



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
ENVIRONMENT & LAND COURT
LAND CASE NO.305 OF 2014

PHARES OMONDI OKECH

JAMES WILLIAM NYAMANGA

JOEL MESHACK OKWENGU

GILBERT OKAYA(Suing for and on behalf of Kasgam

Community – Wadhari Clan).....PLAINITFFS

VERSUS

VICTORY CONSTRUCTION CO. LTD.....1ST DEFENDANT

KISUMU WATER & SEVERAGE CO. LTD.....2ND DEFENDANT

RULING

1. INTRODUCTION

(a) **Phares Omondi Okech, James William Nyamanga, Joel Meshack Okwengu and Gilbert Okaya** (Suing for and on behalf of Kasagami Community – Wadhari Clan) filed this suit through the plaint dated 15th October 2014, against **Victoria Construction Co. Ltd** and **Kisumu Water & Sewerage Co. Ltd** who are hereinafter referred to as the 1st and 2nd Defendants respectively. The plaintiff have averred that they have commenced "this suit on a representative capacity of the Kasagam Community and more specifically Wadhari clan".

(b) The 1st Defendant filed their statement of defence dated 10th November 2014 among other disputing the plaintiffs legal capacity to file this suit on behalf of Kasagam community or Wadhari Clan and that the suit is bad in law and fatally defective.

(c) The 2nd Defendant also filed their statement of defence dated 5th November 2014 in which they among other averred that the suit is incompetent, frivolous,scandalous and that the plaintiff are ill suited and would raise a preliminary objection for the suit to be struck out /dismissed.

2. That the counsel for 1st Defendant filed the notice to raise preliminary objection dated 10th September

2015 on the following ground:

"The plaintiffs lack legal capacity to commence the suit for and on behalf of Kasagan Community – Wadhari Clan, an amorphous entirety not known in law and the suit is therefore incurably defective and must be struck out."

When the matter came up for hearing of the main suit on 6th October 2015, Mr Nyawara, M/S Wafula and M/S Asuna for 1st Defendant, plaintiffs and 2nd Defendant respectively agreed that the preliminary objection be heard first. Each counsel presented their submissions which are summarized herein below:

(a) The counsel for 1st Defendant submitted that the plaintiff have not disclosed what position they hold in the community or Clan that they have filed the suit on behalf of. He also submitted that the Community and Clan are not legal entities that can sue or be sued and their membership has not been disclosed. That a society that is not registered under Section 4 of the Societies Act is an illegal Society. That this suit is not a public interest suit where the plaintiffs could sue for the community. The counsel submitted that the suit is bad in law and the Defendants would not be able to recoup their costs if the plaintiffs fail in their claim. The Counsel referred the Court to the following decided cases:

3. (i) Football Kenya Federation - V - Kenya Premier League Ltd and 4 Others {2005} eKLR

(ii) Amina Hassan & 372 Others {suing as Lekiji Community} -V – Nigal Welbey Trent & Another {2015} eKLR and

(iii) Dennis Olooihero & 4 others - V - The Art of Ventures Ltd & 2 Others {2006} eKLR and prayed for the suit to be struck out.

(b) The counsel for the 2nd Defendant adopted the submissions of the 1st Defendant's Counsel and asked for the suit to be dismissed for lack of capacity to sue.

(c) The counsel for the plaintiffs opposed the preliminary objection and submitted that the plaintiffs envisioned a relief under article 42 as read with article 70 of the Constitution which entitles them to file suit when their right to a clean environment is violated. That the suit is therefore anchored under article 22 of the Constitution. That the plaintiffs are members of the clan and also owners, of the land that has been violated by the Defendants. The counsel submitted that as the plaintiff resides in the area where the Community they represent in this case resides, they therefore have the locus Standi to file this suit. That the prayers in the plaint could be issued under article 23 (3) (a) (b) (c) and (e) of the Constitution. That the written authority signed and filed with the statement allows the plaintiffs to file this suit for their interests, that of the clan and future generation and to allow the preliminary objection would lock out of the court the benefits the plaintiffs seek to confer on the future generation. That to lock out the plaintiffs would be to give undue regard to procedural technicalities and the preliminary objection should therefore be dismissed.

(d) In reply counsel for the 1st Defendant submitted that the issue of capacity cannot be a procedural technicality as there cannot be a suit without capacity to sue. He submitted that the cases he cited has addressed article 22 of the Constitution and that unless in situations where there is a contravention of the rights, then the provisions of the article are not available to the plaintiff. That the written authority the counsel referred is from 2nd to 4th plaintiff authorising the 1st Plaintiff to act for them in this suit.

3. The issue for determination is whether the four named plaintiffs have capacity to institute the suit, for the named Community/Clan. Secondly whether Kasagam Community and or the Wadhari Clan is a legal entity. The court has considered the pleadings filed by the parties, the grounds on the notice of preliminary objection, and the submissions by counsel and come to the following conclusions:

(a) That an incorporated society cannot sue or be sued in its name, but that its officials or trustees

can institute a suit or defend a suit on behalf of the society in accordance with their constitution {see African Orthodox Church of Kenya – V- Rev Charles Omuroka & Lagos Ministry for Orthodox Renewal {2014} eKLR, Mitinyani Women Development Group – V – Group Four security Limited {2005} eKLR, Simu Vendors Association – V – The Town Clerk, City Council of Nairobi & Another {2005} eKLR, Ertrea Orthodox church – V s Waviwax Generation Limited {2007} eKLR, Living water Church International – V – City Council of Nairobi {2008} eKLR which are cited in Football Kenya Federation – V – Kenya Primer League Limited & 4 others {2015} eKLR. That flowing from the foregoing the plaintiffs have not pleaded that the Kasagam Community and Wadhari Clan are registered as such under the Society Act or any other statute. The plaintiffs have also not pleaded whether they are members to the two groups and the positions they hold. They have also not disclosed the names of the members of each of the two named groups. The plaintiffs have also not pleaded that there has been a contravention of their fundamental rights in the plaint and the submissions by their counsel that there has been a contravention is not therefore supported by the pleadings. In the case of Mumo Matemu & 5 others – V – Trusted Society of Human Rights Alliance (2014) eKLR the court of Appeal addressed itself to the provisions of article 22 and 258 of the constitution and said it is only where a person was acting in the public interest and when instituting proceedings before a court challenging the contravention of the constitution, be they NGOS or associations that they can be permitted to institute proceedings as persons, as defined under the respective statutes and when such definitions of who the bodies are is read together with Article 260 of the constitution. The court addressed itself on article 260 of the constitution in the case of Kirinyaga United Bar owners Organization – V- County Secretary Kirinyaga County Government & 6 Others {2014} eKLR. And said the following:

"The above constitutional provision for me indicate that a person named with a capacity to act on his own can bring a representative suit on his own behalf and on behalf of others. A person who lacks capacity to institute a suit can also bring an action under Article 22(1). through another person. The person bringing the action should clearly indicate his name in the suit stating that he/she is bringing the action on behalf of another or on his behalf in addition to others who for purposes of clarity must be named and must give authority or mandate if they wish to benefit or obligated from the relief sought. In the absence of a named person, then it becomes difficulty to know whether legal capacity is vested or not. Under Article 260 of the constitution a " person " includes a company, association or other body of persons whether incorporated or not. Of course bodies have capacity to sue or be sued as the law vests them with legal capacity. What the constitution addresses here are unincorporated bodies or a class of persons such as self help groups. The law does not bestow them with the legal capacity per se but constitution provides for an avenue through which they can competently appear in court and this is through person(s) vested with legal capacity. It is a bit absurd to imagine that the new constitution has opened doors for anybody including people of unsound mind, minors, bankrupts without a next friend, or a person with legal and sound capacity to represent them. Self help group, or community based organizations were created by the government to address poverty eradication and other noble causes, but were not clothed with the capacity to sue but can do so through its elected officials whose description should be given to show who they are and who they represent".

The plaintiffs herein described themselves in paragraph one of the plaint as "adult of sound mind working for gain and residing at Kasagam..... they are bringing this suit on a representative capacity of the Kasagam Community and more specifically Wadhari Clan." This clearly shows that they have not filed this action on their own behalf or on behalf of themselves and the named Community/ Clan. They state clearly that they have brought this "suit on a representative capacity". However they have not disclosed whether they hold any elected offices with the named Community/clan. They have not given the names of the members of the named Community /Clan and the court is unable to establish whether they have obtained the authority or mandate of the members of the named community/clan to file this suit.

(b) That the issue of capacity to sue cannot be a matter of procedure as counsel for the plaintiffs submitted to be cured through Article 159 of the constitution by the consideration of substantive justice. The lack of capacity cannot be cured by Article 159 of the constitution that emphasizes on

substantive justice or by applying the oxygen principle under Section 1A, 1B and 3A of the Civil Procedure Act (see Amina Hassan & 372 others.(suing as Lekiji Community) – V – Nigel Weibay Trent & another (2011) eKLR and Football Kenya Federation – V – Kenya Premier League & 4 others(2015) eKLR).

c. That the persons name as registered proprietors of land parcels Kisumu/Nyalenda "B"415, 416, 417, 422, 433, 434, 2380 and 1674 on which the sludge is said to have been unlawfully deposited may individually or jointly commence suit on their names for the desired prayers. The court has no way of knowing whether any of the persons named as the plaintiffs herein is a registered proprietor of any or all of the said parcels. If any of them is, then that person (s) should pursue their claim in their names and would not be prejudiced if the preliminary objection is upheld.

4. That having found as above, the court finds merit is the preliminary objection by the 1st Defendant and the same is upheld. The suit is consequently struck out but with costs to the Defendants.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

12/11/2015

Dated and delivered this **12th day of November 2015**

In presence of;

Applicants

Respondents

Counsel

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

12/11/2015

12/11/2015

S.M. Kibunja J

Court clerk oyugi

Parties absent

Mr Nyanga for Madialo for Respondent

Court: Ruling delivered in open court in Presence of Mr Nyanga for Madialo for Respondent.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

12/11/2015

Mr Nyanga – Mr Madialo seeks for leave to appeal.

Court: Leave to appeal granted.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

12/11/2015