



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT AND LAND CASE NO. 149 OF 2017 (OS)

MARK KITHINJI MBATIAHPLAINTIFF/RESPONDENT

VERSUS

NAJAHAIT FAIZA HIGHTOWER alias HIGHTOWER FAIZA WILBUR EARL

(on behalf of the estate of Wilbur Hightower JR..... DEFENDANT

RULING

A. The application

1. The court is asked through an application dated 24.1.2022 to review the order made on 21.5.2020, set aside the default judgment default made on 17.10.2020 and all the consequential orders, and thereafter grant the applicant unconditional leave to defend the suit on merits in the normal manner. The application was supported by an affidavit by Najahait Faiza Hightower sworn on the even date.

2. The grounds of the application are that the initial defendant was sickly and later on succumbed to the sickness while in the United States of America on 21.2.2021; there exists a veritable defence to the claim; she has been in use of the suitland after it was given to her late husband by her father in law as a gift; she is available to conduct the case; her brother in-law Nathan Kinoti Ilonga and Catherine Kanini have been in occupation on her behalf since the demise of her father in law on 25.6.2011; the suit had been heard without her participation that the judgment was irregular and that it was in the interest of justice to application.

B. Grounds of opposition

3. The application was opposed by the plaintiff's replying affidavit sworn on 4.2.2022 on the basis that the application was without merits; was res judicata; there was a preliminary objection dated 26.1.2022; given a ruling made on 21.5.2021; the applicant had not met the threshold for review; no new evidence or error has been brought to warrant any review; there was nothing to defend since the matter was heard fully; the court was *functus officio* and that he was already in occupation following the judgment on 2018.

C. Written Submissions

4. Parties were directed to put in written submissions by 24.1.2022. None complied by the set deadline.

D. Determination

5. There is no dispute the court rendered itself on the twin issues of setting aside and the leave to defend the suit by its rulings made on 21.5.2020 and 15.12.2021 respectively.

6. The applicant after getting leave to substitute the deceased on 15.12.2021 has filed the instant appeal for review of the ruling and the order made on 21.5.2020.

7. Order 45 rule 1 and 5 Civil Procedure Rules as read together with Section 80 Civil Procedure Act grants the court powers to review its previous orders or decrees where the applicant has satisfied that there was discovery of new and important matters which upon the exercise of the due diligence was not within the knowledge or could not be procured by him at the time the order or decree was made; mistake or error on the face of the record; and for any other sufficient reason which may make the court review its orders or decree.

8. In **Alvin Mbae & 2 others vs Edwin Nyaga Muketha and 2 others** the court held the underlying objective of the section was neither to enable the court to write a second judgment nor to give a second innings to the party who had lost the case because of his negligence or indifference.

9. The applicant based the application on sufficient reasons. In **Evan Bosire vs Andrew Aginzu citing with approval Stephen Gitua Kimani Vs Nancy Wanjiru Waruingi T/a Providence Auctioneers (2016) eKLR** held review will only be allowed on strong grounds particularly if its effect would amount to the re-opening of the application or the case afresh.

10. In **Suleiman Murunga vs Nilestar holdings Ltd and another (2015) eKLR** the court held failure to annex the order sought to be reviewed rendered the applicant defective.

11. In **IEBC vs Maina Kiai and 5 others (2017) eKLR** the court held res judicata served the salutary aim of bringing finality to litigation while in **Sanlam Services E.A Ltd vs Rentokil (K) Ltd and another (2019) eKLR** the Court of Appeal held review was available where no appeal had not been filed against the order or decree but must be done without unreasonable delay.

12. In **Alpha Fine Food Limited vs Horeca Kenya Ltd and 4 others (2021) eKLR** Mativo J took the view that any other sufficient a reason meant reason sufficiently analogues to those specified in the rule. Similarly in **Wachira Karani vs Bildad Wachira (2016) eKLR**, the court held sufficient cause was the cause for which the defendant could not be blamed for his absence, and that what amounts to sufficient cause is a question of fact and there could not be a straight jacket formula of universal application.

13. The applicant in trying to expound the sufficient reasons states the current defendant was nursing the initial defendant who later on passed on in the USA on 21.2.2021 and that she was now willing and able to conduct the defence.

14. The applicant averred that there has been no change of circumstances on the suitland since the delivery of the judgment and that given her entry into the matter after leave was granted coupled with the fact that she withdrew the notice of appeal the court should grant her a chance to ventilate her attached proposed defence.

15. On the other hand the plaintiff says he is in occupation of the suitland following the entry of judgment in his favour.

16. Given the rival positions taken, the court takes the view the right to be heard is one of the constitutional rights a party should never be denied. In this matter the reasons given appear genuine, reasonable credible and convincing. See **Zachariah Okoth Obado vs Edward Akong'o Ayugi & another (2014) eKLR, Gituma Kaumbi Kioga vs K.R.A & another (2020) eKLR**.

17. In the premises I allow the application with throw away costs of Kshs.35,000 to the plaintiff payable within 21 days from today. The response to the originating summons together with witness statements and list of documents to be filed within 21 days from the date hereof and the matter shall be set down for hearing within 6 months from the date hereof. Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU

THIS 6TH DAY OF APRIL, 2022

IN PRESENCE OF:

MISS MUIA FOR APPLICANT

MR. WAMBUA FOR RESPONDENT

HON. C.K. NZILI

ELC JUDGE