



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC. CASE NO. 141 OF 2014**

**KINGI NZIOKI NGUYO.....PLAINTIFF**

**VERSUS**

**KENYA POWER AND LIGHTING CO. LTD.....1<sup>ST</sup> DEFENDANT**

**RURAL ELECTRIFICATION AUTHORITY.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. Vide a Notice of Motion dated 24<sup>th</sup> July, 2020, the Plaintiff sought for the following orders:

- a) That this Honourable Court be pleased to review and set aside its order and/or Ruling made on 15<sup>th</sup> February, 2019 ordering that the Plaintiff's suit as against the 2<sup>nd</sup> Defendant and Amended Notice of Motion dated 24<sup>th</sup> February, 2015 be struck out with costs.***
- b) That the Honourable Court do reinstate the 2<sup>nd</sup> Defendant in this suit for the just determination of the suit.***
- c) That costs of this Application be provided for.***

2. The Application was supported by the Affidavit of the Plaintiff's Advocate who deponed that upon receipt of instructions from the Plaintiff, he filed this suit against the 1<sup>st</sup> Defendant on 28<sup>th</sup> October, 2014 together with a Notice of Motion Application dated 27<sup>th</sup> October, 2014. It was deponed that in response to the Application, the 1<sup>st</sup> Defendant filed a Replying Affidavit in which it deponed that the Project giving rise to the suit was being carried out by Rural Electrification Authority, the 2<sup>nd</sup> Defendant, and not the 1<sup>st</sup> Defendant, whereafter he sought leave to amend the pleadings orally in court.

3. Counsel deponed that on the same date he made the oral Application, this court granted leave to the Plaintiff to amend his pleadings and join Rural Electrification Authority within fourteen (14) days; that he filed and served the amended pleadings and that the matter came up in court on several occasions before he discovered that on 25<sup>th</sup> April, 2018 the firm of M/s L. N. Kambuni & Company Advocates had fixed the matter for mention on 23<sup>rd</sup> July, 2018 in his absence.

4. Counsel deponed that the invitation served to fix a date upon his firm was for 25<sup>th</sup> May, 2018 which explained why there was no appearance from his firm on 25<sup>th</sup> April, 2018 and that no Mention Notice was served upon his firm for 23<sup>rd</sup> July, 2018 when the matter was listed before the Judge for directions on the Application dated 5<sup>th</sup> April, 2018 and the Preliminary Objection dated 28<sup>th</sup> April, 2015.

5. Counsel deponed that upon perusal of the court file, he noted that it was only the Advocates appearing for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants who appeared and took directions to have the Preliminary Objection heard first; that again his firm was not served with a Mention Notice for 15<sup>th</sup> October, 2018 nor the submissions by the 2<sup>nd</sup> Defendant in respect of the Preliminary Objection and that he was not aware or notified of the Ruling date fixed for 19<sup>th</sup> December, 2018.

6. Counsel finally deponed that upon perusal of the Ruling, it was apparent that the court, through a *bona fide* mistake, made an order to strike out the suit against the 2<sup>nd</sup> Defendant and the amended Notice of Motion dated 24<sup>th</sup> February, 2015 on the grounds that the Plaintiff had not obtained the leave of the court to amend the pleadings to join the 2<sup>nd</sup> Defendant while in fact the said leave was granted on 17<sup>th</sup> November, 2014.

7. The Application was opposed vide the 2<sup>nd</sup> Defendant's Grounds of Opposition dated 2<sup>nd</sup> November, 2020 where counsel stated that there was never any Application on record by the Plaintiff to enjoin the 2<sup>nd</sup> Defendant to the suit; that an Application to add a Defendant to a suit is made under Order 1 of the Civil Procedure Rules and not Order 8 Rule 5 as alleged by the Plaintiff and that the Application should be dismissed.

8. Counsel for the Plaintiff submitted that the Honourable Court on 17<sup>th</sup> November, 2014 made the following order which he invited the court to refer to:-

*“The Plaintiff to amend and serve pleadings to Join Rural Electrification Authority within fourteen (14) days.”*

9. Counsel for the Plaintiff submitted that an Application to join a party as a Defendant under Order 1 Rule 10(2) of the Civil Procedure Rules need not be done by filing a formal Application; that Rule 25 of the said order allows an Application to be made orally in court; that the Application to add the 2<sup>nd</sup> Defendant as a party to this suit was determined on 17<sup>th</sup> November, 2014 and that if anything, the 2<sup>nd</sup> Defendant ought to have challenged the orders made through a review or Appeal since the said orders are still in force.

10. In its Application, the Plaintiff has sought for an order of this court to review its Ruling of 15<sup>th</sup> February, 2019. The Application is premised on the ground that there is an error apparent on the face of the record which calls for the review of the Ruling.

11. The law under which an order of review can issue is provided for under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules. Order 45(1) of the Civil Procedure Rules 2010 provides that:

*“1. (1) Any person considering himself aggrieved-*

*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.”*

12. This suit was commenced by way of Plaint and a Notice of Motion Application dated 27<sup>th</sup> October, 2014 against the 1<sup>st</sup> Defendant alone. The record shows that on 17<sup>th</sup> November, 2014, the Plaintiff's advocate made an oral Application to amend the Plaint and join the 2<sup>nd</sup> Defendant in these proceedings. The said oral Application was allowed by the court as follows:

*“The Plaintiff to amend and serve pleadings to join Rural Electrification Authority within fourteen (14) days.”*

13. The Plaintiff filed an Amended Plaint on 2<sup>nd</sup> March, 2015 in which it enjoined the 2<sup>nd</sup> Defendant as a party in the suit. When the 2<sup>nd</sup> Defendant was served with the Amended Plaint, it filed a Notice of Preliminary Objection dated 28<sup>th</sup> April, 2015 in which it averred that *“the Plaintiff has not sought for leave of court to enjoin the 2<sup>nd</sup> Defendant.”*

14. I have gone through the record and have not come across any evidence to show that the Plaintiff's advocate was served with the Notice of Preliminary Objection, or a mention notice for 23<sup>rd</sup> July, 2018 when directions were given for the hearing of the Notice of Preliminary Objection. Indeed, the record shows that the Plaintiff did not participate in the hearing of the Notice of Preliminary Objection at all.

15. The Ruling of this court in respect of the Notice of Preliminary Objection shows that the said Preliminary Objection was allowed as follows:

*“Having not sought leave of the court to enjoin the 2<sup>nd</sup> Defendant in the suit, the suit as against the 2<sup>nd</sup> Defendant and the Amended Summons dated 2<sup>nd</sup> March, 2015 are bad in law. For those reasons, I allow the 2<sup>nd</sup> Defendant's Notice of Preliminary Objection dated 28<sup>th</sup> April, 2015.”*

16. The record shows that indeed the Plaintiff amended the Plaint and joined the 2<sup>nd</sup> Defendant with the leave of the court, which leave was granted on 17<sup>th</sup> April, 2014. The 2<sup>nd</sup> Defendant's counsel, while filing the Notice of Preliminary Objection, seems not have been aware of the said court order, neither was this court.

17. Considering that Order 1 Rule 10 (2) of the Civil Procedure Rules allows the joinder of a Plaintiff or Defendant to an existing suit with the leave of the court, and the leave to join the 2<sup>nd</sup> Defendant in this suit having been granted by the court, it follows that the decision of this court was made in error. The said error is apparent on the face of the record. That being the case, this court will review its Ruling of 15<sup>th</sup> February, 2019 accordingly.

18. For those reasons, I find that the Application dated 24<sup>th</sup> July, 2020 to be meritorious. The Application is allowed as prayed.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 30<sup>TH</sup> DAY OF JULY, 2021.**

**O. A. ANGOTE**

**JUDGE**