



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
Environmental & Land Case 935 of 2001

NJUGUNA MWAURA MBOGO.....PLAINTIFF

-VERSUS-

**E. K. BANKS LIMITED
ENDAO COMPANY LIMITED.....DEFENDANTS/APPLICANTS**

-AND-

**ELIZABETH NYAMBURA NJUGUNA
FRANCIS KAMAU NJUGUNA.....RESPONDENTS**

RULING

1. The Plaintiff/Applicant has filed a Notice of Motion dated 05/04/12 under Order 45 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules, Section 1A (1) and (2) and Section 3A of the Civil Procedure Act seeking the following orders:-

- i. That the court be pleased to review and set aside its ruling dated 28th March 2012 and make fresh findings and/or give further directions as it would deem fit after hearing the application for review.
- ii. That the costs of the application be provided for.

The application is premised on the following grounds:-

- i. That the Defendants/Applicants in their notice of motion dated 13th July 2011 prayer 2 had prayed that the court does extend time for the filing of the substitution up to the filing date of their application meaning that the provided period of (1)one year be extended so as to keep the suit alive.
- ii. That the court failed to consider and/or overlooked the prayer for extension of time hence arriving at the decision that the suit had abated.
- iii. That though time for applying for the said substitution had expired, the court has discretion to extend such time to allow the filing of an application for substitution under the proviso in Order 24 Rule 3(2)

iv. That the application has been brought timeously.

2. The application is supported by the affidavit of James Kamande Mwaura Gichachi, advocate. He depones as follows :- That on 14th July 2011, he filed a notice of motion dated 13th July 2011 seeking orders that Elizabeth Nyambura Njuguna and Francis Kamau Njuguna, the respondents in this matter be substituted as the plaintiffs in this case in place of Njuguna Mwaura Mbogo who is now deceased. That prayer number 2 of the motion was for the court to extend time for filing of the substitution up to the filing date of that application so that the application would not be out of time and the suit therefore could not have abated. That a reading of the court's ruling delivered on 28th March 2012 shows that the court overlooked prayer number 2 of the application and did not consider the applicants' request for extension and/or enlargement of time which would mean that where time is enlarged the suit would definitely not have abated. Further, it is deponed that since prayer number 2 was not considered in the light it was intended by the applicants amounting to an error on the face of the record, the court should exercise its discretion and review its ruling of 28th March 2012.

3. In response, the 2nd Respondent has filed a replying affidavit dated 16th May 2012 where he depones as follows: -That the application is incompetent as it was filed without the authority of the defendants and that the supporting affidavit was commissioned after the application had been filed in court. Further, it is deponed that the affidavit contains matters that are in dispute before the court making it improper for the applicants' advocate to swear to swear an affidavit on such issues as he has reduced himself to a witness. The 2nd respondent contends that the applicants are seeking to re-argue the application that was disallowed by the court on 28th March 2012 where the court properly found that the suit had abated one year from the date of death of the deceased and that there was no prayer for revival of the suit before the court. It is further deponed that the order for extension of time was vigorously opposed by the respondents as it was argued that the applicants were guilty of inordinate delay and the applicant's advocate made submissions on the issue of extension of time so that it cannot be said that the court did not consider all the arguments advanced by the parties when the court decided to disallow the application. Further, the 2nd respondent states that the application before court is based on what the court allegedly overlooked and or inadvertently failed to do which is not a ground for review but appeal and that there is no error apparent on the face of the record.

4. The application was argued before me on 17th July 2012 where counsels submitted on their respective positions. The respondents filed submissions dated 16th July 2012 on 17.07.12. I have carefully considered the submissions together with the authorities cited. The affidavits filed by the parties which I have extensively quoted in this ruling give a clear background to the application before me. The issue before me is whether the applicants have met the conditions for review under Order 45 Rule 1. The conditions precedent for the court to entertain an application for review are upon rediscovery 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 the party seeking review at the time when the order was made, or on account of some mistake or error apparent on the face of the record.

5. In my ruling delivered on 28th March 2012 which the applicants seek to review, I found that the application dated 13.07.11 was premature since, in my view, the suit should have first been revived before the application for substitution was filed. I do not, with respect, agree with learned counsel for the applicants' submissions in the present application that an extension of time for the filing of an application for substitution per se would have revived the suit which has abated. There is no basis upon which this court can review its orders of 28.03.12 and the applicants' relief does not lie in review. I note that that the application was struck off. I therefore find that the application dated 5th April 2012 is not merited and dismiss it with costs to the respondents.

Orders accordingly.

Dated, signed and delivered this **21st** day of **September** 2012

**R. OUGO
JUDGE**

In the Presence of:-

..... For the applicants

..... For the respondents

..... Court Clerk