



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAIROBI
MILIMANI LAW COURTS
ELC. CASE NO. 41 OF 2014

JOHN NGARUIYA.....1ST PLAINTIFF

ROSEMARY NJERI NDENDERU.....2ND PLAINTIFF

VERSUS

N.S.S.F. BOARD OF TRUSTEES.....DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 20th August 2015 in which the Plaintiffs/Applicants seek for an order to review and set aside the orders of 15th May 2015 dismissing this suit for want of prosecution and an order to allow the Plaintiffs to prosecute this suit on its merits.

The Application is premised on the grounds appearing on its face together with the Supporting Affidavit of the 1st Plaintiff, John Ngaruiya, sworn on 20th August 2015 in which he averred that he was represented by the firm of M/s Muriuki Njagagua & Co. Advocates at the time this suit was filed against the Defendants. He further averred that he engaged in discussions with the Defendant on an amicable settlement of this matter after which the Defendant filed an application to dismiss this suit for want of prosecution. He further indicated that he changed lawyers and appointed M/s Ngugi, Mwaniki & co. Advocates who filed a response to that application. He also stated that it took the Defendant 4 years to set that application down for hearing. He averred further that at the time of the hearing of that application, the court failed to appreciate that pending the hearing of the main suit his former advocates were involved in a serious road traffic accident which led to his hospitalization for a long period of time. He further averred that the court also failed to appreciate that during the pendency of that application, his current advocates tried to set the suit down for hearing by having it transferred to the ELC, preparing and filing pre-trial documents and obtaining and setting the matter down for pre-trial conference. It was his belief that if the trial court had taken this into account, it would have reached a different decision.

The Application is contested. The Defendant/Respondent filed the Replying Affidavit of Austine Ouko, its General Manager, Corporate Affairs and Company Secretary, sworn on 14th January 2016 in which he averred that the two grounds offered by the Plaintiffs as grounds of review, that is the Plaintiffs' advocate was indisposed for a lengthy period and also that the Plaintiffs' suit was ready for hearing are not true or genuine therefore the Application should be dismissed with costs.

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 Plaintiffs/Applicants are only entitled to a review of earlier orders if they have discovered new and important matter or evidence which, after the exercise of due diligence, was not within their knowledge or could not be produced by them at the time the order was made. In this particular case, the grounds relied on by the Plaintiffs/Applicants for an order of review are not new and important matters or evidence. The issue of their previous advocate failing in his duties as well as steps taken to set this suit down for hearing were raised before Justice Mutungi who delivered the Ruling sought to be reviewed. And even if these matters were not considered, they are issues which could be raised at that stage after the exercise of due diligence. I am not satisfied that the Plaintiffs/Applicants have satisfied the requirements for the review of the impugned Ruling that dismissed this suit for want of prosecution. This Application is accordingly dismissed with costs to the Defendant.

It is so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 22ND

DAY OF SEPTEMBER 2017.

MARY M. GITUMBI

JUDGE