



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC. CASE NO. 58 OF 2018**

**KENYA POWER & LIGHTING CO. LIMITED.....PLAINTIFF**

**VERSUS**

**SAMMY WAMBUA KYALE.....1<sup>ST</sup> DEFENDANT**

**B.M. WAMBUA.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. In the Notice of Motion dated 14<sup>th</sup> June, 2019, the Plaintiff has prayed for the following reliefs:

***a. That the Honourable Court be pleased to review and set aside the Judgment entered on 28<sup>th</sup> February, 2019 against the Plaintiff.***

***b. That this Honourable Court be pleased to order for the hearing to start de novo so that the Plaintiff can defend its claim and that raised in the Counter-claim.***

***c. That costs of this Application be provided for.***

2. The Application is supported by the Affidavit of the Plaintiff's advocate who has deponed that the Plaintiff was served with the hearing notice dated 22<sup>nd</sup> May, 2018 in which the matter was slated for hearing on 18<sup>th</sup> July, 2018; that she attended court on 18<sup>th</sup> July, 2018 on which date the matter did not proceed and that she was shocked when she was served with the Defendants' Party and Party Bill of Costs.

3. Upon perusal of the court file, the Plaintiff's advocate deponed that she noted that the matter had proceeded for hearing in her absence on 22<sup>nd</sup> October, 2018; that the Plaintiff's advocate was never served with a hearing notice of 22<sup>nd</sup> October, 2018 and that service of a hearing notice is a mandatory requirement under the law.

4. The Plaintiff's advocate finally deponed that the Judgment and the subsequent Decree was obtained irregularly and ought to be set aside and that the Plaintiff ought to be heard and the case determined on its merits.

5. In response, the 2<sup>nd</sup> Defendant deponed that the Plaintiff is seeking for orders that are not capable of being granted by the court on account of review; that the suit was dismissed way back on 22<sup>nd</sup> October, 2018; that the said dismissal has never been set aside or appealed against and that the hearing date of 22<sup>nd</sup> October, 2018 was properly served upon the Plaintiff's advocate vide a hearing notice dated 25<sup>th</sup> September, 2018.

6. In her submissions, the Plaintiff's advocate submitted that she did not attend court when the matter came up because she was not aware of the date; that she was never informed of the Judgment date as there was no notice served upon her and that the Judgment of the court should be set aside.

7. Counsel submitted that while deciding whether there is a sufficient cause or not, the court must bear in mind the object of doing substantial justice to all the parties concerned and that the technicalities of the law should not prevent the court from doing substantial justice.

8. The Plaintiff's counsel submitted that had the hearing date been indicated in her office diary, she would not have missed attending court for hearing and that the Plaintiff failed to attend court for the hearing because of the mistake and blunder caused by its counsel for not diarizing the date in the diary. Counsel relied on several authorities which I have considered.

9. On his part, the Defendants' advocate submitted that the Application before court is not premised on any of the three grounds provided for under Order 45 of the Civil Procedure Rules for review of decrees or orders and that the Application is not only defective, but one for dismissal.

10. The Defendants' counsel submitted that the Plaintiff has consistently failed to appear in court despite being served with hearing notices; that having executed the ex-parte orders it obtained in the year 2003, the Plaintiff lost interest in the suit property and that it is the Defendants that has been fixing the suit for hearing. Counsel relied on numerous authorities which I have considered.

11. This suit was commenced by the Plaintiff vide a Plaint dated 10<sup>th</sup> June, 2003. In the Plaint, the Plaintiff prayed for a permanent injunction restraining the Defendants from interfering with the laying of electric power transmission lines on land parcel Plot No. 3-784 curved out of L.R. No. 10967.

12. This matter came up for mention on numerous occasions. The record shows that on 16<sup>th</sup> April, 2018, the matter came up for pre-trial directions. Despite being informed of the date for pre-trial directions, the Plaintiff's advocate did not attend court on the said date. The court directed the parties to comply with the provisions of Order 11 of the Civil Procedure Rules and file their statements and documents within forty five (45) days. The court then fixed the matter for hearing on 18<sup>th</sup> July, 2018.

13. When the matter came up for hearing on 18<sup>th</sup> July, 2018, the Plaintiff's advocate was once again not in court. The matter was adjourned until 22<sup>nd</sup> October, 2018. Despite being served with a hearing notice for 22<sup>nd</sup> October, 2018, the Plaintiff's advocate did not attend court. The matter proceeded for hearing in her absence.

14. The Plaintiff's advocate is seeking for an order to set aside the Judgment of the court on the ground that she was never notified of the hearing date. This assertion by the Plaintiff's advocate is false because the Hearing Notice dated 25<sup>th</sup> September, 2018 for the hearing of the suit on 22<sup>nd</sup> October, 2018 was duly served upon her.

15. Indeed, the official stamp of the firm of Wairagu and Wairagu advocates is embossed on the said hearing notice showing that the same was received on 25<sup>th</sup> September, 2018 at 12.37p.m. This fact was known by the Plaintiff's advocate before filing the Application because the stamped Hearing Notice is part of the court records.

16. The issue of having not diarized the date of 22<sup>nd</sup> October, 2018 was only brought up by the Plaintiff's advocate in her submissions, and not in the Supporting Affidavit. I will therefore not consider the issue of whether the said hearing date was misdiarized by the Plaintiff's advocate or not and the consequences thereof.

17. Having denied that her office was never served with the hearing notice of 22<sup>nd</sup> October, 2018, a fact that the Plaintiff's advocate knew was untrue, I find that the Plaintiff's Application dated 14<sup>th</sup> June, 2019 is unmeritorious. The Application dated 14<sup>th</sup> June, 2019 is dismissed with costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 24<sup>TH</sup> DAY OF APRIL, 2020.**

**O.A. ANGOTE**

**JUDGE**