



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

E. L. C. CASE NO. 610 OF 2008

**GEORGE O. OCHOLA.....PLAINTIFF**

(Suing on his behalf and on behalf of 200 others collectively known

As GITUAMBA QUARRY MICRO INVESTORS SELF HELP GROUP)

**VERSUS**

**NGINA KENYATTA ..... 1<sup>ST</sup> DEFENDANT**

**GITUAMBA STONES LIMITED.....2<sup>ND</sup> DEFENDANT**

**RULING**

Coming up before me for determination is the Notice of Motion dated 14<sup>th</sup> December 2011 in which the Defendant/Applicants seek for the suit to be struck out with costs to the Defendants.

It is based on the grounds set out on the face of it together with the Supporting Affidavit of S.K. Njau sworn on 14<sup>th</sup> December 2011 in which he stated that he is the Financial Controller of the 2<sup>nd</sup> Defendant and that the 2<sup>nd</sup> Defendant is the registered proprietor of the suit property. He stated further that the Plaintiff's Group was registered on 27<sup>th</sup> October 2008 and the 2<sup>nd</sup> Defendant was incorporated on 12<sup>th</sup> May 1997 so the 2<sup>nd</sup> Defendant could not have entered into any contractual relationship with the Group for over 30 years as alleged in the Plaint. He stated further that the 2<sup>nd</sup> Defendant granted permits to individual quarry operators which stipulated that the 2<sup>nd</sup> Defendant was at liberty to revoke the same upon service of 3 months' notice. He further averred that the Plaintiff did not seek leave to file a representative suit as required by law so the suit is fatally defective and incompetent. He further stated that the suit has been filed on behalf of unknown persons whose identities have not been disclosed therefore the suit is bad in law. He also stated that the court made a ruling on 24<sup>th</sup> March 2011 that there was no service of summons upon the Defendants and that in view of the mandatory provisions of Order 5 rule 1 of the Civil Procedure Rules, 2010, this court has no jurisdiction to deal with this matter as the suit has abated.

Despite service, the Plaintiffs did not file any response to this application and the same stands unopposed.

**Order 5 Rule 1(6)** provides that every summons ... shall be collected for service within thirty days of issue or notification, whichever is later, failing which the suit shall abate. It is true that the learned Judge in his ruling dated 29<sup>th</sup> March 2011 made a finding that summons had not been served upon the Defendants and that the Defendants merely took a precautionary measure by filing a memorandum of appearance. On this ground alone, I am entitled to declare this suit as abated.

**Order 1 Rule 8** requires a party to seek the leave of the court in order to file a representative suit. The provision clearly stipulates 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. I rely on the case of *Moses Lesiamon Ole Mpoie & Another versus The Commissioner of Lands and 4 Others (2005) eKLR* where it was stated as follows:

***“Being a representative suit, the respondents were first required to seek the leave of Court as provided by Order 1 Rule 8 of the Civil Procedure Rules. As held in the case of Wanjiru versus Standard Chartered Bank of Kenya Ltd & Another (2003) 2 EA 701, where a plaintiff files a representative suit without seeking the leave of the court, such suit will be incompetent and would be amenable to being struck out. The Respondents having failed to seek leave of this court before filing suit, have rendered this suit incompetent. For that reason alone, I would strike out the respondent’s suit.”***

Going by this authority, I am also entitled to strike out this suit on that ground alone.

In conclusion, I find that the Defendants’ application has merit and therefore allow the same. The suit is hereby dismissed with costs to the Defendants.

**SIGNED AND DELIVERED AT NAIROBI**

**ON THE 27<sup>TH</sup> DAY OF SEPTEMBER 2013.**

**MARY M. GITUMBI**

**JUDGE**