REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC CASE NO. 35 OF 2016

ANDREW MANG'UU KABOI.....PLAINTIFF/RESPONDENT

VERSUS

WELLINGTON KIHATO WAMBURU.....DEFENDANT/APPLICANT

RULING

INTRODUCTION

1. The Application before this court is dated 2nd March, 2021 and is brought under the provisions of sections 1A & B, 3A and 63(e) of the Civil Procedure Act and Order 51 of the Civil Procedure Rules. The Applicant seeks the following orders;

> **1) Spent**
>
> **2) Spent**
>
> **3) THAT this honorable court be pleased to set aside/vary and or discharge/review the orders of this honorable court and all other consequential directions made on 25th February, 2021.**
>
> **4) THAT this honorable court be pleased to set aside proceedings that took place on 25th February, 2021, reopen the closed proceedings and allow the defendant/Applicant to give evidence together with his witnesses.**
>
> **5) THAT this honorable court be pleased to grant the Defendant/Applicant herein leave to defend the suit and the draft statement of Defence annexed herein be deemed as duly filed upon payment of the requisite court fees.**
>
> **6) THAT cost of this Application be provided for.**

2. The Application was premised on the grounds listed on the face of it and supported by two Affidavits, one by **WELLINGTON KIHATO WAMBURU,** the Applicant and another by counsel for the Applicant, **RUIRU JAMES NJOROGE.**

3. The Applicant in his supporting Affidavit aver that on 25th February 2021, this matter was heard and it was only after the plaintiff had closed his case that the defendant discovered that he had no defence on record, although he had filed all other relevant documents; that subsequently the court closed the defence and directed the parties to file submissions; that the directions issued on 25th February 2021 are prejudicial to him since the suit will be determined without him being heard; that he stood to suffer irreparable harm since he is the bonafide owner of the suit property with all the necessary documentation, having been in possession thereof since July 2015; that he has undertaken major development on the suit property by building a permanent house, planting trees, digging a well and fencing the whole property; that the court had taken notice of the foregoing in its earlier Ruling delivered on 21st November 2017.

4. It was the Applicant's contention that failure to file a statement of Defence was his counsel's inadvertent and regrettable error which should not be visited upon him. He claimed to have a triable Defence and annexed a draft copy of statement of Defence marked "WKW1". It was his opinion that the Respondent will not suffer any prejudice if the prayers sought are granted as they will get an opportunity to rebut any issue raised in the defence.

5. On their part, counsel for the Applicant admitted to have inadvertently forgotten to include the statement of defence while filing the other documents, in the belief that the same had been filed together with the memorandum of appearance filed on 2nd March 2017; that he was willing to shoulder the consequences and that the same should not be visited upon the Applicant and that the Applicant had a triable Defence and invoked the inherent powers of the court to grant the prayers as sought.

6. The application was opposed vide the replying affidavit of the Plaintiff/ Respondent sworn on 21st May 2021, where he stated that the application is an abuse of the court process since counsel for the applicant had made a similar application orally on 25th February 2021, which prayer was declined by the court; that on 18th September 2019, when the matter came up for pretrial directions before the Deputy Registrar, the Defendant was granted leave to comply with pretrial directions and the defendant was directed to comply by close of business on even date; that it will be unfair to allow the defendant to file his defence after the plaintiff had testified and closed his case; that no developments have been made by the defendants on the suit property and that the defendant is on the suit property unlawfully; that no sufficient reason has been given by the applicant for noncompliance and that the application is misconceived and a waste of judicial resources.

APPLICANT'S SUBMISSIONS

7. In their submissions filed on 2nd November 2021, counsel for the Applicant relied on the case of ***Bank of Africa Kenya Limited v Put Sarajevo General Engineering Co. Ltd & 2 Others (2018) eKLR*** for the proposition that where counsel has made a mistake, the court ought to do whatever is necessary to rectify the mistake if the interest of justice so dictates. They also cited the case of ***Patriotic Guards Ltd vs James Kipchirchir Sambu (2018) eKLR*** which echoed the holding in **Mbogo vs Shah** to the effect that the discretion to set aside Exparte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake; but is not meant to assist persons keen on deliberate evasion of, or obstruction, or delay of justice. Counsel argued that the defendant had not been indolent and neither was he obstructing or delaying justice.

8. It was further contended for the Applicant that Article 5o of the Constitution of Kenya guarantees every person's right to a fair hearing which encompasses the right not to be condemned unheard. Counsel stated that their error was not sufficient enough reason to deny the Applicant the right to be heard. Counsel relied on the cases of ***Bank of Africa Kenya Limited vs. Put Sarajevo General Engineering Co. Ltd & 2 Others [2018] eKLR, M.K vs. M.W.M &Another [2015] KLR*** and ***Mbaki & Others vs. Macharia & Another (2005) 2 EA 206*.** Counsel urged that the likely prejudice to be suffered by the plaintiff who had closed his case, will be cured by allowing him to present fresh evidence.

9. On whether the application was res judicata, counsel contended that the Defendant's application was not res judicata as this Application seeks to set aside the ruling, orders and directions issued on 25th February 2021, upon the oral application by the applicant's counsel.

RESPONDENT'S SUBMISSION

10. Counsel for the Respondent filed submissions in support of their case on 1st December, 2021. They submitted that the instant Application was an afterthought, unmerited, incompetent, scandalous, frivolous and vexatious and as such, it amounts to abuse of the court's due process. Counsel relied on section 7 of the Civil Procedure Act and emphasized that the Application was **res judicata**. Counsel placed reliance on the case of ***The Independent Electoral and Boundaries Commission Vs Maina Kiai & 5 Others (2017) eKLR.*** It was their submission that the defendant already made his oral Application seeking leave to file defence out of time, upon which the court pronounced its ruling on the same issue that is now formally brought vide the instant Application.

11. Counsel argued that the discretion of this court is not meant to assist a party who deliberately intends to obstruct or delay justice. Counsel referred the court to the cases of ***Rayat Trading Co. Ltd vs. Bank of Baroda & Tetezi House Ltd [2018] e KLR, Shah vs Mbogo (1969)*** and ***Thorn PLC v MacDonald (1999) CPLR 660*** Counsel pointed out that the parameters to be considered for granting leave to file a defence out of time are the length of the delay and the explanation for the delay.

12. It was argued for the Respondent that the plaint plus accompanying documents were filed on 26/5/2016. The Applicant entered appearance on 2/3/2017, filed his list of documents on 22/8/2019 and his list of witnesses together with Defendant's witness statement on 5/9/2019. It was hence their contention that the Applicant had over four years within which to file the statement of defence but deliberately failed to do so.

13. Counsel relied on the provisions of **Order 7 Rule 1 of the Civil Procedure Rules** which provide for defence and Rule 5 of the same order which provide in mandatory terms that parties should file all requisite documents before pre-trial conference. They stated that pre-trial directions were taken on **18th September 2019** and all parties confirmed compliance and this formed the basis of the matter being certified and set for hearing.

14. Counsel further cited the case of ***Water Painters International v Benjamin Ka'goa t/a Women in Agriculture Kochieng (Gwako) Ministries (2014) eKLR*** for the proposition that a negligent advocate ought to shoulder the consequences of their negligent acts like other professionals do. Counsel opined that the Applicant's remedy was against their counsel. They further claimed the Respondent stands to suffer prejudice on costs and wastage of the court's time in reopening the case afresh. They also argued that the annexed Defence raises no triable issues and invited the court to adopt the ruling in ***Abdigan Mohammed & 2 Others Vs GAM (2020) eKLR*** where the court declined a similar Application.

15. The Respondents further relied on the equitable doctrine of laches in that the delay in filing the statement of Defence was inordinate, over four years. They also cited the equitable principle that equity does not aid the indolent party and that the Applicant had been indolent. They concluded by praying that the Application be dismissed with costs.

ANALYSIS AND DETERMINATION

16. I have carefully considered the application, the reply, submissions and authorities cited. In my view the issues that emerge for determination are as follows;

a) Whether the defendant's prayer for leave to file the statement of defence out of time is res judicata?

b) If the answer to a) above is in the negative, whether the court should grant the defendant leave to file statement of defence out of time and be allowed to defend the suit.

c) Whether the applicant has met the threshold for review/setting aside or varying the orders of 25th February 2021.

d) Whether the court ought to set aside the proceedings of 25th February 2021.

17. The doctrine of res judicata is enshrined in section 7 of the Civil Procedure Act, cap 21 Laws of Kenya. The said provision states as follows;

> **No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court**.

18. From the foregoing, the elements that must be satisfied for a plea of res judicata to apply are as follows;

i) The court that heard the matter must have been competent

ii) The matter directly and substantially in issue must be the same as that formerly determined.

iii) The parties must be the same and or litigating under the same titles.

iv) The matter must have been heard and finally decided.

19. Principles governing the doctrine of res judicata are well settled. In the case of ***Invesco Assurance Company Limited & 2 Others v Auctioneers Licensing Board & Another; Kinyanjui Njuguna & Company & Another (Interested Parties)*** **[2020] eKLR**, at Paragraph 44, the court held as follows;

> **A close reading of section 7 of the Act reveals that for the bar of *Res Judicata* to be effectively raised and upheld, the party raising it must satisfy the doctrine five essential elements which are stipulated in the conjunctive as opposed to disjunctive terms. The doctrine will apply only if it is proved that;**
>
> **a. The suit or issue raised was directly and substantially in issue in the former suit.**
>
> **b. That the former suit was between the same party or parties under whom or any of them claim.**
>
> **c. That those parties were litigating under the same title.**
>
> **d. That the issue in question was heard and finally determined in the former suit.**
>
> **e. That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit.**

20. The purpose of the doctrine of res judicata was stated in the case of ***The Independent Electoral and Boundaries Commission vs Maina Kiai & 5 others, [2017] eKLR***, where the court stated as follows;

> **"The rule or doctrine of *res judicata* serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of *Res Judicata* thus rest in the public interest for swift, sure and certain justice."**

21. The Supreme Court reiterated this position in its judgment in ***John Florence Maritime Services Ltd & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others (2021) eKLR***, **para 54** and held as follows;

> **The doctrine of Res judicata in effect, allows a litigant only one bite at the cherry. It prevents a litigant or persons claiming under the same title, from returning to court to claim further reliefs not claimed in the earlier actions. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.**

22. To answer the question as to whether the instant application, and more specifically the prayer for leave to file a defence out of time, is res judicata, I must consider the record and specifically the proceedings of 25th February 2021.

23. I have considered the record and I note that on 25th February 2021, Mr. Ruiru Advocate appeared for the Defendant, while Mr. Langalanga Advocate appeared for the Plaintiff. On that date, both parties and counsel having been ready to proceed, the matter proceeded to hearing and the evidence of PW-1 was taken whereof defence counsel cross examined the witness. Upon close of the plaintiff's case, the defence counsel presented DW-1, who began to testify but Mr. Langalanga interjected and notified the court that there was no defence on record. It is at this point that Mr. Ruiru made an application seeking leave to file defence. He stated that failure to file the defence was an inadvertent oversight on his part. He admitted that it was his mistake that the defence was not filed and pleaded with the court to allow him to file the defence. In response, Mr. Langalanga argued that as the Plaintiff had closed his case, and allowing the defendant to file a defence at that point would be prejudicial to the plaintiff.

24. In its ruling, this court stated as follows;

> **When this matter was called out in the morning, counsel for the defendant informed the court that he was ready to proceed. Indeed, on 17/7/2019, this court directed the parties to comply with Order 11 of the Civil Procedure Rules. This is when the Defendant should have realized that there was no defence on record. On 18/9/2019 the parties confirmed that this matter was ready for hearing. In the circumstances, and considering that the Plaintiff has testified and closed his case, I decline to allow the defendant's application to file a defence out of time.**

25. The record also shows that after the above ruling, Mr. Ruiru being dissatisfied, sought for leave to file a formal application for leave to file defence out of time. On that issue, this court determined the same prayer in the following terms;

> **The court has made a ruling on the issue of filing the defence out of time. The issue cannot be raised again in formal application. The plaintiff having closed his case, the parties can only file submissions. The Plaintiff has 14 days to file and serve submissions, while the defendant has 14 days to file and serve submissions from the date of service. Mention on 9/06/2021.**

26. My understanding of the orders of this court made on 25th February 2021 is that it is crystal clear that this court determined with finality, the issue of leave to file defence out of time, and the court was categorical that it will not entertain a similar application just because it had been reduced in to writing. In prayer 5 of the instant application, the Defendant sought for leave to file a statement of defence out of time and to be able to defend this suit. In my view, that issue was determined by this court with finality. As the parties are the same, and this court having competently determined the issue of leave to file defence and defend the suit out of time, this court is *functus officio* and is barred by section 7 of the Civil Procedure Act from determining the same issue for the second time. Therefore, in so far as the prayer for leave to file defence out of time is concerned, the doctrine of res judicata effectively bars this court from determining that prayer and the same is struck out.

27. The applicant has also sought for orders for review, setting aside/varying/discharging orders of 25th February 2021. I must at this stage, point out that no submissions were made in regard to this prayer.

28. Applications for review are governed by Section 80 of the Civil Procedures Act as well as Order 45 (1) of the Civil Procedure Rules.

Section 80 of the Civil Procedure Act provides as follows;

> **Any person who considers himself aggrieved-**
>
> **(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or**
>
> **(b) By a decree or order from which no appeal is allowed by this Act,**
>
> **may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.**

Order 45 Rule 1 of the Civil Procedure Rules provides as follows;

> **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 pother 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.**

29. Essentially therefore, for a court to grant orders of review, it must be satisfied with any of the following conditions;

a) that the applicant has discovered new evidence or material, which he could not have obtained upon applying due diligence; or

b) That there is an error apparent on the face of the record; or

c) That there is sufficient reason; and

d) That the application for review is made without unreasonable delay.

30. In the case of ***Evan Bwire vs. Andrew Aginda Civil Appeal No. 147 of 2006*** the court cited with approval the case of ***Stephen Githua Kimani vs. Nancy Wanjira Waruingi T/A Providence Auctioneers (2016) eKLR,*** where the Court of Appeal held as follows;

> **An application for review will only be allowed on strong grounds particularly if its effect will amount to reopening the application or case afresh. In other words, I find no material before me to demonstrate that the applicant has demonstrated the existence of new evidence which he could not get even after exercising due diligence.**

31. On the question of an error apparent on the face of the record, in the case of ***Nyamogo & Nyamogo vs. Kogo (2001) EA 170*** the court held as follows;

> **An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of undefinitiveness inherent in its very nature and it must be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record.**

32. As regards the aspect of sufficient reason, in the case of **Sadar Mohamed vs. Charan Singh Nand Singh & Another**, **(1959) E.A 793** it was held as follows;

> **Any other sufficient reason for the purposes of review refers to the grounds analogous to the other two (for example error apparent on the face of the record and discovery of new and important matter.)**

33. In the case of **Francis Njoroge v Stephen Maina Kamore [2018] eKLR,** the court cited with approval the Court of Appeal decision in the case of **Francis Origo & Another v Jacob Kumali Mungala Civil Appeal No. 149 of 2001 (Unreported) where the court of appeal sated as follows;**

> **Our parting shot is that an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal.**

34. Similarly, in **Abasi Belinda v Frederick Kangwamu and Another [1963] E.A 557,** the court stated as follows;

> **A point which may be a good ground of appeal may not be a good ground for an application for review and an erroneous view of evidence or of law is not a ground for review though it may be a good ground for appeal.**

35. Having considered the Applicant's prayer for review, in light of all the grounds advanced by the applicant, I note that there is no allegation by the applicant that he has met the conditions set out in Order 45 Rule 1 of the Civil Procedure Rules for grant of review orders. From the application and submissions, I have also not seen an attempt by the Applicant to demonstrate that he had discovered new and important matter or evidence which he could not obtain after due diligence; or an attempt to demonstrate that there was an error apparent on the face of the record; or that there is sufficient reason to review the orders made on 25th February 2021. The grounds raised in support of the application were the same grounds relied upon in respect of the oral application made on 25th February 2021; that a mistake of counsel should not be visited upon an innocent client. That cannot, in my view, form a basis for grant of review orders, where the applicant has sidestepped Order 45 Rule 1 of the Civil Procedure Rules. In my considered view, the totality of the instant application merely demonstrates that the applicant was dissatisfied with the orders of 25th February 2021, has not appealed against the same, but is keen to attempt another bite at the cherry, having failed twice on 25th February 2021, to convince the court to grant him leave to file defence out of time. I therefore find and hold that the instant applicant has not met the threshold for grant of review of the orders of 25th February 2021.

36. Lastly, the applicant has sought for setting aside of the proceedings of 25th October 2021. I note that the proceedings of the said date were conducted in the presence of the Applicant together with his counsel, who were in court willingly and who had indicated their willingness to proceed with the matter. The applicant has not told this court the reason as to why those proceedings ought to be set aside. He has not faulted them in any way. In my view, the applicant has not placed any material before this court to warrant the exercise of the discretion of the court to set aside the proceedings of 25th February 2021. I therefore find and hold that there is no justification for setting aside proceedings of 25th February 2021, and I hereby reject the prayer seeking to set aside the proceedings of 25th February 2021.

37. The upshot is that the Notice of Motion dated 2nd March 2021 is hereby dismissed for lack of merit and being an abuse of the court process.

38. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 3RD DAY OF MARCH 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Mr. Ruiru for the Applicant

No appearance for the Respondent

Josephine Misigo – Court Assistant