



IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 568 OF 2012

BETWEEN

RICHARD WERE.....1ST PETITIONER
SILPHIA OKEYO 2ND PETITIONER
BENTA AKOTH OLWENY..... 3RD PETITIONER
MARGARET KWAMBOKA OGEKA 4TH PETITIONER
PATRICK MWANIKI 5TH PETITIONER
MARY NJOKI 6TH PETITIONER
LYDIA WANJIKU 7TH PETITIONER
JANE M. NYAGA 8TH PETITIONER
ANASTASIA MUNEE 9TH PETITIONER
LEONARD G. MUNGAI 10TH PETITIONER
EDWARD BUSURU 11TH PETITIONER
PETER NDIKU 12TH PETITIONER

AND

PERMANENT SECRETARY

MINISTRY OF HEALTH 1ST RESPONDENT

PERMANENT SECRETARY

MINISTRY OF MEDICAL SERVICES 2ND RESPONDENT

PERMANENT SECRETARY

MINISTRY OF HOUSING 3RD RESPONDENT

THE ATTORNEY GENERAL 4TH RESPONDENT

RULING NO. 3

1. The matter before the court is the Notice of Motion dated 24th March 2014 filed by petitioners seeking review of the judgment delivered on 31st May 2013. The grounds of the application are set out on the face of the Motion and are amplified by the affidavit of Margaret Kwamboka Ogeka, the 4th petitioner, sworn on 21st March 2014 and are as follows;
 - a. *This Honourable Court delivered its judgment on 31st May 2013 wherein it dismissed the Petitioners Petition and ordered the petitioners to vacate the staff houses at Mathari Hospital by 31st July 2013.*
 - b. *On 11th February 2014 this Honourable Court allowed the petitioners to stay in the said staff houses only until 30th March 2014 in default of which they would be liable for eviction at the instance of the Respondents.*
 - c. *It is the Petitioners' case that the 3rd Respondent is the proper person charged with the responsibility of housing by the government.*
 - d. *That the said 3rd Respondent provided housing for the Petitioner based on the house allowance it was able to pay, which has always been way below the market rate, hence creating a legitimate expectation that they would stay so housed until retirement.*
 - e. *That the Petitioners are all variously within 3 to 4 years of retirement and it is difficult at this stage in their life to be able to adapt to finding new housing arrangements with their very meagre salaries.*
 - f. *The said 3rd Respondent is still deducting the house rent from the Petitioners Payslips*
 - g. *It is in the interests of justice, equity and fairness that the said Orders are stayed.*
2. In order to deal with the application for review it is necessary to recount the nature of the case and the proceedings to date. The petitioners are civil servants and at the time of filing the petition they were residents of the staff quarters at Mathari Hospital ("the Hospital") although they worked for various ministries. In April 2012, there was a re-organisation in the Civil Service which meant that officers were transferred to the Hospital and the petitioners were transferred to other departments. The Hospital took the position that it wanted its staff to occupy the houses whereupon notices were issued by the Ministry of Health directing the petitioners to vacate the houses at the Hospital. When the notices were not honoured it threatened to commence eviction of the petitioners.
3. It is the eviction notices that precipitated the filing of the petition dated 7th December 2012. The petitioners moved the court for the following orders;
 - a. *A declaration that eviction notices issued to the petitioners be declared unconstitutional and the same be quashed.*
 - b. *In alternative to the above the 1st, 2nd and 3rd respondents be ordered to provide alternative housing to the petitioners before effecting the said notices if found to be lawful.*
 - c. *Any other order that this Honourable Court may deem fit for enforcement and protection of the petitioners' rights.*
 - d. *The respondents and cited 3rd party do pay the costs occasioned by and of this petition jointly and severally.*
4. The matter was urged in full and I came to the conclusion that the petitioners had not established a case for relief under **Article 43** of the Constitution which they had invoked to preserve their right

to occupy the houses at the Hospital. In my judgment I stated as follows, “ [18] I agree with the respondents contention that the State obligation under **Article 43(1)(b)** is not to give houses to specific applicants but to provide a framework under which the citizen may have access to housing. In order achieve the objective of ensuring that a class of employed person access housing the State has through the **Employment Act** imposed a mandate on the employer to provide housing or an allowance to the employee to obtain housing in the market. The mandate imposed on every employer is consistent with the State obligations under **Article 43(1)(b)** to provide access to housing. The government, as employer, has provision for either housing or payment of house allowance and in the circumstances of this case, it is clear that the respondents are not in contravention of the law. **Regulation L.5** is clear as to whom government quarters are allocated to. It reads as follows, “Government quarters are allocated at the station where an officer is posted for duty on the basis of the points system as will be provided from time to time by the Ministry responsible for housing. In allocating a Government quarter, consideration will also be given to other general requirements such as the family size and proximity to the office.” Therefore, the petitioners having been transferred to another Ministry/station, they were no longer eligible to benefit under these rules.” I dismissed the petition and ordered that, **“The petitioners shall vacate the Staff houses at Mathari Hospital by 31st July 2013.”**

5. The matter did not end with the judgment for when 31st July 2013 arrived, the petitioners instructed the firm of *S. Ogeto Ongori and Company Advocates* to apply for extension of time to vacate the houses. By a Chamber Summons dated 19th August 2013, the petitioner’s prayed that, *“The Honourable Court do consider that this is mid-year and extend the time to 31st December 2013 for the applicants to comply with the courts orders made on 31st May 2013.”* The application was adjourned to be heard on 4th September 2013 and eviction of the petitioners stayed. Unfortunately, the matter was not listed on that date. When it came up for hearing once again on 16th September 2013, the matter was adjourned to 1st October 2013. Once again it was not listed and it stayed in abeyance until the respondents moved to reconstruct the court file on 23rd January 2014 as the court file had been misplaced.
6. The respondents then moved the court for eviction orders by the Notice of Motion dated 30th January 2014. On 4th February 2014, I heard the application and ruled as follows, *“This matter has been before me on several occasions. I recall that since the judgment in May 2013, I gave the petitioners time to move out of the premises taking into account particularly the school year to enable them make arrangements for their children. It is now a new year and they have not moved. The court’s indulgence cannot be taken for granted and I reject any application for adjournment. I therefore make the following order:*
 - i. *The petitioners shall vacate the suit premises, Mathari Hospital on or before 10th February 2014 in default the respondent shall be at liberty to apply for orders of eviction.*
 - ii. *Mention on 11th February 2014 for further orders.”*
7. On 11th February 2014, after the parties pleaded for more time, I gave the following order, *“In view of my orders of 4th February 2014, I give the petitioner’s until 30th March 2014 to vacate the houses, in default the respondents shall be at liberty to apply for eviction orders.”* It is the imminence of the final date that has spurred the application for the review of the judgment.
8. The grounds for review are now well settled and are to be found in **Order 45 Rule 1(1)** of the **Civil Procedure Rules, 2010** which provides the grounds for review of a decree or order as follows:-

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.

9. The scope for review of a decree or order is therefore limited to a situation where an applicant has discovered new and important evidence which was not available at the time the decree was passed or where there is a mistake or error apparent on the face of the record or for any other sufficient reason. The Court of Appeal in the case of **National Bank of Kenya v Ndung'u Njau Civil Appeal No. 211 of 1996** stated that, “A review will be granted whenever the court considers it is necessary to correct an error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law.”
10. I have considered the brief arguments made by counsel for the parties and I take the following view of the matter. The grounds upon which the petitioners have moved the court do not fall within the purview of an application for review. They require the court to revisit the capacity of the 3rd respondent to allocate houses which was an issue central to the determination at the hearing. During the hearing and in the Judgment, the Court appraised itself of the **Code of Regulations (Revised 2006)** and in particular the provisions relating to **Government Housing at Section L**. In my view these are matters that were within the knowledge of the petitioners at the time the suit was filed and could have been brought to the fore for argument.
11. The issue of the circumstances of the petitioners is a matter I gave consideration to when they sought extension to vacate the premises. As I made it very clear in the judgment and my ruling of 4th February 2014, the houses are now required by members of staff of the Hospital. They equally are entitled to consideration and the petitioners’ interests have been accommodated sufficiently by the various extensions.
12. As regards the issue of house allowance, I reiterate that house allowance is intended to assist the petitioner look for alternative housing. It’s sufficiency or otherwise is a matter outside the scope of the inquiry that culminated in the judgment. However, as long as the petitioners’ continue to occupy government houses, their house allowance will continue to be deducted from their salaries. They cannot complain that their house allowance is being deducted while they continue to occupy the said houses.
13. While I sympathise with the petitioners’ plight and the fact that they have almost reached the retirement age, cases are ultimately decided on the material facts and the law. The Judgment has settled application of the law and the petitioner’s entitlement to the houses at the Hospital. The Court, on its part, has accommodated as far as is reasonably practicable the petitioners’ special difficulties by allowing them time to seek alternative accommodation since May 2013. The Court must also take into account the position of the Hospital employees who are entitled to reside at staff quarters in order to serve the patients better. Justice does not look at the plight of only one party but the circumstances of the entire case and in this respect the petitioners’ case must now give way to the reality of the Judgment.
14. The petitioners accuse their previous advocates of not arguing their matters vigorously by failing to disclose to the court matters which would have enabled the court reach a different conclusion. I take a different view. Their advocates on record discharged their obligation and they urged the petitioners’ case to the best of their abilities. I did not detect any shortcoming in their arguments or presentations. The court gave a decision which was made upon consideration of the facts and the

law and it is upon the petitioners' advocates' pleas that indulgence was given after the judgment. On 11th February 2014, I allowed the petitioners to address the Court directly and it is as a result of their supplications that I granted a further extension of time for them to vacate the premises.

15.No sufficient cause has been established to sway the exercise of my discretion. The application is in substance a request by the petitioners to be permitted to stay in the houses at the Hospital until retirement. The court cannot vary the Government housing policy of in favour of the petitioners and to the detriment of other civil servants who would be entitled to the same benefit the petitioners have enjoyed over the years.

16.Finally, this application has been brought 10 months after the judgment was delivered. In the eyes of the Court, this constitutes unreasonable delay.

17.The only possible order that can be made to conclude this matter is that the Notice of Motion dated 24th March 2014 is dismissed. I make no order as to costs.

DATED and DELIVERED at NAIROBI this 26th day of March 2014.

D.S. MAJANJA

JUDGE

Mr Githinji instructed by D. K. Githinji and Company Advocates for the petitioners.

Mr Wamotsa, Litigation Counsel, instructed by the State Law Office for the respondents.