



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MOMBASA**  
**ELC MISC. NO 18 OF 2016**

**RUKIA RAPHAEL THOYA.....PLAINTIFF/APPLICANT**

**VERSUS**

**STEPHEN WANURA.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**KALOLO KIBANI/BAYA – MAGONZI**

**UPGRADING.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**PROJECT COMMITTEE.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**ANDERSON PERU.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

1. The plaintiff/applicant has moved this Court under the general powers of this Court (see 1A, 1B, 3A & 95 of the Civil Procedure Act) seeking for orders :

- 1. That this matter be certified as urgent and service of the same be dispensed with for reasons of urgency.**
- 2. That the Court be pleased to review the orders issued on the 30<sup>th</sup> October, 2014 by Hon Justice Mukunya in High Court at Mombasa ELC No 325 of 2010 RUKIA RAPHAEL THOYA – VS – STEPHEN WANGURA AND OTHERS.**
- 3. That the defendant be given the opportunity to defend his suit in the Chief Magistrate's Court.**
- 4. That this Court be pleased to grant leave to the applicant to fix a hearing date at the Chief Magistrate's Court.**
- 5. That this Honourable Court be pleased to grant temporary injunction Orders directed at the Respondents restraining them, their servants, agents, the police, assigns from in any way interfering with the Plaintiff's use, occupation of Plot Number 301 Kibaoni or in any other way erecting a fence, wall or evicting the Plaintiff/Applicant from the suit premises.**

**6. That this Order be served upon the OCS Kilifi Police Station.**

**7. Costs of this application be provided for.**

2. The application is supported by the grounds listed on the face of it inter alia that the time allowed for fixing the suit for hearing before the magistrate's court was not sufficient and was overtaken by events. Further that the plaintiff has filed all the documents to stand trial.

3. The application is also supported by the affidavit of Dr John Khaminwa advocate for the plaintiff. Dr Khaminwa deposed that the delay was occasioned by the Court technicalities which should not be visited on the plaintiff. He attached a letter dated 15.1.2016 addressed to the Deputy Registrar of this Court seeking from the Deputy Registrar to confirm if the file had been transferred. That the dismissal of the plaintiff's case has caused her to suffer great loss and damage. He deposed that it is in the interests of justice that application be allowed.

4. The application is opposed by the Respondents vide a replying affidavit sworn to by their advocate Mr Tamimi Lewa. He deposed that the order the subject of this review was made pursuant to their application dated 6<sup>th</sup> March 2014 seeking to dismiss the plaintiff's suit for want of prosecution. He deposed that it is obvious from the very beginning that the applicant was not keen to prosecute her suit. Further that the applicant has herself to blame since the order was made in the presence of her counsel and that the Respondent went ahead to serve the said order. They urged the Court to dismiss the application dated 20.6.2016.

5. The parties' advocates made oral submissions which I have considered. The applicant is substantially seeking a review of the order of the Judge made on 30.10.2014 that transferred her suit to the subordinate Court and required her to fix the case for hearing before the lapse of 45 days or else her suit stands dismissed. The applicant blames Court technicalities for not being able to comply with this order. The applicant has however not denied that she was aware of this order.

6. The said Court technicalities are not specified. The applicant has also not stated that she attempted to fix the matter for hearing but could not find the file. The 45 days from 30.10.2014 would lapse on 15.12.14. It is not until 15.1.2015 when a letter was written to the Deputy Registrar seeking to know if the file was transferred. The applicant does not also explain the steps she took to fix this matter for hearing after she learnt of the new case number being PMCC No 75 of 2015. It is interesting to note that in spite of all these, the applicant chose to move this Court on 20.6.2016 which is 1 ½ years later and still shift blame on the Court for her indolence.

7. I would have wished to exercise my discretion in favour of the applicant but I find her guilty of inordinate delay particularly taking into consideration that the Respondents had earlier moved the Court to dismiss her suit for want of prosecution. She has not convinced me that she has been vigilant enough to prosecute her suit to warrant the granting of the orders sought in exercise of the overriding objectives of this Court. Secondly she did not appeal against the order when it was made that 45 days was not sufficient time for her to set down the suit for hearing. Consequently I find prayer 2 & 4 of the motion lacking in merit. Prayer 5 & 6 collapses automatically for they have no foundation upon which they can stand. Costs of this application is awarded to the Respondents.

**Dated and delivered in Mombasa this 21<sup>st</sup> day of February 2017**

**A. OMOLLO**

**JUDGE**