



REPUBLIC OF KENYA

High Court at Nyeri

Civil Appeal 106 of 2009

IHITHE RURAL ELECTRIFICATION PROJECT.....APPELLANT

Versus

DUNCAN KIMAMO NGUGI

JAMES WAIREGI NDUNGU

RICHARD WAMATHAIDEFENDANTS

(appeal arising from the ruling of Hon. L.W. Gitari Chief Magistrate

Nyeri in Civil Case No. 477 of 2004

RULING

1. This is an appeal from the ruling of L.W. Gitari dated 19th August 2009 in which she allowed the preliminary objection by the defendant/Respondent on the basis that the plaintiff stated that the plaintiff are suing on behalf of 73 others but without their authority being annexed.

2. Being dissatisfied by the said ruling the appellant filed his appeal and raised the following grounds of appeal:

1. That the learned trial magistrate erred in law in failing to note that the purported preliminary objection had earlier been canvassed by S.N. Mukunya Advocate for the respondent in this appeal on 28th May 2004 and a ruling thereof delivered on 8th June 2004; thereby entertaining a matter resjudicata.

2. That the learned trial magistrate erred in failing to note that while the suit may well have been representative the plaintiffs, individually had claims against the defendants thereby rendering the suit incapable of being dismissed for failure to file authority together with suit.

3. That the learned trial magistrate erred in law and in fact in failing to note that indeed an authority, debene esse – exists on the court record.

4. That the learned trial magistrate erred in law in completely misdirecting herself on the law application.

3. Directions were given that this appeal be heard by way of written submissions which have now been filed.

4. The preliminary objection that led to this appeal was to the effect that the five plaintiffs brought a representative suit on behalf of 73 others without the authority being attached to the pleadings contrary to then order 1 rule 12 CPR (*now order 1 rule 13*).

5. By a plaint dated 24/5/2004 the appellant sued the respondent and at paragraph 1 thereof stated.

1. The plaintiffs are adult males of sound minds suing for themselves and on behalf of 73 other whose authority to sue on their behalf is annexed to the plaint”.

6. As at the time when the respondent took out the preliminary objection there was no authority of 73 other members of Ithethe Rural Electrification Self Help Project attached to the plaint.

7. It is also clear that the defendant/respondent in their defence denied that the plaintiffs have authority to file the suit and further derived that such authority if any was filed and or served.

8. There are therefore only two issues for determination in this appeal.

a. Whether the trial court was right in upholding the preliminary objection

b. Whether the said objection was resjudicata.

SUBMISSIONS

9. It has been submitted by the appellant that the issue of the authority to file representative suit had been argued and specifically ruled upon by the trial court and therefore it was not available for the respondent to raise the issue by way of preliminary objection having opted not to appeal.

10. On the issue of authority it is submitted that the same was filed and that the form of that authority was not the issue for courts determination and that the issue as to whether the said document qualified as an authority was not capable of being impeached by way of preliminary objection and in support thereof the case of MUKISA BISCUIT was referred to.

11. It was further submitted that even if the authority was not filed the other five plaintiff had filed the suit on their own behalf and therefore the suit could not fail for want of authority.

12. On behalf of the respondent it was submitted that this being a representative suit an express authority for each of the persons must be sought and filed in court and since no other authority had been sought and filed the suit was incompetent and improperly before the court.

13. It was submitted that the matter was not resjudicata since the court had not exercised its judicial mind on the same since the court did not determine the issue of representation at the application stage and was of the opinion that the same could be determined in the main suit.

14. In support of the issue of lack of authority the respondent relied upon the case of SALIM LEMUTA KONYOKIE & ANO. Vs ERICK KONCHELLA & 2 OTHERS (2006) 2KLR wherein the court held that since the sixty (60) families on whose behalf the suit and the application were made did not give them consent in writing in terms of order 1 rule 12(2) of the Civil Procedure rules the application was also rendered incompetent.

15. To determine this appeal one need to look at order 1 rule 8(1) which provides as follows:

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 maybe authorised by the court to defend in such suit on behalf of or for the benefit of all the persons so interested.

Order 1 rule (2) provides as follows:

8(2) The court shall in such a case direct the plaintiff to give notice of 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 in each case may direct.”

16. The plaintiffs were therefore perfectly entitled to file a plaint in a representation capacity if they were satisfied that the cause of action was the same and it was therefore the duty of the court under rule 8(2) to direct the plaintiff to give notice of the institution of the suit to all such persons.

17. From the above it is clear that the trial court was not right in dismissing the appellant suit but should have ordered the same to serve all the other interested parties.

18. I have also noted that the issue raised in the preliminary objection had been conversed before a court of competent jurisdiction which ruled that determined in the main trial and since the respondent did not appeal against the said holding I agree with the appellant that the same was not available to the respondent to raise by way of preliminary objection.

19. By reason of the matters stated herein I allow the appeal herein and direct that the appellants should be taken back for trial before the chief magistrate.

20. Cost of the appeal shall await the determination of the main suit.

Dated and delivered at Nyeri this 23rd day of May 2013.

J. WAKIAGA
JUDGE

Mr. Theuri for Karweru for appellant

Miss Ndegwa for the respondent

Court: The ruling is delivered in open court in the presence of the above named advocates. CMCC No. 477/2004 to be mentioned before the Chief Magistrate on 24th June 2013 for further directions.

J. WAKIAGA
JUDGE