



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
MILIMANI LAW COURTS
ELC. CASE NO. 565 OF 2009

LEONARD NJOGU..... PLAINTIFF

VERSUS

PARMENAS KABUTHIAI.....DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 12th May 2015 in which the Defendant/Applicant seeks for an order that the summary judgment entered against him on 30th May 2010 by Hon. Justice Aggrey Muchelule be reviewed and set aside including all consequent orders thereof, that he be granted leave to file a Defence and that he be allowed to enjoin the Housing Finance Company Kenya Limited as a third party herein and a third party notice be issued.

The Application is premised on the grounds appearing on its face together with the Supporting Affidavit of Monica Nyambura Mbuthia sworn on 12th May 2015 in which she averred that she substituted the Defendant in this suit who was her husband and who died on 10th October 2014. She averred further that her late husband was mentally disturbed even before institution of this suit. She stated that her late husband was attending Masaba Hospital since February 2002 and on 11th March 2008, Dr. Wilfred Isoe found that he suffered from psychosis and hypertension while Dr. G. Mareko of Kenyatta National Hospital found that he suffered from clinical Parkinson's disease with cognitive impairment in February 2010. She further averred that she only came to obtain the reports of the two doctors later and filed a motion on 13th October 2010 to be appointed as her husband's guardian among other prayers. She added that her husband died before the motion could be heard and determined. She accused the Housing Finance Company Kenya Ltd of fraudulent dealings with the suit property culminating with the sale of the suit property to the Plaintiff. On those grounds, she sought for this Application to be allowed as prayed.

The Application is not contested.

On the issue of the review of the order issued by this court on 30th May 2010, 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 she has discovered new and important matter or evidence which, after the exercise of due diligence, was not within her knowledge or could not be produced by her at the time the order was made or on account of some mistake or error apparent on the face of the record or for any other sufficient reason. In addition, such a request must have been made without “unreasonable delay”. In this particular case, the Applicant is relying on medical reports from two doctors who treated the late Parmenas Kabuthiai to make the argument that he was not mentally stable to be able to prosecute this suit properly. Firstly, the medical reports produced by the Applicant relate to periods of time before the impugned Ruling of 30th May 2010 was delivered. Those reports are therefore not new and important matter or evidence which came to the Applicant after the impugned Ruling. Secondly, this Application was filed on 19th May 2015, a period in excess of 5 years after the impugned Ruling was delivered on 30th May 2010. No explanation whatsoever was given by the Applicant as to why it took her more than 5 years to seek the review of the impugned Ruling. I consider that delay to be “unreasonable delay” which disentitles the Applicant from a review of the impugned Ruling.

In light of the foregoing, this court finds that the Applicant has not shown any sufficient reason which warrants this court to review its decision delivered on 30th May 2010. Accordingly, this Application is hereby dismissed with no order as to costs.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 5TH DAY OF MAY 2017.

MARY M. GITUMBI

JUDGE