



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MALINDI

ELC NO. 230 OF 2018

SHABAN ATHUMAN & ALEX FURAHA CHARO (Suing for and on behalf of the
Wamwanyundo Clan) PLAINTIFF

VERSUS

1. M/S KARSAN RAMJI & SONS LTD1ST DEFENDANT
2. DIRECTOR OF LANDS ADJUDICATION AND SETTLEMENT....2ND DEFENDANT
3. SETTLEMENT OFFICER KILIFI3RD DEFENDANT
4. NATIONAL LAND COMMISSION 4TH DEFENDANT
5. THE CHIEF LAND REGISTRAR5TH DEFENDANT
6. MINISTRY OF LANDS & URBAN DEVELOPMENT6TH DEFENDANT
7. THE ATTORNEY GENERAL.....7TH DEFENDANT

RULING

This ruling is in respect of the 1st Defendant's Notice of Preliminary Objection dated 28th July 2021 based on the following grounds: -

- a. That the dispute subject matter of this suit offends the provisions of Order 1 Rules 8 and 13 of the Civil Procedure Rules, 2010.
- b. That the Plaintiff is incompetent, fatally defective, bad in law and an abuse of the court process.

Counsel agreed to canvas the Preliminary Objection vide written submissions which were duly filed.

1ST DEFENDANT'S SUBMISSIONS

Counsel submitted that the Plaintiff's suit filed on behalf of Wamwanyundo Clan which was identified as the beneficial owner of the land Kilifi/Kawala (A) Kadzodzo/399 situated in Jimba/Kaliang'ombe Adjudication Scheme is defective as it was filed without an authority to plead on behalf of the Wamwanyundo Clan as is required under Order 1 Rule 8 and 13 of the Civil Procedure Rules, 2010.

Counsel submitted that the Preliminary Objection raised is on a pure point of law on locus standi and cited the cases of **Law Society of Kenya v Commissioner of Lands & others, Nakuru HCCC No. 464 of 2000** and **Alfred Njau & others v City Council of Nairobi [1982] KAR 229** to buttress the point. Counsel therefore urged the court to uphold the Preliminary Objection.

PLAINTIFF'S SUBMISSIONS

Counsel for the Plaintiff opposed the Preliminary Objection and listed two issues for determination on as to whether the Preliminary

Objection raises pure points of law and whether the Plaintiff's suit should be struck off.

It was counsel's submission that the law is silent on the consequences of failing to file such authority to act on behalf of the clan and that the court should use its discretion in the matter. Further that failure to file the authority was a technical error that this court should allow to be rectified as opposed to dismissing the suit.

Counsel relied on the court's inherent powers under Sections 1A, 1B and 3A of the Civil Procedure Act and cited the cases of **Research International East Africa Ltd v Julius Arisi & 213 others [2007] eKLR**; and **Hezekia Kipkorir Maritim & 10 others v Philip Kipkoech Tenai & 2 others [2016] eKLR** and urged the court to dismiss the Preliminary Objection with costs.

ANALYSIS AND DETERMINATION

The issue for determination is whether the Plaintiff's suit should be struck on the ground that the Plaintiff did not file an authority to plead on behalf of the Wamwanyundo clan.

It is evident on record that the Plaintiff did not file an authority to file this suit on behalf of Wamwanyundo clan as required by law and procedure. Counsel for the Plaintiff also submits that it was a technical error which the court has discretion to rectify.

In the case of **Law Society of Kenya v Commissioner of Lands & Others, Nakuru High Court Civil Case No.464 of 2000**, defined *locus standi* as follows:

“Locus Standi signifies a right to be heard, a person must have sufficiency of interest to sustain his standing to sue in Court of Law”. Further in the case of Alfred Njau and Others -Vs-City Council of Nairobi (1982) KAR 229, the Court also held that; -

“the term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings”.

The Plaintiffs described themselves in the e Amended Plaint as follows: -

“...adults of sound mind residing in Kilifi County in the Republic of Kenya suing for and on behalf of the Wamwanyundo Clan...”

The Plaintiff Shabani Athumani Maitha has filed a verifying affidavit where he states that he is fully authorized to swear the affidavit as he is conversant with the facts of the case. The issue of capacity to sue goes to the root of the matter.

The court is guided by the cases of case of **Hezekia Kipkorir Maritim & 10 others v Philip Kipkoech Tenai & 2 others [2016] eKLR** (supra) where the Court stated-

“...In view of the foregoing and with regard to the competence of this suit and the instant application, it is my view that even if the 2nd to 10th Plaintiff's suit was declared a non -starter for failure to authorize the 1st Plaintiff to swear respective affidavits on their behalf, the 1st Plaintiff's claim against the Defendants shall still stand. As it was held by the Court of Appeal in the foregoing Research International East Africa Ltd Case, *ibid*, the Honourable court has discretion and jurisdiction to allow the Plaintiffs to comply with the aforesated requisite rules...”

The failure of filing an authority to act in this particular case may not be fatal as the Plaintiff is also a member of the clan which he represents. If the worst scenario were to occur, then the Plaintiffs would still have capacity to proceed as individuals.

Sections 1A, 1B and specifically Section 3A of the Civil Procedure Act provides as follows-

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

Similarly, in Court of Appeal case of **Research International East Africa LTD vs Julius Arisi & 213 others [2007] eKLR** the court held that: -

“Having come to the conclusion that the verifying affidavit of Julius Arisi was filed without authority of the other 213 Plaintiffs, it follows that the other 213 Respondents have not complied with mandatory provisions of Rule 1 (2) of Order VII Civil Procedure Rules and that their suit was liable to be struck out by the superior court under rule 1 (3) of Order VII CP Rules.”

The superior court however had a discretion. It had jurisdiction instead of striking out the plaint to make any other appropriate orders such as giving the Plaintiffs another opportunity to comply with the rule.

This Court has jurisdiction to make any order that the superior court could have made. We have considered whether the 213 Respondents should be given another opportunity to comply with the rule.”

I am guided by the above case and find that this court has discretion to rectify the anomaly and hence the Plaintiff are given an opportunity to file an authority within 14 days from the date of this ruling. The Preliminary Objection therefore fails as it has no merit.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 16TH DAY OF FEBRUARY, 2022

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.