



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE 1045 OF 2001

DAVID NJIHIAPLAINTIFF

V E R S U S

KENYA POWER & LIGHTING CO. LTDDEFENDANT

TERESIA WANJIRU THIRUAPPLICANT

R U L I N G

The Plaintiff herein died on 2nd January, 2003. There was no application made within one year of the death for substitution of someone else in his place, and the suit abated. Subsequently, an application for revival of the suit was filed. It was argued *inter partes* on 2nd July, 2007 and dismissed by a ruling dated 28th and delivered on 30th November, 2007.

The same Applicant, **TERESIA WANJIRU THIRU**, has come back to court by **notice of motion dated 14th May, 2008** seeking a review of the said order of 30th November, 2007 under **Order 44, rules 1(1) and 2** of the **Civil Procedure Rules** (the Rules). The grounds for the application appearing on the face thereof are:

- “1. That the applicant has brought to court new evidence of her inability to file the application seeking orders to revive the suit and making her a party to the suit in place of the deceased.
2. That failure to bring the evidence through the previous application was not intentional on the part of the applicant and is highly regretted.
3. That through the affidavit sworn in support of this application, the applicant has demonstrated that she was prevented by a sufficient cause from moving this honourable court in good time.
4. That this matter was being discussed out of court by the parties with a view to compromising it, and no prejudice shall be suffered by the defendant if this application is allowed since it shall have the opportunity to be heard on its defence.”

There is a supporting affidavit sworn by the Applicant.

The Defendant has opposed the application as set out in the replying affidavit filed on 3rd October, 2008. It is sworn by one **ALLAN OWITI**, a legal officer of the Defendant. The grounds of opposition to the application include:-

1. That the application is an abuse of the process of the court.
2. That ignorance of the law is no defence.
3. That there is no new evidence placed before the court.

Review under Order 44 of the Rules is available from a decree or order from which an appeal is allowed but from which no appeal has been preferred, and also from a decree or order from which no appeal is allowed. Review must be upon any of the following grounds:-

1. Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant's knowledge, or could not be produced by him at the time when the decree was passed or the order made.
2. On account of some mistake or error apparent on the face of the record.
3. Any other sufficient reason.

I have carefully read the Applicant's supporting affidavit. I have also given due consideration to the submissions of the learned counsels appearing. No authorities were cited. I find no new and important matter or evidence demonstrated in the supporting affidavit. Even if there were such new and important evidence, it has not been demonstrated that it was not within the Applicant's knowledge or could not be produced by her at the time the order sought to be reviewed was made. The Applicant is simply attempting to urge afresh matters that were fully litigated on 2nd July, 2007. That cannot be permitted.

I also find no mistake or error apparent on the face of the record. There is no other sufficient reason to disturb the order of 30th November, 2007. In the result the notice of motion dated 14th May, 2008 is hereby dismissed with costs to the Defendant. It is so ordered.

DATED AT NAIROBI THIS 16TH DAY OF JUNE, 2009

H. P. G. WAWERU

J U D G E

DELIVERED THIS 26TH DAY OF JUNE, 2009