



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUNGOMA**  
**CIVIL SUIT NO.9 OF 2016**

JACK MUKHONGO MUNIALO.....PLAINTIFF

VERSUS

NZOIA SUGAR CO. LTD.....1<sup>ST</sup> DEFENDANT

NZOIA OUTGROWERS CO. LTD.....2<sup>ND</sup> DEFENDANT

**RULING**

1. By a Plaint dated 9<sup>th</sup> September 2016 the Plaintiff Jack Mukhongo Munialo suing on his own behalf and on behalf of all sugar farmers contracted to Nzoia Sugar Company Ltd sued the Nzoia Sugar Company Limited (hereafter referred to as 'Nzoia Sugar' as the 1<sup>st</sup> defendant and Nzoia out growers Limited (herein referred to as 'Nzoia Out growers') as the second defendant.

2. It is his case that in the year 1991 or thereabout the defendants entered into an agreement in which the 2<sup>nd</sup> defendant would represent the interest of individual cane farmers contracted by the Nzoia sugar and pursuant to the said agreement a 1% levy was to be is charged upon each farmer contracted by Nzoia Sugar and remitted to Nzoia Out growers. That the said agreement lapsed on 22<sup>nd</sup> May, 2012 and since the same was never renewed any such deductions are wrongful and as a consequence thereof the Plaintiff sought for the following orders:-

***a. A declaration that there is no valid agreement between the 1<sup>st</sup> and 2<sup>nd</sup> defendant Companies for a scheme of deduction by the 1<sup>st</sup> defendant of 1% capital levy or any other levy from proceeds of sugarcane delivered by farmers to the 1<sup>st</sup> defendant, and to pay the 2<sup>nd</sup> defendant without farmers voluntary registration as members of the 2<sup>nd</sup> defendant and express consent to such deduction.***

***b. A declaration that the 2<sup>nd</sup> defendant has no legal monopoly and or automatic membership of sugarcane farmers and the plaintiff and all other farmers contracted to the 1<sup>st</sup> defendant have the liberty to join any other legal competently managed farmers institution other than 2<sup>nd</sup> defendant Company.***

***c. A permanent injunction restraining the 1<sup>st</sup> defendant from deducting 1% capital levy or at all from sugarcane proceeds of the plaintiff and all the other farmers contracted to it and or remitting the same to the 2<sup>nd</sup> defendant.***

***d. An account of how the 1<sup>st</sup> defendant has wrongly deducted from the plaintiff and other***

***farmers and paid to the 2<sup>nd</sup> defendant from the 23<sup>rd</sup> of May 2012 to-date and upon taking such account an order of payment by the defendants jointly and severally to the Plaintiff and all other affected sugarcane farmers, of all moneys found to have been wrongly deducted from the proceeds of deliveries from the 1<sup>st</sup> defendant of sugarcane.***

3. Each of the two defendants filed their respective defences. Nzoia sugar admitted having entered into an agreement with Nzoia out growers on 11<sup>th</sup> October, 1991 to represent interest of farmers as stated by the Plaintiff but denies that the 1% levy was based on the initial agreement and states that the deductions are predicated upon the Memorandum and Articles of Association of the Nzoia Out growers. Further the levy is only charged upon farmers who are members of Nzoia Out growers. It admits terminating the agreement between the two but not on 22<sup>nd</sup> December, 2010 but on the 22<sup>nd</sup> November, 2011. It further denies that the 1% levy is illegal.

On its part Nzoia Out growers states that the Plaintiff is not a contracted cane grower and has no *locus* therefore to agitate for farmers in the cane growing region. And since he is not a member of the 2<sup>nd</sup> defendant he has no knowledge of any agreements between the defendants. Nzoia Out growers further denied that there are any unlawful deductions as alleged. Further it contends that it has no monopoly and farmers are at liberty to join or withdraw and there are laid down procedures.

4. With its defence Nzoia Out growers filed a notice of Preliminary objection which was supported by Nzoia sugar to the effect that;

***1. The plaintiff herein lacks the requisite locus standi to agitate and/or maintain these proceedings as a representative of cane growing farmers as he is not even a cane growing farmer.***

***2. The plaintiff has not sought and obtained relevant consents, issued notices or obtained leave of the Court prior to institution of suit.***

***3. The suit is a non-starter having been founded on the applicant's misunderstanding of the notice and the existing relationship between the respondents which has not been ousted.***

***4. The entire claim is malafides, untenable and ambiguous. It is a mere replica and or duplicity of another suit earlier filed; Bungoma CMCC No.53 of 2016.***

***5. The Plaintiff is a vexatious litigant and busy a body who has made it a habit to institute frivolous and inconsequential pleadings.***

5. At the hearing of the Preliminary Objection as the first business of the Court, Nzoia Out grower's Counsel Mr. Sichangi reiterated his grounds urging that the Plaintiff not being a farmer cannot represent the interest of sugar cane farmers, there is no proof that 800,000 farmers have consented to the suit, and failure to obtain consent of the farmers is fatal and renders the suit a non starter.

6. Mr. Makokha for Nzoia sugar supported the Preliminary objection and urged that this not being a Constitutional Petition, the plaintiff must prove that he has a cause of action, he must be a farmer contracted by Nzoia sugar or a member of Nzoia Out growers, yet there is no proof of any of the two.

Secondly Mr. Makokha reiterates that consent of others is necessary and the plaintiff must seek consent and leave of Court to institute such proceedings.

7. In response Mr. Olonyi for the Plaintiff submitted that, in the documents filed there is a list signed by farmers giving their consent, authorising the Plaintiff to file suit; Secondly the other grounds are not grounds for Preliminary Objection as they ought to be proved.

8. Having considered the notice of Preliminary Objection and submissions, issues for consideration are:-

a. *Whether grounds raised are capable of being considered by way of a Preliminary Objection.*

b. *Whether or not the suit before Court is competent as a representative suit and if the Plaintiff has locus.*

c. *Whether or not a similar suit is pending before another Court.*

9. A Preliminary Objection raised ought to be purely on points of law based on the assumption that all facts pleaded by the other side are correct and no facts are to be ascertained or if what is being sought is not judicial discretion. See **Uhuru Muigai Kenyatta versus Nairobi Star Publication Limited (2013)e KLR**. Items 2&3 in my considered opinion are pure points of law. Item 1 on whether the Plaintiff is a farmer whether he is or he is not a member of the 1<sup>st</sup> and 2<sup>nd</sup> defendant and likewise item 3 & 5 of the grounds require evidence and are not matters that can be disposed of by way of a Preliminary objection.

10. I will therefore confine myself to items 2 & 3 the rest are dismissed. Is this a representative suit if so what are the requirements order 1 rule 8 provides

**“One person may sue or defend on behalf of all in same interest.**

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

*(2) The parties shall in such cases give a 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.*

*(3) Any person on whose behalf or for whose benefit a suit is instituted or defended under sub-rule (1) may apply to Court to be made a party to such suit.”*

11. **Order 1 rule 8** is quite clear that for a representative suit there has to be notice to all those affected by either personal service or by way of a public advertisement, as the Court may direct. This requirement is mandatory.

12. No order as required in order 1 rule 8 was obtained and no such notice was issued. Both parties have indicated that to be affected farmers numbering 700,000 to 800,000, meaning that the Plaintiff ought to have moved the Court for an order to advertise the notice which has not been done.

13. The above in my view is not a reason to strike out the entire suit taking into account that it is not fatal at this stage since the suit is still in its infancy stage and giving due regard to Article 159 of the Constitution. The Plaintiff still has an opportunity to comply.

14. The next question is whether there is a duplicity of suits. Nzoia Out growers assert that there exists another suit **Bungoma CMCC No.53 of 2016**. Indeed as part of the defence evidence a plaint in the said suit is annexed indicating the parties to be similar and the pleadings equally similar. The prayers sought are also the same.

15. **Section 6 of the Civil Procedure Act** states as follows;

**“No Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previous instituted suit or proceedings between the same parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or other Court having jurisdiction in Kenya to grant the relief claimed.”**

16. On the above issue the Plaintiff’s Counsel simply denied the existence of the suit, yet it is clear that

such a suit was filed on 3<sup>rd</sup> of February, 2016.

**17.** In line with the requirement of Section 6 of the Civil Procedure Act this Court therefore cannot proceed with this suit. The same is stayed pending hearing and determination of CMCC No.53 of 2016 or until further orders of this Court. The Preliminary objection succeeds to this extent.

**18.** Cost to the defendants.

DATED and DELIVERED at BUNGOMA this 19<sup>th</sup> day of October, 2017

**ALI-ARONI**

**JUDGE**