



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ENVIRONMENTAL AND LAND DIVISION**  
**ELC CIVIL SUIT NO. 614 OF 2012**

DAVID NGATI.....1<sup>ST</sup> PLAINTIFF  
YUDA JOSEPH..... 2<sup>ND</sup> PLAINTIFF  
BONIFACE MATHEKA.....3<sup>RD</sup> PLAINTIFF  
JAMES NDETO.....4<sup>TH</sup> PLAINTIFF  
GEOFFREY OCHANDA ..... 5<sup>TH</sup> PLAINTIFF

**VERSUS**

EMBAKASI VILLAGE CRAFTS JUA KALI ASS.....1<sup>ST</sup> DEFENDANT  
NAIROBI CURIOS JUA KALI ASSOCIATION.....2<sup>ND</sup> DEFENDANT  
JOSEPH M. MUTIE.....3<sup>RD</sup> DEFENDANT  
JOSEPH OBONYA.....4<sup>TH</sup> DEFENDANT  
JULIUS MUANGE.....5<sup>TH</sup> DEFENDANT  
ANDREW MBITHI.....6<sup>TH</sup> DEFENDANT  
BONIFACE OMBUI.....7<sup>TH</sup> DEFENDANT  
JEMIMAH KIOKO.....8<sup>TH</sup> DEFENDANT  
JOYCE MUSILA.....9<sup>TH</sup> DEFENDANT  
KYALE SIMBA.....10<sup>TH</sup> DEFENDANT  
JANE MUNANIE.....11<sup>TH</sup> DEFENDANT  
DANIEL MUSEMBI .....12<sup>TH</sup> DEFENDANT

## RULING

By a Notice of Motion application dated 4<sup>th</sup> October 2013 the plaintiffs seek a review and/variation of the court's ruling of 3<sup>rd</sup> October 2013 in regard to the application dated 17<sup>th</sup> September 2012. The court's ruling as per the record was delivered on 20<sup>th</sup> September 2013. The plaintiffs further seek an order that the Respondents be directed to refrain from acts of waste/sale and/or in any other manner interfering with Land Parcel **NO. 21695** and/or part of it until the internal management wrangles are resolved by the Registrar of societies and/or the Registrar calls for fresh elections.

The plaintiffs premise the application inter alia on the grounds that:-

- i. The court in its ruling established that there exists management wrangles between parties to the suit,
- ii. The court advised in its ruling that these wrangles be resolved by the Registrar of societies,
- iii. The respondents comprising of the current officials of the association have been involved in the mismanagement of the society's properties and in particular have proceeded to sell off part of **L.R. NO. 21695** without consultations and/or authority from the majority of its members.

The plaintiffs application is further supported on the grounds contained in the supporting affidavit of **David Ngati** sworn on 4<sup>th</sup> October 2013, and which virtually reiterates the grounds set out on the face of the application.

The Defendants/Respondents oppose the Plaintiffs application and have filed grounds of opposition and inter alia state that there is no new evidence adduced to warrant a review of the ruling dated 20<sup>th</sup> September, 2013 and that the injunctive orders sought in the plaintiffs application do not lie in law in a review process. Both counsel for the plaintiffs/applicants and the Defendants/Respondents have filed written submissions to articulate their respective positions.

The plaintiffs application is expressed to be brought under the provisions of section 1A, 1B and 3A of the Civil Procedure Act and order 45 of the Civil Procedure Rules. A party who seeks a review of a decree or order has to satisfy the conditions upon which a review may be granted set out under order 45 Rule 1 (I) of the Civil Procedure Rules.

**Order 45 rule 1(I) provides:-**

1. **(I) 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 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.**

Thus the grounds on which a party may seek a review under order 45 Rule 1 would be:-

- i. where there is discovery of new and important evidence which was not available as at the time the decree or order was made.
- ii. on account of some mistake or error apparent on the face of the record.

iii. any other sufficient cause,

iv. application has to be made without unreasonable.

From my reading and understanding of the plaintiffs application the same is not based on the discovery of new and important evidence that was not available at the time the order was made and neither is it, made on account of some mistake or error apparent on the face of the record.

The only other ground the plaintiff could rely on is “**Any other sufficient cause**”. There is no question that the plaintiff brought the application without unreasonable delay. The order sought to be reviewed was made on 20<sup>th</sup> September 2013 and the instant application was filed on 8<sup>th</sup> October 2013 and the lapse of say 17 days cannot be said to represent any unreasonable delay.

The issue thus would be whether the plaintiffs have demonstrated there is a sufficient cause to have the order reviewed as sought by the plaintiffs. In the application determined by the court the annexure marked “**DNI**” attached to the plaintiffs supporting affidavit in the present application for review was equally annexed to the earlier application and marked similarly as “**DNI**” and thus the same was available to be considered and was considered by the court. The plaintiffs further premise their present application on the fact that the court made findings to the effect that there were management wrangles between two competing interest groups of the associations and the court in its wisdom offered some words of advise that the members could perhaps seek a resolution of the wrangles through the intervention of the Registrar of Societies whose mandate extends to regulating the affairs of registered societies and/or organizations. The plaintiff wants the court to enter the fray by issuing restraining orders against one group of members pending the resolution of the wrangles by the Registrar of societies.

The court will decline such an invitation as effectively it would amount to permitting the plaintiff to reargue the earlier application on new grounds and in effect have a second bite of the cherry. The initial application before the court was not seeking a stay of proceeding and maintenance of status quo pending any resolution of the dispute by the Registrar of societies and there would be no basis for the court in the guise of a review of its order of 20<sup>th</sup> September 2013 to make an order that is totally unrelated to the orders the plaintiffs sought in the earlier application. On the basis of the material that was before the court at the time the court made its order dismissing the plaintiffs application for injunction it is my view the court was justified in making the order it did.

As the court observed in its ruling there was no demonstration that the Defendants as the current office bearers acted **ultra vires** the associations constitutions in any of their dealings so as to invite the intervention of the court. The court cannot intervene in the affairs of an institution unless there is cogent evidence that the rights and interests of the members have been infringed and/or there is risk of infringement occurring unless there is an order of restraint. The plaintiffs have to act within the constitution of the association and it was within that context that the court preferred “**unsolicited**” advice that perhaps the plaintiff could seek the intervention of the Registrar of societies in case they felt there was an infringement of their membership rights so that the matters could be addressed within the confines of the Associations constitution. I would repeat the advice.

In the whole I find the plaintiffs application for review to be lacking in merit and accordingly order the same to be dismissed. I will however make no order for payment of costs in regard to this application and I direct that each party meets their own costs for the application.

**Ruling read in open court on this 28<sup>th</sup> day of February 2014**

**J. M. MUTUNGI**

**JUDGE**

**In presence of:**

.....for the plaintiffs

.....for the Defendants