



REPUBLIC OF KENYA

High Court at Malindi

Environmental & Land Case 102 of 2012

IN THE MATTER OF: PLOT NO. 13/III/MN CR NO.5692

AND

IN THE MATTER OF: APPLICATION FOR DECLARATION THAT THE PLAINTIFF'S
HAVE OBTAINED OWNERSHIP OF 206 ACRES OF THE SAID LAND BY ADVERSE
POSSESSION

BETWEEN

JEURI COMMUNITY BASED ORGANISATION

THROUGH

KAHINDI KATANA MWANGO

KAHINDI MRAMBA MWENI

(ON BEHALF OF 41
OTHERS).....PLAINTIFFS

VERSUS

CANON ASSURANCE K. LTD.....DEFENDANT

RULING

1. What is before the court is the Defendant's Notice of Motion dated 23rd November 2012 and filed on 26th November 2012. The said Motion seeks for the following reliefs:

(a) **THAT the Plaintiff's pleadings herein be set aside and or struck out with costs to the Defendant.**

(b) **THAT the costs of this application be provided for.**

1. The Application is premised on the grounds that the pleadings as drawn and filed by the Plaintiff are fundamentally defective; that the pleadings amount to an outright abuse of the process of court for grossly offending the appropriate mandatory provisions of the Civil Procedure Rules; that the Plaintiffs

have no *locus standi* to institute the current pleadings for lack of authority and finally that no nexus has been demonstrated between the unincorporated Jeuri Community Based organization and the two Plaintiffs either on their own or on behalf of the other 41 persons.

2. The Application is supported by the Affidavit of John Ng'ang'a, the Defendant's Finance Director. The said affidavit is a reinstatement of the grounds which I have summarised above.

3. When this Application came up for hearing on 12th February 2013, Mr. Nyachiro, counsel for the Plaintiffs, informed the court that he had not filed a Replying Affidavit due to the fact that he was no longer seized of the matter. Counsel applied for an adjournment to enable him file an application to withdraw from acting for the Plaintiffs. The Application for adjournment was allowed and the Plaintiff's advocate was ordered by the court to file the Application to withdraw from acting within 14 days. The Defendant's Application was fixed for hearing on 13th March 2013.

4. When the matter came up for hearing on 13th March, 2013, Mr. Nyachiro, counsel for the Plaintiffs was not in court. The Plaintiffs' counsel had also not tiled the Application to withdraw from acting for the Plaintiffs. No Replying Affidavit was filed in response to the current Application.

5. Ms Adagi, counsel for the Defendant filed written submissions which she relied on in arguing the Defendant's application.

6. Counsel submitted that the current suit is purported to be brought in a representative capacity by the two Plaintiffs without an order permitting them to institute the proceedings pursuant to the provisions of Order 1 Rule 8 of the Civil Procedure Rules. Consequently, counsel submitted that the entire suit is a nullity.

7. The Defendant's counsel further submitted that the institution of these proceedings by persons who form an unincorporated organization without complying with Order 1 Rule 8 renders the suit *null* and *void ab initio* and the suit cannot be saved even by way of amendment to substitute.

8. It was further submitted on behalf of the Defendant that the Plaintiffs have failed to show in their Verifying Affidavit any written authority entitling them to sue on behalf of "JEURI COMMUNITY BASED ORGANISATION and or on behalf of 41 others" in accordance with Order 1 Rule 13 of the Civil Procedure Rules.

9. No *nexus*, counsel submitted, had been demonstrated between the two Plaintiffs and "JEURI COMMUNITY BASED ORGANISATION" either on their own behalf or on behalf of the other 41 persons. In that respect, it was submitted, the suit is a nullity *ab initio*, incompetent for want of lawful Plaintiffs and is incapable of being amended.

10. The Defendant's counsel finally submitted that the Plaintiffs have no actionable right to bring these proceedings and the said proceedings amount to an outright abuse of the process of the court for grossly offending the Mandatory provisions of Order 37 Rule 7 of the Civil Procedure Rules, 2010. The Defendant's counsel relied on case law which I have considered.

11. The Plaintiffs, JEURI COMMUNITY BASED ORGANISATION, through Kahindi Katana Mwango and Kahindi Mramba Mweni (on behalf of 41 others) moved this court by way of an Originating Summons on 2nd July 2012 seeking the determination of the following issues:

(a) Are the Plaintiffs entitled to be declared proprietors of 260 acres of land on Plot No. 13/111/MN CR NO. 5692 which they have acquired by adverse possession after staying on the plot for over 30 years?

(b) Are the Plaintiffs entitled to be registered as the owners of PLOT NO. 13/111/MN CR NO.5692 and be issued with a certificate or title?

(c) Are the Applicants entitled to the costs of this suit?

11. The Originating Summons were filed by the firm of Ombachi, Moriasi & Co. Advocates. The Plaintiff's Supporting Affidavit was sworn by Kahindi Katana Mwangi where he described himself as the 1st Plaintiff and hence competent to swear the affidavit.

12. The 1st Plaintiff does not mention or describe "Jeuri Community Based Organisation" or the 2nd Plaintiff or the 41 persons whose names he has annexed on the Supporting Affidavit at all.

13. The only instance that the 1st Plaintiff makes a remote mention of the other people whose names he has annexed in the Affidavit is at paragraph 3 where he states as follows:

"THAT I personally and the rest of the occupants entered the suit premises on diverse dates before the year 1962 without anybody's consent and our stay on the plot has been continuous, openly and adequately and or uninterruptedly and above all adverse to the title of the defendant herein."

14. The 1st Plaintiff does not describe Jeuri Community Based Organisation on whose behalf he purports to be suing. The 1st Plaintiff does not state the circumstances under which he is bringing this suit on behalf of 41 others and the office he holds in Jeuri Community Based Organisation.

15. In the case of **FREE PENTECOSTAL FELLOWSHIP IN KENYA -VS- KENYA COMMERCIAL BANK; HCCC.NO. 5116 OF 1992 (OS)**, Justice Bosire, as he was then, held as follows:

"The position in common law is that a suit by or against unincorporated bodies of persons must be brought in names of, or against all the members of the body or bodies. Where there are numerous members, the suit may be instituted by or against one or more such persons in a representative capacity pursuant to the provisions of Order 1 Rule 8 of the Civil Procedure Rules. In the instant matter the suit was instituted in the name of the religious organization. It is not a body corporate. It is not a body which would then mean it would sue as a legal personality. That being so it lacked the capacity to institute proceedings in its own name."

16. The above pronouncement by Justice Bosire, as he then was, is the correct legal position on the requirements of Order 1 Rule 8 of the Civil Procedure.

17. Indeed, Order 4 Rule 4 of the Civil Procedure Rules requires that where the Plaintiff sues in a representative capacity, the Plaintiff shall state the capacity in which he sues. The Plaintiff's Originating Summons does not state whether the Jeuri Community Based Organisation, through the two Plaintiffs, suing on behalf of 41 others is a representative suit or not. That, in my view, renders the suit incurably defective.

18. As at the time of filing the suit, the Plaintiffs were under an obligation to show the written authority entitling them to sue on behalf of "JEURI COMMUNITY BASED ORGANISATION" or on behalf of 41 others in accordance with the provisions of Order 1 Rule 13 of the Civil Procedure Rules, 2010. The Applicant cannot just annex a list of the inhabitants on whose behalf he purports to be acting which is not signed by any of the persons listed therein. In the case of **SONKO AND OTHERS -VS- HALUNA & ANOTHER (1971) EA 443**, the court held as follows:

"In the absence of a representation Order the claim on behalf of unnamed Plaintiffs cannot stand and would be struck out".

19. In **JOHN MUNGAI NJORONGE & 8 OTHERS; Nakuru H.C.C.C. No. 152 of 2003**, it was held as follows:

"The plain reading of the above rule (order 1 Rule 12 of the Civil Procedure Rules) is that where a

party requires another party to appear, plead, or act on his behalf he had to give the authority in writing before such a person filing the suit can claim to be representing such person.”

20. In the absence of a signed written authority by the 41 people on whose behalf the Plaintiffs purport to be suing; and in the absence of the averment in the Originating Summons describing the legal status of JEURI COMMUNITY BASED ORGANISATION or any document showing the legal status of the said organisation; and in the absence of a notice of the suit to all the 41 persons on whose behalf the two Plaintiffs purport to be acting either in person or by advertisements, I find and hold that the entire suit is *null and void ab initio*.

21. In the circumstances, I allow the Defendant's application dated 23rd November 2012 as prayed.

Dated and delivered at Malindi this **26th** day of **April**, 2013.

O. A. Angote

Judge