sup>rd</sup> defendant's submissions and determine whether or not the same would have affected the final outcome of the motion dated 20.09.2011. There is no dispute that this court considered the facts deponed in the replying affidavit of Eliud Matu Wamae sworn on 12.12.2011 and the further affidavit of the same deponent sworn on 2012. What was not taken into account was the plaintiff's written submissions dated 29<sup>th</sup> June 2015. The written submissions basically reiterated the facts deponed in the two affidavits. The question which I wish to address is the manner the plaintiff responded to the 3<sup>rd</sup> defendant's assertion that it has a good and strong defence. In this court's ruling delivered on 16.8.2016, this court emphatically stated that the plaintiff did not deem it fit to respond, to it. In the written submissions the plaintiff avers that the land was duly allocated to the respondent and there is evidence that it paid the standard premium and all the requisite charges. It is also said that the respondent has showed that the applicant in writing undertook to complete its part in the transaction, namely to issue title to the plaintiff for the land. It is argued that after allocating the land to the plaintiff/respondent the council could not legally re-allocate the land to third parties. The plaintiff further argued that the allotment letter was not conditional upon issuance of the title because payment of the standard premium and all requisite charges shifted the burden of completing the transaction upon the 3<sup>rd</sup> defendant which was obliged to issue the title. The plaintiff submitted that the draft defence was a mere denial and a sham. This court was urged to find that there were no triable issues hence the regular judgment should not have been disturbed. After a careful consideration of the plaintiff's written submissions over the issue as to whether or not the 3<sup>rd</sup> defendant has a good and strong defence, I have come to the same conclusion as I did in my ruling delivered on 16.8.2016 that the draft

defence filed by the 3<sup>rd</sup> defendant raises serious issues. A reading of the plaintiff's submissions will reveal that three triable issues commend themselves for determination namely: **First**, whether or not the 3<sup>rd</sup> defendant could legally re-allocate the land in dispute to third parties. **Secondly**, whether or not the letter of allotment was conditional **Thirdly**, whether or not the plaintiff breached any of those conditions if any.

11) In my humble view, the plaintiff's submissions in fact further expanded and strengthened the issues that should go for trial.

12) In the end and after considering the substance of the plaintiff's application for review dated 23.9.2015 I find no merit in it. The same is dismissed with costs abiding the outcome of this suit.

13) The second limb of the plaintiff's application is an alternative prayer for issuance of an order directing the 3<sup>rd</sup> defendant to deposit the decretal sum of ksh.220,141,338/= in court. The plaintiff's learned counsel did not attach any reason to this prayer in the motion and in the supporting affidavit. The learned advocate merely deponed that the order should be made in the interest of justice to both parties. However, in his oral submissions, Mr. Wamae stated that the order should be issued to make the 3<sup>rd</sup> defendant move diligently in prosecuting the suit.

14) I have already stated that though the plaintiff is saying that the order will make the 3<sup>rd</sup> defendant diligent in pursuing the matter, in my humble view I think the order is akin to granting the 3<sup>rd</sup> defendant a conditional leave to defence the suit. I find no justification in making the 3<sup>rd</sup> defendant's right to defend the suit conditional. I decline to grant the order. The plaintiff has made a passionate plea that the suit be heard on priority basis. This suit was filed in court more than twenty (20) years ago hence there is need to have it heard on priority basis. I direct the parties to comply with the provisions of Order 11 of the Civil Procedure Rules, 2010 within 30 days from the date hereof after which the suit should be fixed for pre-trial conference within 60 days from the date of this ruling.

**Dated, Signed and Delivered in open court this 27<sup>th</sup> day of January, 2017.**

**J. K. SERGON**

**JUDGE**

In the presence of:

.....for the Appellant

.....for the Respondent