



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**THIKA LAW COURTS**

**ELC.NO.6 OF 2017**

**THOGOTO UKAI SELF HELP GROUP.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**PETER KERU KANUNE ..... 2<sup>ND</sup> PLAINTIFF/RESPONDENT**

**-VERSUS-**

**JOSEPH GACHOKI GITARU**

**T/A GEO ACRE SURVEYS .....1<sup>ST</sup> DEFENDANT**

**THE DIRECTOR OF SURVEYS.....2<sup>ND</sup> DEFENDANT**

**THE CHIEF LAND REGISTRAR.....3<sup>RD</sup> DEFENDANT**

**THE NATIONAL LAND COMMISSION.....INTERESTED PARTY**

**RULING**

The matter for determination is the *Notice of Motion* dated **10<sup>th</sup> May 2017**, brought under Section 3A of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules and all enabling provisions of the law. The application is brought by the 1<sup>st</sup> Plaintiff herein, *Thogoto Ukai Self Help Group*. The Applicant has sought for the following orders:-

***a) The Honourable Court be pleased to review the orders of the Court of 5<sup>th</sup> April 2017 directing for the cross examination of the District Social Development Officer Kikuyu.***

***b) The costs of this Application be borne/be in the cause.***

The Application is premised on the grounds stated on the face of the application and on the **Supporting Affidavit** and a **Supplementary Affidavit** of **Protus Inziani Majanje**. Among the grounds in support of the application are:-

***1) The Court on the 5<sup>th</sup> April 2017 directed that the District Social Development Officer Kikuyu be cross examined on the 31<sup>st</sup> May 2017.***

***2) The order for the cross examination was issued by the court following a letter from the District Social Development Officer dated 30<sup>th</sup> March 2017 addressed to the County Criminal***

***Investigation Officer.***

***3) The order for the cross examination of the District Social Development Officer Kikuyu, was made when there is no affidavit on record sworn by District Social Development Officer Kikuyu, to warrant a cross examination.***

***4) Furthermore the order for cross examination was issued following an oral application made by the Advocate for the 2<sup>nd</sup> Plaintiff who failed to lay down any just cause or bona fide basis for the cross examination.***

***5) The 2<sup>nd</sup> Plaintiff's Advocate further did not raise any contention with regard to the letter issued to warrant the cross examination of the District Social Development Officer Kikuyu.***

***6) The 2<sup>nd</sup> Plaintiff's application to have the District Social Development Officer Kikuyu, cross examined is a ploy meant to rove into matters which have not been particularized.***

***7) The confirmation having been received by way of the letter of 30<sup>th</sup> March 2017 and no contention having been raised, there was therefore no basis for cross examination of the officer.***

***8) The Applicant avers therefore that the application for review should be allowed based on an error of law, fact and further for sufficient reason.***

***9) It is the interest of justice that the application be allowed as prayed.***

The application is ***opposed*** and ***Peter Keni Kanuna***, the 2<sup>nd</sup> Plaintiff swore a Replying Affidavit and averred that he has been advised by his advocate which advise he verily believe to be true that the application is defective or incompetent for want of procedure and substance.

He also stated that the Applicant is in utter disregard of the procedure for review as he failed to annex the order sought to be reviewed as required by law. It was his contention that the Court issued an order on ***5<sup>th</sup> April 2017***, summoning the ***Social Development Officer, Kikuyu*** for purpose of cross-examination on the content of her letter dated ***30<sup>th</sup> March 2017***, upon oral application by the Counsel for the 2<sup>nd</sup> Plaintiff/Respondent.

He also stated that the cogency, legitimacy and competency of the said letter dated ***30<sup>th</sup> March 2017***, is in question and was contested by his advocate and hence the order for cross-examination. It was his further averment that the order for cross-examination of the District Social Development Officer, Kikuyu was made because the said person being the custodian of all formal records regards the membership of the 1<sup>st</sup> Plaintiff/Respondent with a view to resolve the issue of representation which is still pending before the Court. Further that the District Social Development Officer, Kikuyu who is the custodian of all formal records has not objected to the summons. The Deponent further deposed that he has been advised by his advocate on record that the Court has unfettered discretion and power to issue any orders it deems necessary for the ends of justice to be met. It was his further contention that the application herein is a delay tactic employed by the Applicant who is hell bent to delay the main suit. He further deposed that he has been advised by his advocate on record that some of the issues raised in the application can only be heard in the Court of Appeal as review is a forum to correct an error apparent on the face of record but not an error in law on merit of the application. The 2<sup>nd</sup> Plaintiff urged the Court to dismiss the Notice of Motion dated ***10<sup>th</sup> May 2017*** with costs.

The application was canvassed by way of Written Submissions which this Court had carefully considered. Though the application seeks to review the orders issued on ***5<sup>th</sup> April 2017***, directing for the cross-examination of the District Social Development Officer Kikuyu, the Court has noted that this application is anchored under Section 3A of the Civil Procedure Act which provides that:-

**“Nothing in this Act shall limit or otherwise affect inherent power of the Court to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the Court”.**

The application is also anchored under Order 51 which deals with the issue of applications.

However, an application for review is anchored under Order 45 Rule 1 of the Civil Procedure Rules which provides:-

**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 of 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 Judgement to the Court which passed the decree or made the order without unreasonable delay”.**

The Applicant herein has sought for review of the orders of the Court which were granted **on 5<sup>th</sup> April 2017** to the effect that:-

**“Summons to issue to officials of the 1<sup>st</sup> Plaintiff and author of the letter dated 30<sup>th</sup> March 2017 to appear in Court for cross-examination on the contents of the said letter.”**

The letter in issue was allegedly written by **Rose Mwangangi**, the District Social Development Officer, stating who are that current officials of the 1<sup>st</sup> Plaintiff herein **Thogoto Ukai Self Help Group**.

At the core of the dispute is the issue of Legal Representation:- who are the proper Advocates on record for the Plaintiffs. The only way of resolving the above issue of legal representation is by ascertaining who are the proper officials of the self help group who gave instructions to the advocates.

The Law Firm of **ENK LLP** filed this suit and sought for various orders. The Court granted the order of maintenance of status quo on 9<sup>th</sup> February 2017. Later the law firm **of Maina & Maina Advocates** came on record for the 1<sup>st</sup> Plaintiff and sought to withdraw the whole suit.

The Court would wish to establish who are the proper officials of the 1<sup>st</sup> Plaintiff who would then be legally responsible in giving instructions on behalf of the 1<sup>st</sup> Plaintiff.

The 2<sup>nd</sup> Plaintiff has disputed the contents of the letter dated **30<sup>th</sup> March 2017**. The only way of establishing the authenticity of this letter is by summoning the author for cross-examination in Court. The Court acted within its inherent power granted under Section 3A of the Civil Procedure Act. The 1<sup>st</sup> Plaintiff herein did not anchor its application under order 45 of the Civil Procedure Rules. Even if it was, there was no evidence brought out that there was discovery of new and important matter or evidence or that there was **mistake** or **error** apparent on the face of record. Further there was no sufficient reason given for review of the said order of the Court.

The Court has inherent power under section 3A of the Civil Procedure Act to make orders that are necessary for the end of justice to be met and also to prevent abuse of the Court process. Why is the 1<sup>st</sup> Plaintiff blocking the appearance of the author of the said letter?

The Court finds that the **Notice of Motion** dated **10<sup>th</sup> May 2017**, is **not merited**. Consequently, the Court

*dismisses the said application entirely with costs to the 2<sup>nd</sup> Plaintiff.*

Summons to issue as earlier directed by the Court on *5<sup>th</sup> April 2017*.

It is so ordered.

Dated, Signed and Delivered at Thika his **29<sup>th</sup>** day of **September, 2017**.

**L. GACHERU**

**JUDGE**

**29/9/2017**

In the presence of

M/s Nyawira holding brief M/S Maitai for 1<sup>st</sup> Plaintiff/Applicant

M/s Munawa for 2nd Plaintiff/Respondent

No appearance for 1<sup>st</sup> Defendant

No appearance for 2<sup>nd</sup> Defendant

No appearance for 3<sup>rd</sup> Defendant

No appearance for interested party

Lucy - Court clerk.

**L. GACHERU**

**JUDGE**

**29/9/2017**

**Court** – Cross-examination of the District Social development Officer, Rose Mwangangi on 6<sup>th</sup> November at 11.30am.

**L. GACHERU**

**JUDGE**

**29/9/2017**

Further the summons to be served by Mr. Munawo for the 2<sup>nd</sup> Plaintiff. Let the said Rose Mwangangi avail the official file relating to this self help group in court.

**L. GACHERU**

**JUDGE**

**29/9/2017**