



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 181 OF 2012

JOYCE MWELU MULANIPLAINTIFF/RESPONDENT

VERSUS

TABITHA NDUKU MULANI.....DEFENDANT/APPLICANT

RULING

1. In the Notice of Motion dated 26th October, 2019 and filed on 14th November, 2019, the Defendant has sought for the following orders:
 - a. That the Honourable Court be pleased to review and/or vacate the Ruling entered against the Defendant/Applicant by this Honourable Court on the 24th day of May, 2019.*
 - b. That this Application be heard inter parties on such date and time as this Honourable Court may direct.*
 - c. That the costs of this Application be provided for.*
2. The Application is supported by the Affidavit of the Defendant who has deponed that the Application dated 9th April, 2018 was dismissed for lack of evidence to show why she did not attend court on 21st February, 2018.
3. The Defendant deponed that she was taken ill on 18th February, 2018; that this matter was scheduled for hearing on 21st February, 2018; that she is a senior citizen facing health complication and that she has been diagnosed with Hypertensive heart disease.
4. The Defendant deponed that the new evidence attached on her Application is crucial and forms an integral part of the main suit and that the Ruling of 24th May, 2019 by this court should be reviewed. According to the Defendant, the omission and commission by his advocate should not be visited upon her and that the Application has been made without unreasonable delay.
5. In response, the Plaintiff deponed that the Defendant is a vexatious litigant who keeps filing application after application; that it has been eight (8) years since the inception of this matter and that the Applicant and her advocate failed to attend court on 21st February, 2018 when the matter was scheduled for hearing.
6. It was deponed that no medical record has been adduced by the Defendant for 21st February, 2018 and that there is no evidence to show that the Defendant had been declared immobile on 21st February, 2018 when the matter came up for hearing.
7. The Plaintiff finally deponed that the Application does not meet the threshold for the grant of the orders sought and that the Defendant is only interested in delaying this matter. Both the Defendant and the Plaintiff's advocate filed written submissions which I have considered. I have also considered the filed authorities.
8. The Defendant herein filed an Application dated 9th April, 2018 in which she sought for the following orders:
 - a. That the order closing both the Plaintiff's suit and the Defendant's case be rescinded and the court do order for a recalling of the witnesses who testified on behalf of the Plaintiff's case for purposes of cross-examination.*
 - b. That the court do grant an order re-opening the Defence case and allow the Defendant and her witnesses to testify in response to the Plaintiff's case.*
 - c. That the Defendant/Applicant be granted leave to file further documents in this suit to wit Title Deeds for L.R. No. Machakos Konza North Block 1/450, Konza South/Konza South Block 5 (Konza) 756 and ballot/allocation card for commercial Plot No.1065*

Konza Kwa Mautio.

d. That the costs of this Application be in the cause.

9. This court delivered a Ruling in respect of the Application dated 9th April, 2018 on 24th May, 2019. In the said Ruling, the court dismissed the Defendant's Application. In the Ruling, the court held as follows:

"10. Although the Defendant has stated that she was sick on the date the matter came up for hearing, albeit without any evidence, neither the Defendant nor her previous advocate has explained why the advocate never appeared in court on the day the matter came up for hearing and sought to have the matter adjourned.

*11. Indeed, having not offered any explanation as to why her advocate was not in court on 21st February, 2018, the court cannot exercise its discretion, which must be exercised judiciously, in favour of the Defendant. As was held in the case of **John Onger Mariaria & 2 others vs. Paul Matundura, Civil Application No. 301 of 2003 (2004) 2 EA 163**, clients must learn at their costs that the consequences of careless and leisurely approach to work by the advocates must fall on their shoulders."*

10. The Defendant has now filed an Application seeking to review the said Ruling. Order 45 Rule 1 of the Civil Procedure Rules provides the circumstances under which an Order or a Decree of the court can be reviewed. The said Order provides as follows:

"1. (1) 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 a review of Judgment to the court which passed the decree or made the order without unreasonable delay."

11. According to the Defendant, she was unwell when the matter came up for hearing on 21st February, 2018. To support this deposition, the Defendant annexed on her Affidavit two Medical Reports dated 3rd February, 2018 and 18th February, 2018.

12. In the Medical Report of 3rd February, 2018, the "Echo Technician" concluded in her Report that the Defendant has "hypertensive heart disease".

13. In the Medical Report of 18th February, 2018, the doctor stated that the Defendant was suffering from "Hypertension, gerd and Arrhythmia" and made the following comments.

"Referring for specialist evaluation."

14. Although the two Medical Reports have been produced to support the Application for review of the Orders of this court, there is no evidence before me to show that the said Medical Reports were new, and that the same were not within the knowledge of the Defendant, even after exercising due diligence, as at the time the Application dated 9th April, 2018 was filed.

15. Indeed, the said Reports must have been in possession of the Defendant as at the time the Application dated 9th April, 2018 was filed. Furthermore, the two Medical Reports do not make any reference to the date of 21st February, 2018, which is the date that the Defendant and her advocate did not attend court.

16. Having not produced any new evidence which was not in her possession indicating that indeed she was unwell on 21st February, 2018 to the extent of not being able to attend court; and having not shown why her advocate was not in court on the said day to seek for adjournment on her behalf, it is my finding that the Defendant has not established the grounds that are required to review the order of the court of 9th April, 2018.

17. For those reasons, the Application dated 26th October, 2019 is dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 12TH DAY OF FEBRUARY, 2021.

O.A. ANGOTE

JUDGE