



REPUBLIC OF KENYA



KENYA LAW
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**Odhalo & 6 others v City Council of Nairobi (Civil Suit 623 of 2003)
[2023] KEHC 18026 (KLR) (Civ) (25 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18026 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL**

CIVIL SUIT 623 OF 2003

JN MULWA, J

MAY 25, 2023

BETWEEN

MRS JEANNE ODHALO 1ST PLAINTIFF
THOMAS ABUOGA 2ND PLAINTIFF
SAMSON GACHAGO 3RD PLAINTIFF
**BEN ASHIHUNDU (ALL SUING AS OFFICIALS OF WOODLEY RESIDENTS
WELFARE SOCIETY AND ON THEIR OWN BEHALF) 4TH PLAINTIFF**
CHRISTOPHER NDICHU MBUGUA 5TH PLAINTIFF
WAHOME TIMOTHY GATHERU 6TH PLAINTIFF
ABRAHAM LISERO 7TH PLAINTIFF

AND

CITY COUNCIL OF NAIROBI DEFENDANT

RULING

1. The application for consideration is the plaintiffs notice of motion dated July 12, 2022. The plaintiffs/ applicants seek the following Orders:
 1. That the Honourable Court be pleased to review and vary the interlocutory Order issued by the Hon Justice Isaac Lenaola (as he then was) on June 16, 2004 and the interlocutory order thereof be discharged.
 2. That as a consequence thereto, this Honourable Court do order that the sum of Kshs. 1,850,675/= deposited in court by the members of the Plaintiffs



Society namely Woodley Residents Welfare Society and otherwise described as Tenants of Joseph Kang'ethe Estate Nairobi, as security for the interlocutory orders obtained from Court, be transferred and paid to their Advocates, Messrs. C. N. Kihara & Company Advocates.

3. That the Honourable Court be pleased to give any further or such other order(s) as it may find prudent to meet the interests of Justice.
4. That the costs of the application be provided.
2. The Application was brought pursuant to order 40 rule 6 & 7 and order 27 rule 9 of the *Civil Procedure Rules*, 2010 as well as sections 1A, 1B and 3A of the *Civil Procedure Act*. It is based on the grounds set out on its face and supported by the affidavit of Samson Gachago, the 3rd Plaintiff herein and the Chairman of Woodley Residents Welfare Society.
3. The Plaintiffs aver that on June 23, 2003, the plaintiffs, through their Advocates Messrs. C. N. Kihara & Company Advocates, filed a Chamber Summons application seeking injunctive to restrain the Defendant from evicting, harassing and repossessing their houses over rent arrears. They state that on 16th June 2004, Lenaola J. (as he then was) granted interlocutory conservatory orders sought on condition that the Plaintiffs do remit the monthly rent payable to the Defendant in court. They assert that over time and variously, they deposited a total sum of Kshs. 1,850,675/= to the Court in satisfaction of the said Court Order.
4. The Plaintiffs contend that it has been fifteen (15) years since the injunction was granted and that its conditional effects lapsed as the Defendant forced them to pay the rent due and the balances of the purchase prices using other resources and not from the deposits in Court. They urge that they be reimbursed the deposited sum of Kshs. 1,850,675/= through their Advocates on record, to account to them subject to their fees.
5. The Defendant did not oppose the Application despite being duly served with the same as well as the hearing notices as evidenced by the two Affidavits of Service filed in court by the Plaintiffs advocates.
6. The court order of June 16, 2004 that the Plaintiffs seek to be discharged reads in part:
 - “ 1. That this suit be listed for hearing on 21st and July 22, 2004 at 9.00am.
 2. That in the meantime all the 94 tenants represented by Ms Kihara & Company Advocates in this suit should pay their respective one (1) month rent plus arrears of rent equivalent to (2) two months rent monthly with effect from July 1, 2004 until the final determination of this suit.
 3. That in default of payment of rent in (2) two above the defendant shall have liberty to evict or exercise such other right as the landlord which is deemed lawful.
 4. That rent so whereby in (2) above shall be received and receipted by the Defendant failure to which the Applicants shall have leave to deposit the rent in court.
 5. That this matter be mentioned on 9th July at 9.00am.



6. That as long as this matter is in court and undetermined, no party and specifically the Town Clerk of the respondent should make any and issue statements which fly in the face of the existing court orders.”
7. This is a very old matter that has been in court for twenty years now. A perusal of the court file reveals that the matter has never progressed to hearing. The parties filed several other applications after the order of Justice Lenaola J (as he then was) then there was a long unexplained hiatus of over ten years before the matter came up on December 7, 2018 for a Notice to Show Cause why it should not be dismissed. However, even after the NTSC, it appears that no action was taken in the matter until July 13, 2022 when the instant application was filed in court.
8. Be that as it may, the Plaintiffs have not placed before the court any evidence of the rent arrears paid to the Defendant through alternative means as alleged. In addition, they have not annexed receipts or any concrete evidence to prove that they deposited the sum of Kshs. 1,850,675/= in court in compliance with the court order of 16/6/2004. The annexed schedule of payments marked “SG-2” prepared by the Plaintiffs advocates cannot suffice as proof of payment in the absence of court deposit receipts. The deposit receipt issued by the court would in my view be sufficient to prove that indeed the deposit was made. The court cannot grant orders based on bare averments by the parties without any proof even if the Defendant failed to respond to the application. It is the duty of the parties and/ or their counsel to ensure that the evidence is duly placed before the court if the court is to believe them or make any favourable orders. The court is cautious not to make orders in vain, and that which may not be executable.
9. For the foregoing, the court finds that the Plaintiffs application lacks merit and is hereby dismissed with no order as to costs.

Orders accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 25TH DAY OF MAY 2023.

JANET MULWA

JUDGE

