



**REPUBLIC OF KENYA**

**High Court at Mombasa**

**Civil Suit 91 of 2009**

**JACK ANZAYA & 9 OTHERS.....PLAINTIFFS**

**VERSUS**

**ZACHARIA AMAMBI & OTHERS.....DEFENDANTS**

**RULING**

1. The Plaintiffs came to court by way of plaint and a Notice of Motion dated 26<sup>th</sup> March, 2009. They are suing on behalf of 22 others. They seek a mandatory injunction to compel the Defendants to accept the Plaintiffs' subscription to Khwisero Development Society, and to be allowed to take part in the society's affairs. They also seek an injunction against their expulsion from the society. The Plaintiffs' verifying affidavit was sworn by Jack A. Anzaya acting on the written authority of ten, only, of the thirty two other Plaintiffs.

2. The Defendants filed a Preliminary Objection on the grounds:

- a) That the leave of the court was not sought before the suit was filed pursuant to Order 1 Rule 8 of the old Civil Procedure Rules.
- b) That no notice of institution of suit, preferably through the print media or in any other way as the court may deem sufficient was given to all parties concerned.

3. Parties filed written submissions. Order I Rule 8 of the old Civil Procedure Rules provided:

***“8 (1) Where there are numerous persons having the same interest in one suit, one or more of such persons may sue or be sued or may be authorised by the court to defend in such suit on behalf of or for the benefit of all other persons so interested.***

***(2)The court shall in each case direct the Plaintiff to give notice of the institution 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 may in each case direct.”***

4. The issues for determination are as follows:

- a) Whether the leave of court was required prior to institution of the suit, and if so, whether there was need for notice to be issued to Defendants.
- b) Whether non compliance with the requirement of order 1 Rule 8 is fatal to the suit.

5. The Defendants relied on the following authorities:

**Sonko and Others Vs Haluna and Another** [1971) EA 443 in which the High Court (Uganda) held that:

***“...in the absence of a representation order, the claim or behalf of unnamed Plaintiffs could not stand and would be struck out.”***

**Bahadir Engineer & 2 Others Vs Aspi Konkrahalla & Ten Others** HCC 443/1993 Mombasa where the court held:

***“Order 1 Rule 8 of the Civil Procedure Rules provides that any Plaintiffs bringing a suit in a representative capacity must obtain a representation order on behalf of the unnamed Plaintiffs. Non-compliance thereof is fatal, and as the requirement is mandatory the incidental order that must flow from that omission is that the suit must be struck out.”***

The **Bahadir** case followed, with approval, the cases of **Sonko** and **JJ Campos and Another Vs De Souza and five Others** (1933) 15 KLR

6. The Defendants also cited **El Busaidy Vs Commissioner of Lands and 2 Others** KLR (E & L) 1 479 where it was held that where numerous persons having the same interest in one suit and one such person wishes to sue he must do it on behalf of the others in a representative capacity. Further that:

***“...it is mandatory that leave of the court has to issue before the suit is filed and the court has mandatorily got to make a direction that the notice of the institution of the suit has to be given to all parties concerned preferably through the print media or as the court will deem sufficient.”***

7. The Plaintiffs' only response in its submissions was that the Preliminary Objection should not be allowed because none of the parties had complied with the new Civil Procedure Rules, 2010, and that the Defendants' written submissions are defective for not being dated. They sought that the hearing proceed on its merits.

8. The Plaintiffs also filed an authority, viz, HCC 58 of 1996 Mombasa **Awadh Osham and 2 Others vs Job Omino and 2 Others** where the court dealt with, *inter alia*, whether the suit there was a representative suit and if so, whether the Applicants needed leave of the court to proceed with the suit. The court there held that Order 1 Rule 8 is intended to prevent a multiplicity of suits where common interests of numerous persons are being considered. The court further found the suit to be a representative suit and struck it out as incompetent for failure to comply with Order 1 Rule 8 as to obtaining a court order.

This authority is of assistance to the Defendants' position.

9. Dealing with the two issues for determination together, it is clear from Order 1 Rule 8 and the cited authorities that the law mandatorily required a party filing suit in a representative capacity to obtain a representation order from court and for notification to be published to all interested persons. It is also clear that failure to do so was fatal to the application and that such omission would lead to striking out.

10. If the application had been heard in 2009 under the Old Civil Procedure Rules I would readily have agreed with the Defendants position. I would nevertheless have had in mind that the Plaintiff's omission is entirely a technicality, and does not respond to the substantive issues in dispute. Further I would have in mind that to entirely and conclusively lock out a party from the corridors of justice should always be based on very good and convincing reasons, and as a last resort.

**11.** In this case, the Plaintiffs' real substantive complaint, is one which concerns their being locked out of their membership association without the rules of natural justice being followed. This hearing of the Preliminary Objection is also coming at a time when a new constitutional order is in place. This court's mandate in the dispensation of justice under the new order is, under Article 159 (2), to ensure that:

***“(d) justice shall be administered without undue regard to procedural technicalities.”***

12. This court's hands are not tied by the technicalities of procedure that were relevant or mandatory under the old constitutional order. I must bear first allegiance to the new constitutional order. It would be dissonant of the court to make pronouncement today bending to yesterday's technicalities when today's law and legal jurisprudence and present practice call for a new paradigm and an end to the past. I will therefore exercise my discretion to disregard the Plaintiffs' omission in favour of substantial justice. I also have in mind the new Civil Procedure Rules Order 1 Rule 8(1) which provides that:

***“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....”***

13. Accordingly, whilst a strict application of the Old Civil Procedure Rules may have led to the striking out of the suit, I hereby decline to do so for the reasons stated. In the result, I will order as follows:

- a) The Plaintiffs shall, by affidavit ascertain and confirm all the persons who are Plaintiffs in the suit. This shall be effected within Ten (10) days of the date hereof.
- b) The Plaintiffs shall give notice of the suit to all parties affected thereby by advertisement in one daily newspaper of national circulation. This shall be effected within twenty one (21) days of the date hereof.
- c) The parties shall thereafter comply with Order 11 of the Civil Procedure Rules, 2010, within forty five (45) days of the date hereof by filing lists of and witness statements, lists of, and duly paginated documents to be relied upon at the hearing.
- d)** Upon compliance with (c) above, the hearing of the suit shall proceed after a pre-trial conference within fifteen(15) days, thereafter
- e) Liberty to apply is granted, except as to extensions of time in relation to orders (a), (b) and (c) above.
- f) The Costs herein are costs in the cause.

Orders accordingly.

**Dated, signed and delivered this 11<sup>th</sup> day of January, 2013**

**R.M. MWONGO  
JUDGE**

**Read in open court**

**Coram:**

Judge: R.M. Mwongo

Court clerk: M. Matano

**In Presence of Parties/Representative as follows:**

- a).....
- b).....
- c).....
- d).....