

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ELC NO. 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).....PLAIN
TIFF**

VERSUS

**JANET WAIRIMU MWANIKI.....1st
DEFENDANT
THE CITY COUNCIL OF NAIROBI.....2nd
DEFENDANT**

RULING

Background

1. Before this court for determination is the Applicant’s Notice of Motion application dated 14th October, 2025 brought pursuant to the provisions of **Sections 1A & B, 3A and 44** of the **Civil Procedure Act** as read with **Order 42 Rule 6, Order 45 Rules 1 & 2, Order 22 Rule 37 & Order 51 Rule 1** of the **Civil Procedure Rules** seeking the following reliefs:

- i. Spent.*
- ii. Spent.*

- iii. That the proclamation and attachment of the Personal Assets of the Officials of the Defendants Society be declared to be unlawful and be set-aside in its entirety.*
 - iv. The Honourable Court do review its ruling on the stay of execution on account of costs ordered against the Defendant Society issued on the 10th of July 2025 now that the Court of Appeal has allowed the Defendants' Appeal to proceed to full hearing.*
 - v. Upon review this Court do now allow the stay of execution of the orders for payment of costs by the Defendant Society pending the hearing and determination of the Appeal.*
2. The application is based on the grounds on the face thereof and supported by the Affidavit of Peter Gichuhi, the Chairman of Marurui Estate Residents Welfare Association, the Applicant herein.
 3. He deponed at the onset that he acts solely on the mandate of the membership of the Marurui Estate Residents Welfare Association and not in his personal capacity, and is therefore not personally liable for any obligations arising from the affairs of the Association and that all decisions to institute or defend proceedings are made by resolution of the Association's membership and not at his individual instance.

4. The Chairman of Marurui Estate Residents Welfare Association, the Applicant herein deposed that being aggrieved by the judgment of this court and the manner in which it was delivered, which denied them adequate time to file an appeal, the Association filed a notice of appeal and sought leave from the Court of Appeal to file the same out of time.
5. He explained that while awaiting the hearing and determination of that application, the Respondents proceeded to tax their bill of costs, prompting the Association to apply for stay of execution before this court pending the outcome of the application before the Court of Appeal and that the application for stay was dismissed on 10th July 2025 on the basis that there was no subsisting appeal upon which such an order could be granted.
6. It was his deposition that notwithstanding the pending application before the Court of Appeal, the Respondents proceeded with execution for the taxed costs and that nonetheless, on 9th October 2025, the Court of Appeal allowed the application and admitted both the Notice of Appeal and the intended appeal.
7. Despite this development, he averred, on 13th October 2025, auctioneers instructed by the Respondents proceeded not against the Association, but against him personally as Chairman, and proclaimed his household goods.

- 8.** He stated that such attachment was unlawful as the proceedings were instituted against the Association and not against him or the Secretary in their personal capacities. He deponed that liability for any decretal sums lies with the Association collectively and not with its officials individually, and that the attachment of personal assets of officials is irregular and contrary to public policy as it would discourage individuals from serving in such capacities.
- 9.** The Chairman of Marurui Estate Residents Welfare Association, the Applicant herein, explained that where an association lacks attachable assets, the proper legal course would be to issue a notice to show cause against its officials to determine whether personal liability may attach, akin to lifting the corporate veil, which procedure was not undertaken in this case.
- 10.** Further, he explained, judgment was delivered on 16th September, 2021 and costs taxed on 18th July 2023, and that in the circumstances, execution could not properly issue without a notice to show cause being taken out. He stated that the proclamation and attachment was therefore irregular and ought to be set aside.
- 11.** He deponed that following the Court of Appeal's decision allowing the appeal, new and material circumstances have arisen which were not in existence at the time this court

delivered its ruling on 10th July 2025, thereby justifying a review of that decision and the grant of stay pending appeal.

- 12.** As a demonstration of good faith, he deponed that the Association is willing to deposit half of the decretal sum within thirty (30) days, if so directed, and urged that the interests of justice favour the preservation of the status quo pending the determination of the appeal.
- 13.** He further deponed that there is no assurance that the Respondents will be in a position to refund the decretal sum in the event the appeal succeeds, and contended that it would therefore be more prudent for the parties to await the outcome of the appeal, which will conclusively determine the issues now before the Court of Appeal.
- 14.** In response, the 1st Respondent, Janet Wairimu Mwaniki, swore a replying affidavit on 18th November, 2025. She deponed that judgment in this suit was delivered virtually on 16th September, 2021 as against the Applicant with the court dismissing the same on account of failure to exhaust the then prevailing mechanisms regarding approval of buildings and dismissed the suit granting them costs. Subsequently, a decree was issued on 30th May, 2024.
- 15.** Aggrieved by the judgment, the Applicant filed a notice of appeal dated 12th October 2021. However, as the said notice was filed out of time, the Applicant moved to the Court of Appeal by way of an application dated 26th April 2022,

seeking leave to file and lodge the notice of appeal out of time.

- 16.** According to the 1st Respondent, on 21st March, 2022, she filed a bill of costs in the sum of Kshs. 535,005; that the bill was taxed on 18th August, 2023 and allowed as against the Applicant in the sum of Kshs. 524,561.00 and that the Applicant failed, refused and/or neglected to pay the costs awarded necessitating her to make an application for execution following which the Applicant filed an application seeking stay of execution dated 13th November, 2024.
- 17.** Ms. Mwaniki deponed that the Applicant's application was heard and determined by a ruling delivered on 10th July 2025, in which it was dismissed on the basis that there was no valid appeal pending before the Court of Appeal at the time and that following that determination, she proceeded to apply for execution of the decree, upon which warrants of attachment were duly issued and a proclamation notice dated 30th September, 2025 was served upon the Applicant.
- 18.** She deponed that the Applicant's application for leave to file a notice of appeal out of time was heard and determined on 9th October 2025, whereupon the Court of Appeal allowed the application and directed that the record of appeal be filed within twenty-one (21) days from the date of the ruling.
- 19.** She further explained, on the advice of Counsel, that Marurui Estate Residents Welfare Association, being a registered

association, lacks legal personality and is therefore incapable of suing or being sued in its own name.

- 20.** According to her, such proceedings can only be instituted in the names of its officials, who consequently bear personal responsibility for the liabilities of the Association. In that regard, she asserted that the officials of the Association, are jointly and severally liable for its debts.
- 21.** She deponed that prior to the filing of this application, a proclamation notice dated 30th September, 2025 had been issued requiring settlement of the decretal sum within seven (7) days, failing which the proclaimed assets would be attached and that the Applicant did not comply with that notice but instead waited until the lapse of the notice period before filing the present application.
- 22.** She stated that this was the first instance of execution being undertaken against the Applicant following her application for execution by way of attachment of movable property. She added, on advice of Counsel, that the law permits execution not only through attachment but also through committal to civil jail, upon issuance of a notice to show cause where appropriate.
- 23.** She maintained that due process was followed in the issuance of warrants of attachment and contended that the attachment of the Applicant's assets, in their capacity as officials of the Association, was lawful. In her view, since the

Association lacks legal personality, its officials are liable for its obligations and were therefore properly subject to execution upon failure to satisfy the decree.

24. The 1st Respondent disputed the contention that there was a subsisting appeal at the time of filing the present application, stating that the record of appeal was only filed after the lapse of the twenty-one (21) days as directed by the Court of Appeal and that, in any event, the appeal has neither been heard nor determined, and it is therefore premature to suggest that it has been allowed.
25. She urged that no sufficient basis has been laid for the grant of stay of execution, and contended that the Applicant has consistently employed delaying tactics to deny her the fruits of her judgment. She stated that the supporting affidavit was sworn by Peter Gichuhi without indicating that he did so on behalf of the co-officials of the Applicant, thereby casting doubt on whether they support the application or are willing to provide security.
26. 1st Respondent further stated that the provision of security is not a matter of mere willingness but is subject to the court's determination under **Order 42 Rule 6** of the **Civil Procedure Rules**. She contended that the Applicant has neither offered nor furnished adequate security as required under the law.

27. Finally, she deponed that she is the registered owner of plot no. Nairobi 139/84 situate in Marurui Estate, and that her whereabouts and financial standing are well known to the Applicant. She urged that granting the application would unjustly curtail her right to enjoy the fruits of her judgment and would tilt the scales of justice unfairly in favour of the Applicant.
28. Vide a further affidavit dated 15th December 2025, Mr Gichuhi reiterated his assertions as set out in the Motion, *to wit*, that while the Association can only sue or be sued through its officials, the scope of such representation under the Societies Act is limited to the prosecution and defence of proceedings and that it does not extend to imposing personal liability upon those officials for obligations arising from such litigation.
29. He deponed that any costs awarded in the suit are payable by the Association itself and that in the event that the Association is unable to meet such obligations, the appropriate recourse would lie within the insolvency framework, to be pursued in accordance with the procedures set out under the **Insolvency Act**, as read together with the Societies Act.
30. On the allegation that the Applicant has been indolent or engaged in delay tactics, he deponed that this issue had already been addressed by the Court of Appeal, which

acknowledged that the delay in the delivery of its ruling was occasioned by the court itself. He contended that the delay was therefore beyond the Applicant's control and that it would be unjust to attribute any prejudice to the Applicant in those circumstances.

- 31.** In response to the assertion that there are three Applicants, he clarified that the suit was instituted by the Association through its officials in a representative capacity, as permitted by law. He deponed that it is not incumbent upon individual officials to furnish security, as any such obligation lies with the Association.
- 32.** He further explained that the authority to swear affidavits is governed by the Association's constitution, and that, ordinarily, the chairperson, as in the present case, deposes on its behalf.

Submissions

- 33.** The Applicant's counsel filed submissions on 6th October, 2025. Counsel submitted that the Applicant, a registered society, instituted this suit in 2008 through its officials, namely the Chairperson, Secretary and Treasurer and that although the suit proceeded to hearing, it was ultimately dismissed on technical grounds for failure to exhaust certain dispute resolution mechanisms, and costs were awarded against the Applicant Association.

- 34.** Counsel submitted that following the award of costs, the 1st Respondent commenced execution proceedings. However, instead of executing against the Applicant Society and its assets, she proceeded against the personal homes and private assets of the society's officials, notwithstanding that they had participated in the proceedings purely in their representative capacity.
- 35.** Relying on the decision in **Kenya Shell Limited vs Benjamin Karuga Kibiru & Another [1986] KLR 410**, Counsel submitted that the principles governing execution require the court to intervene where substantial loss may result. In Counsel's view, the impugned execution was not only prejudicial, but unlawful, as execution must be undertaken in a procedurally proper and legally justified manner.
- 36.** Counsel further argued that the Respondents' justification that the society lacks legal personality and that its officials are therefore personally liable is erroneous. It was submitted that under the Societies Act (Cap 108), a registered society has the capacity to sue and be sued through its officials in their representative capacity, but such officials do not thereby assume personal liability for the society's obligations.
- 37.** Counsel relied on the principle in **Salomon vs Salomon & Co Ltd [1896]** and submitted that personal liability of

officials only arises where the corporate veil is lifted on grounds such as fraud, bad faith, or where the entity is a sham. According to Counsel, no such circumstances had been demonstrated in the present case.

38. It was therefore submitted that execution against the officials personally is unfounded and unlawful, and unless restrained, the officials stand to suffer substantial and irreparable loss through attachment and auction of their personal household assets. Counsel argued that such execution would render any intended appeal nugatory. No submissions were filed by the Respondent as at the 27th March, 2026.

Analysis and Determination

39. Having considered the pleadings and submissions, the issues that arise for determination are:

- i. Whether the Applicant has met the threshold for the grant of review sought? And if so, whether a stay should issue?*
- ii. Whether the impugned proclamation and attachment should be declared unlawful and set-aside in its entirety?*

40. The law governing the framework of review is set out in **Section 80** of the **Civil Procedure Act** and **Order 45, Rule 1(1)** of the **Civil Procedure Rules, 2010**. **Section 80** of the Act provides as follows:

***“80. 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.”***

41. Whereas Order 45 Rule 1(1) of the Civil Procedure Rules, 2010 provides as follows:

***“Rule 1 (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 review of judgment to the court which passed the decree or made the order without unreasonable delay.”

42. Discussing this, the Court of Appeal in **Benjoh Amalgamated Limited & another v Kenya Commercial Bank Limited [2014] eKLR** observed that:

“In the High court, both the Civil Procedure Act in section 80 and the Civil Procedure Rules in Order 45 rule 1 confer on the court power to review. Rule 1 of Order 45 shows the circumstances in which such review would be considered range from discovery of new and important matter or mistake or error apparent on the face of the record or any other sufficient reason but section 80 gives the High Court greater amplitude for review”.

43. By way of a brief background, the Applicant, a resident association, instituted the present suit as against the Respondents. It sought among other reliefs, an order compelling the 2nd Respondent to demolish a structure erected by the 1st Respondent on plot number Nairobi Block 139/84, permanent injunctive orders restraining the 1st Respondent from constructing any high-rise or multi-storey

buildings on the said property or any other plot within Marurui Estate and costs of the suit.

44. The Applicant's case was premised on the claim that the 1st Respondent was erecting a multi-storey structure in violation of the lease terms and the Association's building guidelines.
45. The court, upon analysing the Applicant's case, dismissed the same vide the judgment of 16th September, 2021. The court found, *inter-alia*, that the claim was premature, for failure to exhaust the applicable dispute resolution mechanisms for building approvals then in place.
46. Vide the Motion dated 13th November 2024, the Applicant sought an order for stay of execution of the judgment. The court, however, found the application unmerited, principally on the basis that no appeal had been filed before the Court of Appeal upon which such stay could be anchored. The present application seeks a review of that determination.
47. Turning to the prerequisites for review, the court will first address whether the application has been brought without unreasonable delay, this being a fundamental requirement under **Order 45 Rule 1** of the **Civil Procedure Rules**. This position was underscored by the Court of Appeal in ***Francis Origo & another vs Jacob Kumali Mungala [2005] eKLR*** when it held thus:

“...most importantly, the applicant must make the application for review without unreasonable delay.”

- 48.** What constitutes unreasonable delay is a matter of fact dependent on the circumstances of the case. The ruling in issue was delivered on 10th July, 2025 whereas the present application was filed on 14th October, 2025 approximately 3 months later. There has not been any allegation that this period is inordinately late and the court considers that it is not so late as to warrant the court declining to entertain the same.
- 49.** The Applicant’s plea for review is anchored on the assertion that, on 9th October 2025, the Court of Appeal allowed its application for leave to appeal out of time and admitted both the notice of appeal and the intended appeal. It is contended that this development constitutes new and material circumstance which was not in existence at the time this court delivered its ruling on 10th July 2025, warranting a review of the earlier decision. The Respondents deny this asserting that the plea is unmerited.
- 50.** The issue that then arises is whether the foregoing development amounts to the discovery of new and important matter or evidence within the meaning of **Order 45 Rule 1** of the **Civil Procedure Rules**.

51. Speaking to this, the Court of Appeal in **Rose Kaiza v Angelo Mpanju Kaiza [2009] KECA 422 (KLR)**, held:

“Applications on this ground must be treated with great caution and as required by r 4(2) (b) the Court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. Before a review is allowed on the ground of a discovery of new evidence, it must be established that the applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made.”

52. Similarly, the Court of Appeal in **Tokesi Mambili and others v Simion Litsanga (2004) eKLR** held:

“ i. In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason. ii. Where the application is based on sufficient reason it is for the Court to exercise its discretion.”

- 53.** Considering the foregoing vis the new information referenced, the court finds that the same does not amount to “new and important matter or evidence” as contemplated under **Order 45 Rule 1**.
- 54.** This is because the said development arose subsequent to the delivery of this court’s ruling on 10th July 2025, and therefore did not exist at the material time. It cannot, in those circumstances, be said to be a matter that was either within or outside the Applicant’s knowledge at the time of the impugned decision. A supervening event or change in circumstances occurring after the delivery of a ruling cannot constitute discovery of new evidence.
- 55.** To hold otherwise would undermine the principle of finality in litigation and open the door to a multiplicity of review

applications each time new developments arise after the court has made its decision. The appropriate recourse in such circumstances lies not in review, but in instituting fresh proceedings or seeking appropriate relief based on the changed circumstances.

- 56.** Accordingly, the plea for review is devoid of merit. The plea for stay, upon review also falls.
- 57.** Mr Peter Gichuhi, the Chairman of the Applicant contends that the proclamation and attachment of his, and the secretary's personal assets were unlawful, on the basis that the decree herein was issued against the Applicant Association and not against them, as officials in their personal capacity.
- 58.** He further submitted that the judgment and order for costs were issued on 16th September 2021, with costs subsequently taxed on 18th July 2023, over two years later. In the circumstances, he deposed, execution could not properly issue without first invoking the procedure of a notice to show cause against the Society. Such a Notice was required to be issued and prosecuted prior to any attachment by auctioneers, even where execution was intended against the Association.
- 59.** The Respondent, on the other hand, contends that the Association lacks legal personality and is therefore incapable of bearing liability in its own name. It is her position that the

officials of the Association are jointly and severally liable for its obligations and that execution against them personally was therefore proper and in accordance with the law.

60. From the material placed before the court, it is not in dispute that the Applicant is a society duly registered on 10th July 2007, pursuant to the Societies Act. The law on the legal personality of societies is settled. In **African Orthodox Church of Kenya v Charles Omuroka & Another [2014] eKLR**, the court held:

“There is no doubt therefore, that both the Plaintiff and the 2nd Defendant as societies or Associations registered under the Societies Act are not legal entities capable of suing and being sued in their own names. They have no legal capacity to institute proceedings in any court in their own names and cannot maintain such proceedings. They can only sue through Trustees, if they have one or in the names of their officials in a representative capacity.”

61. Similarly, in **Supreme Council of Kenya Muslims (SUPKEM) & another vs Registrar of Societies; Omar & 2 others (Interested Parties) [2024] KEHC 1320**, the court stated:

“It is trite that societies registered under the Societies Act or other unincorporated bodies are

not legal persons with the capacity to sue or be sued in their own names. Such societies can only sue or be sued through their elected officials or members who are duly authorized.”

.... The Legislature did not intend or provide for the service of legal processes on a registered Society to be served on its registered officials as the only manner of effecting service. The Society is a stand-alone entity duly registered under the statutory regime of the Societies Act.”

- 62.** The import of the foregoing authorities is that while a society may sue or be sued through its officials, such officials act strictly in a representative capacity and not in their personal capacities. This distinction is critical, as it underscores that the obligations of the society are not, without more, the personal obligations of its office bearers.
- 63.** By parity of reasoning, the mere fact that individuals hold office within a society does not render them personally liable for the obligations of that society. Such liability must be specifically established through due process and cannot be presumed solely by virtue of the office held. Its liabilities must, in the first instance, be met from its own assets as so held.
- 64.** Indeed, the Societies Act contemplates this arrangement, requiring that the constitution or rules of every society

provide for the custody and investment of its funds and property, and designate the persons responsible therefor. Typically, such property is vested in trustees or officials on behalf of the society.

- 65.** Indeed, in this case, the Applicant's constitution expressly provides that all land, buildings, and other immovable property, as well as investments and securities, shall be vested in not less than three trustees appointed from among its members.
- 66.** The schedule of movable property sought to be attached from the Chairman and the Secretary includes items such as a motor vehicle and household goods, including sofa sets, a refrigerator, and a cooker. These are, prima facie, personal assets belonging to the officials rather than property held by them in trust for the Association.
- 67.** Notably, the Respondent has not alluded to, or demonstrated, any attempt to distinguish between property held by the officials in their capacity as trustees of the Association and property belonging to them personally.
- 68.** Ultimately the court agrees that the proclamation and attachment of the personal assets of Peter Gichuhi and Simon Kimunge Mwihoti pursuant to the warrants of attachment dated 30th September, 2025 is premature and unlawful.

69. In the end, the court finds that the Motion dated 14th October, 2025 partly succeeds in the following manner:

- i. A declaration is hereby issued that the proclamation and attachment of the personal assets of Peter Gichuhi and Simon Kimunge Mwihoti was unlawful, and the same is set aside in its entirety.**
- ii. Each party shall bear its own costs.**

Dated, signed and delivered virtually in Nairobi this 30th day of April, 2026.

**O. A. Angote
Judge**

In the presence of;

Mr. Wnyango for Mr. Namada for Applicant.

Mr. Munguti for 1st Defendant

Court Assistant: Tracy