



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

HCCA NO 148 OF 2016

COUNTY GOVERNMENT OF KIAMBU.....APPELLANT

VERSUS

SEBASTIAN MURIUKI GAKURU.....RESPONDENT

JUDGEMENT

1. The respondent (Sebastian Muriuki Gakuru) filed a suit on his behalf an on behalf of Thika Madaraka Market stall owners vide Thika C.M's Civil suit No. 565 of 2013. He sued:

- (i) The County Government of Kiambu (Appellant)
- (ii) Peter Nganga Munuve
- (iii) James Njuguna

2. In his plaint he sought the following prayers:

- (a) Mandatory injunction compelling the 1st defendant to remove and or demolish all the structures and or sheds erected by the 2nd and 3rd defendants their agents, servants, employees, associates or any other persons along Madaraka market premises wall and the road reserve thereof and their eviction therefrom.*
- (b) Permanent Injunctive orders restraining the 2nd & 3rd defendants, their agents, servants, employees, associates or any other persons from carrying on business, remaining on, erecting structures and or sheds along Madaraka Market perimeter wall and the road reserve thereof and harassing and or interfering with he plaintiffs quiet possession of the suit land*
- (c) Costs of the suit and interest thereof.*

3. The appellant filed its defence to the suit together with a notice of motion dated 12th August 2013 seeking to have the suit against the appellant struck out for being an abuse to the court due process. It raised the grounds that:

- (i) Order 1 of the Civil Procedure Rules was not complied with.
- (ii) Since gazette notices had been issued, the suit ought to have been filed within 3 months of publication. Further that any remedy ought to have been sought by way of Judicial review before the high court.

4. The respondent filed a replying affidavit opposing the application. He averred that the suit was not challenging the legality or validity of the notice published but was seeking a remedy of the on going torts and/or unlawful acts by the other defendants. He could not therefore file for judicial review.

5. The application was canvassed by way of written submissions and the learned trial magistrate delivered a Ruling on 6th March 2014. He disallowed the application and directed the respondent herein to file and serve the appellant with the authority to act within 14 days of the date of the Ruling.

6. The appellant being aggrieved with the Ruling filed this appeal citing the following grounds:

- (i) The learned magistrate erred in law and fact by not addressing her mind to the provisions of the then applicable section 3 of the*

public Limitations act (Cap39) vis-à-vis the gazette Notice 24th February 2010 issued by the then Municipal Council of Thika hence arrived at the wrong conclusion.

(ii) The learned magistrate erred in law and fact in not appreciating and considering that there having been a Gazette notice issued by the then Municipal Council of Thika on the subject matter, any grievances claim, litigation arising therefrom including but not limited to enforcement of the said Gazette Notice ought to have been by way of Judicial review.

(iii) The learned magistrate having arrived at the conclusion that the nature, of the matter was a representative suit, erred in law and fact by not appreciating the fact that the requirements of filing a representative suit had not been complied with hence arrived at the wrong conclusion.

(iv) The learned magistrate erred in law and fact in not addressing her mind and/or making a finding on what would be the consequences in the event of default by the respondents to comply with the orders granted and/or issued, hence arrived at the wrong conclusion.

(v) The learned magistrate erred in law and fact by not appreciating the fact that the issues of law raised by the appellant were of a substantive nature and not based on mere technicalities hence arrived at the wrong conclusion.

7. Both counsels appearing for the parties herein agreed to dispose of the appeal by written submissions which they filed. M/s Gathoga Wairegi for the appellant in his submissions abandoned the 2nd ground of appeal and submitted on the rest of the grounds. His argument is based on the Notice published by the then Municipal council of Thika on 24th February 2010 upon which action was to be undertaken after 30 days of the Notice. That the notice expired on 26th March 2010 and the suit herein was filed on 19th July 2013 a period of 3 years and 3 months after 26th March 2010.

8. He cites section 3 of Cap 39 which provided that a suit based on a tortious act or negligence be filed within 3 months. Further that no notice was issued by the respondent in terms of Order 1 Rule 8(2) Civil Procedure Rules and no leave of the court was sought in terms of Order 1 rule 8(3) Civil Procedure Rules. That instead of compliance the respondent filed a replying affidavit and sneaked in the authority to act.

9. M/s Mwihiya and Mutai & Co advocates for the respondent in their submissions opposed the appeal. On the issue of failure to file an authority to act by the respondents, Counsel cited the case of **Giant Clothing Designers Ltd and 20 others vs Industrial and commercial development Corp Ltd [2008] eKLR** where Justice Okwengu J (as she then was) found that where no authority is filed alongside the plaint per se is not fatal and leave can be granted to the plaintiff to do so.

10. He urged that since the tort was of a continuous nature the respondent cannot be said to be in violation of section 3 of Cap 39 Laws of Kenya. His prayer was that the appeal should be dismissed.

DETERMINATION

11. This is a first appeal and I have a duty to appreciate the entire evidence by subjecting it to a fresh exhaustive scrutiny and arrive at my own independent conclusion. See **Selle & Another vs Associated Motor Boat Co Ltd & Others [1968] E.A 123; Peters v Sunday Post Ltd [1958] E.A. 424; Mary Wanjiku Gachigi vs Ruth Muthoni Kamau (Civil Appeal No 172 of 2000: Tunoi, Bosire, & Owuor JJA); Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Anor Civil Appeal No 345 of 2000: O'Kubasu, Githinji & Waki JJA**

12. I have considered the record, the grounds of appeal, submissions and authorities cited. The two issues for determination are:

(i) Whether failure to comply with Order 1 Rule 8(2) (3) and Rule 12 Civil Procedure Rules is fatal to this case.

(ii) Whether the suit is statute barred.

Issue (i) Whether failure to comply with Order 1 Rule 8(2) (3) and Rule 12 Civil Procedure Rules is fatal to this case.

13. The respondent who was the plaintiff before the lower court describes himself in the plaint in para 1 as follows:

“The plaintiff is an adult male of sound mind residing and working for gain in Thika Kiambu county and brings this suit on his own behalf and on behalf of Thika madaraka market stall owners. His address of service for the purposes of this suit shall be care of Mwihiya & Mutai Co, advocates Thika Arcade, 4th Floor, Commercial street P O Box 821-1000 Thika.

Even the pleading itself is indicated as Sebastian Muriuki Gakuru (suing for and on behalf of Thika Madaraka Market stall owners). All this go to show that the suit filed is of a representative nature.

14. Order 1 rule 8(1) Civil Procedure Rules provides:

(1) Where numerous persons have the same interest in any proceedings, the proceedings may be commenced, and unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.

Rule 8 (2)

The parties shall in such case give notice of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct.

Rule 8 (3)

Any person on whose behalf or for whose benefit a suit is instituted or defended under subrule (1) may apply to the court to be made a party to such suit.

Order 1 Rule 13(1) Civil Procedure Rules provides:

Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.

Rule 13 (2)

The authority shall be in writing signed by the party giving it and shall be filed in the case.

15. There is no doubt that when the respondent filed the plaint it was clear that this was a representative suit. Further that there was non compliance with the provisions requiring notices and even filing authority to act on behalf of the others. Order 1 rule 8(3) and Rule 13(1) Civil Procedure Rules are however not mandatory provisions.

16. In his reply to the appellant's Notice of Motion dated 13th August 2013 the respondent attached a copy (**SM1**) of an authority to act duly signed by the other Madaraka Market Stall Owners. He urged the court to grant him leave to file the same in full compliance with the provisions of the law. It was served on the appellant. It is therefore not correct for Counsel for the appellant to submit that the said authority was sneaked in.

17. The trial court weighed all this and came to the conclusion that this was a matter where technicalities would not prevail over justice to the parties. The trial court granted the respondent leave to file and serve the appellant with the authority to act within 14 days.

18. As I have already found this is a representative suit, as the pleadings speak to it. The failure to file the authority with the plaint is not fatal to the suit. It is one of those instances where article 159 (2) (d) of the Constitution comes into play. Substantive justice would demand that the error be corrected in the circumstances and the case be heard and determined on merit rather than striking it out.

19. This is owing to the fact that the pleadings confirm that the suit is representative and none of the parties would be prejudiced if the respondent was allowed to formalize that position by filing the required document. In this I am persuaded by the holding by Justice Okwengu J (as she then was) in the case of **Giant Clothing Designers Ltd** (supra) on a similar issue.

20. Justice demands that all parties be given an equal opportunity to articulate their cases, unless there is no room for such a discretion to be exercised. On this issue I find that the failure to comply with order 1 Rule 8 and Rule 13 Civil Procedure Rules was not fatal in the circumstances of this case. The learned trial Magistrate did not err in allowing the respondent time to comply.

Issue No (ii) Whether the suit is statute barred

21. Notices were published in the Media in respect to the tortious acts complained of. The same were not Gazette notices and they were published by the then Municipal Council of Thika. The first notice is asking those who had erected illegal structures to remove them within 30 days failure to which the same would be removed. Later on 26th November 2010 the same Municipal Council of Thika issued another notice cancelling the earlier Notice. An interpretation of this would mean there is no restriction in the construction of illegal structures.

22. The earlier notice having been cancelled/revoked Counsel cannot talk of a time when the notice was running. The Notice of 26th November 2010 brought the parties where they were before the Notice of 24th February 2010. i.e structures being put up in a haphazard manner uncontrolled/undeterred. The respondent is saying the nuisance has continued unabated hence the suit.

23. The appellant can't run away from it. The parties must be heard and a decision made. In fact had it not been for this appeal the suit could have been heard and determined a long time ago. The complaint being an ongoing one has no ending date until determined. I find this issue to have no footing.

24. All in all I find no merit in this appeal which I dismiss with costs to the respondent. The matter should be mentioned before the Chief Magistrate Kiambu Law Courts within 30 days for directions to be taken on how to proceed with the hearing of the case.

Dated, signed and delivered this 3rd day of August 2018 in open court at Kiambu.

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HEDWIG I. ONG'UDI

JUDGE