



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MILIMANI**

**ELC 473 OF 2008**

**PETER GICHUHI as Chairman**

**SIMON KIMUNGE MWIHOTI as Secretary**

**STEPHEN KAMAU MUCHIRI as Treasurer suing for and**

**On behalf of MARURUI ESTATE RESIDENTS WELFARE**

**ASSOCIATION.....PLAINTIFF**

**VERSUS**

**JANET WAIRIMU MWANIKI.....1<sup>ST</sup> DEFENDANT**

**THE CITY COUNCIL OF NAIROBI.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. This suit was filed on 30<sup>th</sup> September 2008. As at 9<sup>th</sup> May 2013, the suit was not ready for hearing. The suit was first fixed for hearing on 17<sup>th</sup> February 2014. The first time it came up for hearing, the suit was removed from the hearing list on the ground that the parties were not ready to proceed.
2. The case was once more fixed for hearing on 19<sup>th</sup> November 2014. Come this date, the counsel for 1<sup>st</sup> Defendant indicated that they were not ready to proceed as they had not complied with Order 11 of the Civil Procedure Rules. The court then gave all the parties 30 days within which to comply with order 11 of the Civil Procedure Rules.
3. The case was once more fixed for hearing on 23<sup>rd</sup> November 2015. When the matter came up for hearing, the same could not proceed as the 1<sup>st</sup> Defendant's counsel had passed on. The case was again fixed for hearing on 4<sup>th</sup> April 2017 when again the same could not proceed as the 1<sup>st</sup> Defendant had not appointed a lawyer to replace her previous deceased advocate. The case was fixed for hearing on 14<sup>th</sup> March 2018 as the 1<sup>st</sup> Defendant had now identified a firm of Advocates who were to represent her. On 14<sup>th</sup> March 2018, the case could not proceed as the 1<sup>st</sup> Defendant had just appointed a new firm of Advocates. The case was adjourned to 27<sup>th</sup> September 2018 when again it could not proceed as the counsel for the 1<sup>st</sup> Defendant was said to be sick.
4. The case was listed for hearing before Justice Mutungi who was in Nairobi for service week. The date allocated was on 29<sup>th</sup> October 2018. On this date, the case could not proceed as there was no service of hearing notice on the part of the Defendants. The case was adjourned to 28<sup>th</sup> November 2018. On this date, the case could not proceed as the 1<sup>st</sup> Defendant's advocate said that he intended to cease acting for 1<sup>st</sup> Defendant as he had lost touch with his client. The case was fixed for mention before me on 5<sup>th</sup> December 2019.
5. When the matter came before me for mention, the court was informed that the counsel who had taken over wanted to photocopy pleadings to enable him proceed. The court granted this request and fixed the matter for mention on 29<sup>th</sup> April 2019. On 29<sup>th</sup> April 2019, the counsel for the Defendants did not attend court. Counsel for the Plaintiff took 21<sup>st</sup> January 2020 for hearing. Come 21<sup>st</sup> January 2020, the 1<sup>st</sup> Defendant who was present indicated that she was acting in person and was ready to proceed to hearing. The case proceeded to hearing and the Plaintiffs closed their case. The Court then adjourned the case and fixed defence hearing date for 16<sup>th</sup> March 2020. The 1<sup>st</sup> Defendant was asked to file her bundle of documents within 14 days. The 1<sup>st</sup> Defendant had only filed a list of documents.

6. On 16<sup>th</sup> March 2020, when the case was supposed to come up for defence hearing, it coincided with the Covid 19 which had just been reported in Kenya. Courts then scaled down the hearing of cases. On 28<sup>th</sup> April 2020, the court started upscaling the court business. Defence hearing was fixed on 1<sup>st</sup> October 2020. Hearing notice was given by court. On 1<sup>st</sup> October 2020, the case was mentioned virtually. The counsel for both the 1<sup>st</sup> and 2<sup>nd</sup> Defendants applied for adjournment which was rejected owing to the age of the case. The parties were directed to come to open court for hearing at 10.30 am.

7. The Court proceeded to open court at 11.46 am. Counsel for the 2<sup>nd</sup> Defendants re-newed his application for adjournment which was again rejected. The counsel for the 1<sup>st</sup> defendant did not attend the open court session. The court deemed the defence case as closed and directed parties to file written submissions. Before the submissions could be filed, the 1<sup>st</sup> Defendant filed an application seeking review of the orders of 1<sup>st</sup> October 2020 to enable the 1<sup>st</sup> Defendant to give her defence and have the Plaintiff recalled for purposes of cross-examination.

8. In the application dated 12<sup>th</sup> October 2020, the 1<sup>st</sup> Defendant/ Applicant's counsel contends that they were appointed to represent the 1<sup>st</sup> Defendant who was acting in person after the closure of the Plaintiff's case. They wrote a letter to court asking for proceedings but that there was no response. In the meantime, the Advocates saw from the court's e-filing portal that the case had been listed for hearing on 1<sup>st</sup> October 2020.

9. On 1<sup>st</sup> October 2020, a counsel from the firm of Henia Anzala & Associates M/s Masai attended the virtual mention and applied for adjournment which adjournment was rejected. The court indicated that hearing was to proceed at 10.30 am. The deponent of the affidavit in support of the application states that she contacted the 1<sup>st</sup> Defendant to come for hearing and that he was ready to proceed virtually as from 10.30 am. He waited until 2.30 pm when he decided to call the counsel for the Plaintiff who informed him that the court proceeded in open court at 11.46 and that the defence case had been closed.

10. The 1<sup>st</sup> Defendant contends that if the application is not allowed, the 1<sup>st</sup> defendant will end up being condemned unheard contrary to Article 50 of the Constitution which provides that a party should be given a fair hearing. The first Defendant further contends that there will be no prejudice suffered if the case is re-opened and the 1<sup>st</sup> Defendant allowed to file her documents and the Plaintiff's witness recalled for cross-examination by her counsel.

11. The 1<sup>st</sup> Defendant's application was opposed by the Plaintiff based on a replying affidavit sworn on 13<sup>th</sup> January 2021 by the Plaintiff's counsel. The Plaintiff contends that the 1<sup>st</sup> Defendant's application contains half-truths. The matter was first mentioned virtually when all advocates for parties were present. Applications for adjournment were made by Defendants' counsel which applications were rejected. The court then ordered that the hearing proceeds in open court at 10.30 am. Later when the court proceeded to open court, there was no counsel for the 1<sup>st</sup> Defendant or the 1<sup>st</sup> Defendant herself.

12. The Plaintiff contends that the 1<sup>st</sup> Defendant has been given several opportunities before to file documents but has not done so. The 1<sup>st</sup> Defendant has not shown that she did not adequately cross-examine the Plaintiff's witness when the matter proceeded to hearing on 21<sup>st</sup> January 2020. The Plaintiff's counsel contends that the Plaintiff will be prejudiced if this old case was to be reopened for fresh hearing and cross examination of the Plaintiff's witness.

13. The parties were directed to dispose of the application through written submissions. The 1<sup>st</sup> Defendant filed their submissions dated 11<sup>th</sup> February 2021. The Plaintiff filed submissions dated 5<sup>th</sup> March 2021. I have considered the submissions filed by the Plaintiff and those filed by the 1<sup>st</sup> Defendant. I have also considered the application by the 1<sup>st</sup> Defendant as well as the opposition thereto by the Plaintiff. The only issue for determination is whether the 1<sup>st</sup> Defendant has met the threshold for review of my orders of 1<sup>st</sup> October 2020.

14. Order 45 of the Civil Procedure Rules is clear on the grounds for review. Review can only be undertaken where there is discovery of new and important evidence which could not be obtained with due diligence, error on the face of the record or for any sufficient cause. The application must of course be brought without unreasonable delay. In the instant case, the order which is sought to be reviewed was given on 1<sup>st</sup> October 2020. The present application was made on 12<sup>th</sup> October 2020. I find that the application was made without undue delay.

15. The ground upon which the 1<sup>st</sup> Defendant is seeking review is that there are sufficient grounds to warrant review. The 1<sup>st</sup> Defendant's counsel contends that he logged in to the e-portal from 10.30 am to 2.00 pm when he gave up as the matter was not being called out. He then spoke to the Plaintiff's counsel who informed him that the case had been mentioned in open court and that defence had been deemed closed.

16. The 1<sup>st</sup> Defendant's counsel is not being candid. When the case was mentioned virtually on 1<sup>st</sup> October 2020, both the counsel to the 1<sup>st</sup> and 2<sup>nd</sup> Defendant applied for adjournment. Both applications were declined and the court ordered that hearing was to proceed at 10.30 am in open court. The court proceeded to deal with applications and mentions virtually. The court finally moved to open court at 11.46 am. The Plaintiffs' counsel was present. The counsel for the 2<sup>nd</sup> Defendant was also present. The counsel for the 2<sup>nd</sup> Defendant renewed his application for adjournment which again was declined. The court then directed that parties file written submissions as the defence cases were deemed closed. The counsel for the 1<sup>st</sup> Defendant cannot therefore claim that he logged in from 10.30 am to 2.30 pm without being heard.

17. The 1<sup>st</sup> Defendant has shown little effort of proceeding with this case. Despite having been given a number of opportunities to file her bundle of documents, this has not been done. This is conduct of a person who is clearly out to delay the finalization of this case which is now almost thirteen (13) years old. There is absolutely no ground shown to warrant this court to review the orders of 1<sup>st</sup> October 2020. This application lacks merit. The same is hereby dismissed with costs to the Plaintiff/Respondent.

It is so ordered.

**Dated, Signed and delivered at Nairobi on this 8<sup>th</sup> day of April 2021.**

**E. O.OBAGA**

**JUDGE**

In the Presence of :-

Mr Kabue for 2<sup>nd</sup> Defendant

M/s Masai for Mr Anzala for 1<sup>st</sup> Defendant

M/s Omamo for Mr Namada for Plaintiff

Court Assistant: Okumu

**E.O.OBAGA**

**JUDGE**