



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ISIOLO

ELC CASE NO. E001 OF 2021

ISIOLO VISION OF HOPE YOUR DEVELOPMENT PROGRAMMES CBD

(Suing thro' Hussein Halkano (Chairman) Abdi Yusuf (Secretary) & Abdi Dadacha (Treasurer).....PLAINTIFFS

-VERSUS-

BISHAR MUSA.....1ST DEFENDANT

THE PHYSICAL PLANNER.....2ND DEFENDANT

THE LAND REGISTRAR ISIOLO COUNTY.....3RD DEFENDANT

THE HON. ATTORNEY GENERAL.....4TH DEFENDANT

RULING

1) The Notice of Preliminary Objection in this matter states as follows:

NOTICE OF PRELIMINARY OBJECTION

TAKE NOTICE that the 2nd and 4th defendant shall raise a preliminary objection to have the suit struck out on the following grounds:

1. The suit Offends the mandatory provisions of Order 1 Rule 13 and Order 1 Rule 8 (1) of the Civil Procedure Rules.

DATED AT MERU THIS 23RD DAY OF NOVEMBER, 2021

FOR: MBOGO & MURIUKI ADVOCATES FOR THE 2ND AND 4TH DEFENDANTS

2) The application was canvassed by way of written submissions. The 2nd and 4th defendants submissions are to the effect that:

a) There was no authority for all members of the plaintiff organization to be represented by the cited parties as required by Order 1 Rule 8 (1) and Order 1 Rule 13 (1) and 2 of the Civil Procedure Rules. I note that in both provisions, the operative word is "MAY" not "SHALL".

b) According to them the following cases support their assertions:

(i) ELC no. 94 of 2019 (OS) at Machakos.

(ii) Pentecostal Fellowship in Kenya Versus Kenya Commercial Bank [1999] eKLR. Note that the case was not annexed to the submissions.

3) The authorities cited by the 2nd and 3rd defendants are good authorities in their facts and circumstances. But not all suits are congruent to a degree of mathematical exactitude in their facts and circumstances. Every case must be considered on its own merit.

4) The 2nd to 4th defendants/respondents did not file written submissions.

In lieu thereof, they filed grounds of opposition which stated as follows:

GROUND OF OPPOSITION

TAKE NOTICE that the 3rd and 5th Defendants/Respondents herein shall at the hearing of this suit oppose the same on the following grounds THAT

1. This suit discloses no cause of action against the 3rd and 5th defendants/respondents and the same ought to be dismissed with costs.

It is clear that the 2nd to 4th defendants contemplate that there will be hearing of the suit. Of course, grounds of opposition should not be conflated with Preliminary Objections on a point of law. In my view, the 2nd to 4th defendants ought to be given their day in court as indicated in their grounds of opposition.

5) In its submissions, the plaintiff opined that the defendants Preliminary Objection was a tactic meant in a bid to deny the plaintiff and its members, all of whom are widows, or orphans and the less vulnerable in their society, their legal proprietary right.

According to them Article 260 of the Constitution defines a person as:

“person” includes a Company, association or other body of persons whether incorporated or unincorporated”.

According to the plaintiff, this Constitutional Provision debunks the provisions contained in Order (1) Rule 8 (1) and Rule 13 (1) and (2) of the Civil Procedure Rules.

6) The plaintiff argues that section 100 of the Civil Procedure Act provides for an avenue to cure defects such as the ones asserted by the 2nd and 3rd defendants. It states as follows:

Section 100: ***“The court may at anytime and in such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceedings.”***

7) The plaintiff has also argued that Orders 1, Rule 10, order 8 Rule 3 (10) and Order 5 rule (5) of the Civil Procedure Rules provide for ameliorative avenues in cases such as this. To buttress its argument the plaintiff has offered the case of Moon Versus Atherton (1972) 3 All ER 145 as cited by the Court of Appeal in Kenya Trypanosomiasis Research Institute versus Anthony Karimba Gusinjilu Suing for and on behalf of 112 plaintiffs [2019] eKLR where Lord Denning opined as follows:

“In a representative action, the person who is named as plaintiff is, of course, a full party to the action. The others who are not named, but whom she represents are also parties to the action. They are all bound by the eventual decision in the case

... the court may at any stage in the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading in such terms as to costs or otherwise may be just and in such manner (if any) as it may direct.”

8) The plaintiffs says that in this representative suit they have authority to sue on behalf of the other members as they have provided the names of the members of the organization with their signatures next to the names, their national identity card numbers and phone numbers. This invites the issue of determination of if this constitutes proper authority for the Chairman, Secretary and Treasurer to institute this suit on behalf of all the members of the plaintiff. This clearly invites arguments and renders the Preliminary Objection not to be raising pure points of law.

9) The plaintiff has offered the case of ***Phares Omondi Okeck K 3 others (suing for and on behalf of Kasgam Community – wadhari Clan Versus Victory Construction Co. Ltd and Kisumu Water and Another [2015]eKLR*** which buttresses the finding in many cases that unincorporated bodies can only sue in the name of its officials. They have also offered the case of ***Mumo Matemu & 5 others Versus Trusted Society of Human Rights Alliance [2014] eKLR*** where the court of Appeal opined as follows:

“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 associates that they can be permitted to institute proceedings as persons as defined under the respective statutes and when such definition of who the bodies are is read together with Article 260 of the Constitution. In the same vein the plaintiff offers Kirinyaga United bar Owners Organization versus County Government & 6 others [2014] eKLR. To demonstrate that its case is not unmeritorious, ambiguous, unintelligible and raises irrelevant issues, the plaintiff has offered the case Trust Bank Ltd Versus Amin Co. Ltd & Another [2000] eKLR.

10) The plaintiff feels that the Preliminary Objection in this case is meant only to unnecessarily increase costs, delay determination of pertinent issues and confuse them and has offered the case of ***Pontillas Investment Versus Central Bank of Kenya & Another [2017]*** in the East African Court of Justice.

11) Finally, the plaintiff argues the dismissal of this suit would be draconian and would not solve the issues in dispute. It proffered the case of Dickson Karaba Versus John Ngata Kariuki & Another [2010] eKLR where the court opined as follows:

“striking out is a very serious matter, it is draconian and it should be resorted to as an avenue when the case filed is hopeless or is meant or intended to abuse the process of the court.....the court cannot also exercise its inherent jurisdiction when the exercise will lead to an injustice”.

12) I do find that the Preliminary Objection in this case raises arguments and renders the issues it raises not pure points of law. I do note that the proponents of the Preliminary Objection do agree on the last page of their written submission that the 3 officials who instituted the suit can continue prosecuting their case. This means that this suit cannot be dismissed in its entirety at this stage.

13) I do note that in the case of JEURI COMMUNITY BASED ORGANIZATION, eKLR, where the court said: “That the Applicant cannot just annex a list of the inhabitants on whose behalf he proposes to be acting which is not signed by any of the persons listed therein can be distinguished from the facts of this case where the members had not only signed against their names but also had availed their identity card numbers and their phones.

14) In the circumstances, I issue the following orders:

a) This Notice of Preliminary Objection is hereby dismissed.

b) The parties are directed to concurrently fully comply with Order 11 of the Civil Procedure Rules within 30 days after delivery of this RULING.

c) Costs shall be in the cause.

d) Parties shall take directions on 30/5/2022.

DELIVERED IN OPEN COURT AT ISIOLO THIS 14TH DAY OF MARCH, 2022 IN THE PRESENCE OF:

Court Assistant: Balozi

Ashava for the plaintiffs

M/S Nyasani h/b Muriuki for 2nd to 4th Respondents

HON. JUSTICE P. M. NJORGE

JUDGE