



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAIROBI
MILIMANI LAW COURTS
ELC. CASE NO. 88 OF 2014

NUH ABDILLE HASSAN.....PLAINTIFF

VERSUS

CHIEF LAND REGISTRAR.....1. DEFENDANT

NATIONAL LAND COMMISSION.....2. DEFENDANT

RULING

Coming up before me for determination is the Defendants/Applicants' Notice of Motion dated 21st September 2015 seeking for this court to set aside the ruling delivered by Justice Onguto on 10th March 2015 dismissing the Defendants' Statement of Defence filed on 6th November 2014, that the said Statement of Defence and the annexed Defendants' List and bundle of documents and witness statements be allowed and deemed to have been filed within time.

The Application is premised on the grounds appearing on its face together with the Supporting Affidavit of Wambui Nganga, the State Counsel having the conduct of this matter, sworn on 21st September 2015 in which she averred that the Plaintiff served the Office of the Attorney General with an Amended Plaint on 24th October 2014 to which was attached an application being Notice of Motion dated 24th June 2014 seeking to enter judgment in default against the Defendants. She further averred that she filed Grounds of Opposition thereto and a ruling was delivered by Justice Onguto allowing the Defence filed on 6th November 2014 on record and requiring the Defendants to put in their witness statements and documents within 30 days. She further averred that despite efforts to obtain written instructions and documents from the Chief Land Registrar, the same were not forthcoming as the registry at that time was undergoing a restructuring. She added that on 10th March 2015, the matter was mentioned before Justice Onguto who proceeded to strike out the Defence filed on 6th November 2014 for failure to comply with his directions. She stated that it was difficult to trace the parcel file for the suit property but that after a protracted process, she was able with the assistance of a registrar at the Ministry of Lands to trace the file which shed light on the matter. She further indicated that with the file traced, she was able to prepare a witness statement and a list and bundle of documents which she annexed. She stated that the Defendants have a strong defence, that the documents raise serious triable issues that ought to be canvassed at a full trial and that being a land matter involving a high value property, the public stands to lose should the case go undefended. She added that the Plaintiff shall not suffer any loss which cannot be compensated with an award of costs.

The Application is contested. The Plaintiff/Respondent, Nuh Abdille Hassan, filed his Replying Affidavit sworn on 25th November 2015 in which he averred that it is true that the court delivered a ruling in respect of the Plaintiff's Notice of Motion dated 24th June 2014 seeking leave to apply for default judgment against the Defendant in which the court declined to grant those orders and instead directed the Defendants to file their witness statements and list and bundle of documents within 30 days failing which the Statement of Defence filed by them on 6th November 2014 would be struck off. He added that his Advocates wrote to the Defendants a letter dated 23rd January 2015 reminding them to comply with the court's direction to file their necessary documents. He further stated that on 10th March 2015, the court proceeded to strike out the Statement of Defence and ordered the matter to proceed for formal proof. He added that the Defendants are only interested in derailing the final determination of this matter and to waste the court's time. On those grounds, he sought that this Application be dismissed.

Both parties filed their written submissions.

This is essentially an application for review, seeking the review of Justice Onguto's ruling delivered on 10th March 2015 striking out the 1st and 2nd Defendants' Statement of Defence dated 6th November 2014 and filed on 7th November 2014 as well as denying the Defendants a chance to file their witness statements and their list and bundle of documents. It is true that Justice Onguto, in his Ruling in respect of the Plaintiff's Notice of Motion dated 24th June 2014 delivered on 18th November 2014 had indeed given the Defendants a window of 30 days from that day to file their witness statements and list and bundle of documents. The Defendants failed to comply prompting Justice Onguto to issue a further ruling on 10th March 2015 which I have alluded to earlier. On this issue of review, the applicable law is as follows:-

Section 80 of the Civil Procedure Act provides that,

“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.”

Then **Order 45 Rule 1 of the Civil Procedure Rules, 2010** provides that:-

“(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.”

Going by the legal provisions cited above, the Applicant is only entitled to a review of earlier orders if he has discovered 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 the order was made. In this particular case, the Defendants/Applicants are relying on the ground that they have now come across new and important matter and evidence which was not previously available to them. It is their assertion that they had been unable to trace the file for the suit property at the Ministry of Lands for some time but that they have

now succeeded to trace the said file which has shed much light into the matter. They have annexed the draft witness statement as well as documents which they wish to rely on in defending this suit. I have had a look at the said documents which have been annexed to this Application and have arrived at the conclusion that the information supplied is vital in shedding light on the issue of ownership of the suit property for which two title deeds have been produced. I am further satisfied that this was not information that was available to the Defendants/Applicants earlier but has only recently come into their possession after the file for the suit property at the Ministry of Lands has been unearthed. My finding is that this is a matter in which the Defendants/Applicants are entitled to a review of Justice Onguto's Ruling delivered on 10th March 2015. That Ruling is hereby set aside and the 1st and 2nd Defendants' Statement of Defence dated 6th November 2014 and filed on 7th November 2014 is deemed as being duly filed and properly on the court record.

This Application is therefore allowed. Costs shall be in the cause. The parties hereto are at liberty to proceed to set the suit down for hearing.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF MARCH 2017.

MARY M. GITUMBI

JUDGE