



**Kenyaga v Onganyo & 5 others (Sued as trustees of Barina Squatters Self Help Group)
(Environment & Land Case 313 of 2013) [2022] KEELC 2329 (KLR) (12 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 2329 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 313 OF 2013
LA OMOLLO, J
MAY 12, 2022**

BETWEEN

PACIFICA MORAA KENYAGA PLAINTIFF

AND

JACKON MEMBA ONGANYO 1ST RESPONDENT

TOBIAS OSANO 2ND RESPONDENT

SIMON KURIA NDUNGU 3RD RESPONDENT

JOHANAH KIBILOCH KIBET 4TH RESPONDENT

DAVID NJUGE KANINI 5TH RESPONDENT

**BARINA SQUATTERS SELF HELP GROUP ALIAS BARINA SQUATTERS SELF
HELP GROUP LAND PROJECT 6TH RESPONDENT**

SUED AS TRUSTEES OF BARINA SQUATTERS SELF HELP GROUP

RULING

Introduction

1. This ruling is in respect of the 6th Defendant/Applicant's Notice of Motion application dated 7th October, 2021. The said application is expressed to be brought under Section 1A, 3A and 63 (e) of the *Civil Procedure Act*, Order 51 of the Civil Procedure Rules 2010 and Article 159 (2) (b) of *the Constitution*.
2. The application seeks the following Orders:
 1. ...Spent



2. That the 6th Defendant be granted leave to file its memorandum of appearance and statement of defence out of time.
 3. That the statement of Defence dated 7th October, 2021 be deemed as duly filed and served upon payment of the requisite fees.
 4. That costs of this application be in the cause.
3. The application is based on the grounds on its face and supported by the affidavit sworn by one Patrick Maguru who is the chairperson of the 6th Defendant/Applicant. The supporting affidavit is sworn on the 7th October, 2021.

Factual Background

4. This suit was commenced by the Plaintiff dated 22nd April, 2013 and filed on the same date. An amended plaint dated 19th March, 2020 was subsequently filed on 3rd March, 2021.
5. The prayers sought in the plaint are:
 - I. A permanent injunction restraining the Defendants by themselves, with their servants, agents and or any other persons claiming under them from entering, taking up, trespassing, alienating, cultivating, occupying and or interfering with the plaintiffs in any way whatsoever with all that parcel of land known as plot no. 329 also now known as plot No. 252 measuring approximately 6 acres.
 - II. Declaration that all parcel of land known as plot No. 329 now known as Plot 252 measuring approximately 6 acres has been purchased by the plaintiff herein legitimately hence it is her property and the 2nd – 6th Defendants be ordered to issue the Plaintiff with a title deed.
 - III. Costs of this suit
 - IV. Any other relief that this honourable court may deem fit.
6. The suit as against the 5th Defendant was withdrawn on 6th February, 2018.
7. The 4th Defendant did not respond to this application.
8. The 6th Defendant was joined to this suit vide an amended Plaintiff filed on 3rd March, 2021 and has filed this application seeking leave to file its defence out of time.
9. The 2nd and 3rd Defendant have filed a preliminary objection to the said application.

The 6th Defendant/ Applicant's Contention.

10. The 6th Defendant/Applicant contends that it was formed for the purpose of buying land through the contributions of its members and that it bought 4803 acres of land and paid the full purchase price in the year 2006.
11. It is its contention that it is the beneficial owner of land parcel No's LR No. 11384, LR No. 5700 and LR No. 10332 having bought the same for its members and that the Plaintiff in this matter commenced this suit regarding her share of the property as a member of the applicant organization.
12. It contends further that the plaintiff alleges that the 2nd to 5th Defendants are its trustees and that they wish to dispose her land to third parties.



13. It is also its contention that the process of obtaining the land and subdividing it has been hijacked by people who were squatters on the land to the detriment of its genuine members who have now been displaced by third parties who had bought the land from fraudsters who were claiming to be officials of the 6th Defendant/Applicant.
14. The 6th Defendant/Applicant also contends that the said persons have been allocated over 803 acres for their settlement but they have now registered trusts and are purportedly trying to dispose off the other properties.
15. It contends that the said persons include the Applicant's co-Defendants in this case and that any service upon the trustees cannot be construed as being proper service to the 6th Defendant/Applicant as they do not hold any positions in it.
16. It also contends that it did not know of this case as it was never served with the summons or any other court documents and it now wishes to put in its defence in order to ventilate its case adding that no evidence has been produced to show that it was served with any court documents.
17. It is its contention that the proceedings and determination of this matter will have affect it because the judgement is sought against it and the other Defendants.
18. It ends its deposition by stating that it is in the interest of justice that the orders sought are granted adding that no prejudice will be occasioned to the Respondents if the orders sought are allowed.

2nd and 3rd Defendants' Response.

19. In response to the application, the 2nd and 3rd Defendants/Respondents filed a Notice of Preliminary Objection on the following grounds:
 - 1) The 6th Defendant is not a legal person or entity and is not capable of suing or being sued in its own name.
 - 2) The said application dated 7th October, 2021 is hence bad in law, fatally incompetent, does not lie and is incapable of being allowed.
20. The Plaintiff and the 1st Defendant did not file any response to the application.

Issues for Determination

21. I have considered the rival submissions filed in this application, the relevant statutes and jurisprudence.
22. The 6th Defendant/Applicant filed its submissions on 20th January, 2022 while the 2nd and 3rd Defendants filed their submissions on 2nd March, 2022.
23. The 6th Defendant/Applicant identified the following issues for determination:
 - a) Whether the respondent is a legal entity capable of sustaining a suit in a court of law.
 - b) Whether the Applicant should be allowed to file its Defence out of time.
 - c) Costs.
24. The 2nd and 3rd Defendants/Respondents in their submissions addressed the court on whether the 6th Defendant/Applicant is a legal entity capable of suing and being sued.
25. In my view, the issues for determination are:



- a. Whether the preliminary objection is merited.
 - b. Whether the 6th Defendant/Applicant should be granted leave to file its defence out of time.
 - c. Who should bear the cost of the application?
26. I will proceed to make a determination on the preliminary objection. Should I find that it is merited, there shall be no need to address the second issue.
 27. The 2nd and 3rd Defendants submit that the 6th Defendant have annexed and certificate of registration to the affidavit in support of this application and that the said certificate is a “Certificate of Registration of Self-help Group/Project” and that the certificate is registered by the “Ministry of Labour, Social Security and Services”.
 28. The 2nd and 3rd Defendant submits that the joinder of the 6th Defendant as a party to this suit is bad in law, incompetent hence null and void.
 29. The 2nd and 3rd Defendant point out the contradictions in the personality of the 6th Defendant as contained in the plaint and as contained in the affidavit in support of its application. In the plaint, the Plaintiff avers that the 6th defendant is a legal entity incorporated under the *trustees (Perpetual Succession) Act*, cap. 164 Laws of Kenya while the 6th Defendant describes itself as Self-Help group registered under the Ministry of Labour and Social Services.
 30. In support of their submissions, the 2nd and 3rd Defendant have relied on the decisions in *Kipsiwo Community Self Help Group Vs Attorney General And 6 Others* [2013] eKLR.
 31. The 2nd and 3rd Defendant submit that presence of proper parties before a court is a prerequisite to exercise jurisdiction. On this point, the 2nd and 3rd Defendant rely on the judicial decisions in *Kituo cha Sheria vs John Ndirangu Kariuki & Another* [2013] eKLR and *Football Kenya Federation Vs Kenya Premier league Limited Kenya Limited & 4 Others*[2015] eKLR and *Nyeri Quarry Transporters Self Help Group Vs Municipal Council of Nyeri & Town Clerk Municipal Council of Nyeri* [2014] eKLR
 32. The 2nd and 3rd Defendant submit that capacity to sue or be sued is a fundamental issue that goes to the root of the suit and cannot be cured by the provisions of Article 159 (2) (d).
 33. The 2nd and 3rd defendant end their submissions by a prayer for striking out the amended plaint- to the extent of joinder of the 6th Defendant -and the Notice of motion application dated 7th October, 2021.
 34. The 6th Defendant/Applicant in their submissions concede that their registration as a Self-help Group was procured through the Ministry of Gender, Children and Social Development. It submits that they have a constitution, by-laws, they file yearly returns with the registrar and finally they submit on the mode of notifying the registrar on change of officials.
 35. The 6th Defendant submits that is has communication from Standard Chartered Bank and the National Land Commission in respect of the suit property.
 36. The 6th Defendant submits on the leadership wrangles between it and the other Defendants stating, particularly, that the 3rd Defendant is depriving bonafide members of the self-help group their share of land and that he is unjustly enriching himself. It states that the 3rd Defendant is not an official of the 6th Defendant but a fraudster.



37. In the case of *Mukbisa Biscuit Manufacturing Co. Ltd. vs West End Distributors Limited*, 91969) EA 696, defined a preliminary objection as follows;

“.....a “Preliminary Objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. Where a Court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a Preliminary Objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence...”

38. The preliminary objection raised is whether the 6th Defendant has capacity to sue and be sued. This is a legal question and fundamental to the proceedings herein. I say that it is fundamental because court orders cannot and should not be issued in vain. It is important that the court is certain that when it issues orders, the said orders shall be capable of execution.

39. It would be tragic, for instance, if an order were to be issued in this matter and it is discovered, at execution, that the person against whom the order was issued does not exist or lacks legal capacity. It would undoubtedly be a waste of precious and scarce judicial time.

40. In *Kituo cha Sheria Vs John Ndirangu Kariuki & Another* [2013] eKLR, The Learned Judge observed;

“As a general rule, unincorporated legal persons including societies, clubs and business-names can only bring proceedings through their registered or elected officials or in their proprietor’s names. See *The Fort Hall Bakery Supply Co. Vs Fredrick Muigai Wangoe* [1959] E.A. 474 at 475. Templeton J, relying on *Banque Internationale de Commerce de Petrograd Vs Goukassaow* [1923] 2 KB 682 found that the entity before the court was a mere name only and could not maintain the action. In the latter decision at page 688, Bankes L.J. delivered himself as follows:-

“the party seeking to maintain the action is in the eye of our law no party at all but a mere name only, with no legal existence”.

41. I have perused the certificate attached to the affidavit in support of the application by the 6th Defendant. It is issued by the Ministry of Labour, Social Security and Services. It is a certificate of self-help group/project and is issued to Barina squatters self-help Group Land project. The certificate was issued on 6th April, 1999.

42. In *Kipsiwo Community Self Help Group Vs Attorney General And 6 Others* [2013] Eklr, the Learned Judge faced with a situation similar to the one presenting in this suit observed as follows;

The petitioner in this case is Kipsiwo Self Help Group and has in bracket squatters at ADC Kimwani Farm. The preamble and first paragraph of the petition are drawn as follows: -

The Humble Petition of the Kipsiwo Community Self Help Group, Squatters at ADC Kimwani Farms of P.O Box 139 Songhor in the Republic of Kenya is as follows: -



The Petitioner is duly registered self-help group with the ministry of Gender, Sports, Culture and Social Service under Registration Number 227211 and has a membership of about members of about 60 with about 300 Dependants (sic)...

...I have also seen the certificate of registration. It states that Kipsiwo Community Self-Help Group is registered with the office of the District Gender & Social Development Officer (DGSDO) as a Self-Help Group/Project. The registration was done on 15th July, 2011.

...The question that arises is whether Kipsiwo Self Help Group, and indeed whether a Self-Help Group, can institute proceedings at all, or at least proceedings of this nature... (emphasis is mine)

... I think the issue is not really whether unincorporated entities may commence action but the manner in which unincorporated entities may commence proceedings. A number of individuals may come together and form an identifiable group. They can bring action as the group, but it does not mean, that the group is now vested with legal capacity to sue and to be sued. In such instance, the members of the group have to bring action in their own names, as members of the Group, or a few can bring action on behalf of the other members of the group, in the nature of a representative action. Unincorporated entities have no legal capacity and cannot therefore sue in their own names. (emphasis is mine) They can however sue through an entity with legal capacity. Just because *the Constitution* allows unincorporated bodies to sue, does not vest such bodies with legal capacity, and such bodies do not become persons in law, and cannot be the litigants or sue in their own standing. They still have to use the agency of a person recognized in law as having capacity to sue and to be sued.

43. In *Football Kenya Federation v Kenyan Premier League Limited & 4 others* [2015] eKLR the Learned Judge also went to great lengths to address the question of legal capacity of unincorporated associations. She made the following observation.

“In my exploration for some good law on this point, I globally searched many jurisdictions that I came across- England, New Zealand, Malaysia, USA, Canada, among others, are all in agreement that a registered unincorporated society has no legal persona with the capacity to sue and be sued.

In 1802 Lord Eldon Opined as follows In *lloyd Vs Loaring* (1802, Ch.) 6 Ves. 773, 777. Accord: *Pipe v. Bateman* (855)

“It is the absolute duty of Courts of Justice not to permit persons, not incorporated, to affect to treat themselves as a corporation upon the Records... I desire my ground to be understood distinctly. I do not think, the court ought to permit persons, who can only sue as partners, to sue in a corporate character; and that is the effect of this bill.”

A similar position is taken in other cases: *Seely V. Schenck & Denise Quoted with Approval in Richardson vs Smith & Co.*(1885) 21 FLA. 336, 341

“Thus, a society is a number of persons taking to themselves a fictitious name, and by that name, protruding themselves into a court of justice.... But by this assumed name, they cannot appear in a court of justice. They can neither sue nor be sued by it. This is a privilege appertaining to corporate bodies only ... To sue and be



sued, in their corporate name, is one of the great privileges granted to corporate bodies. It can only be authorized by statute. It is too plain for any argument that the unincorporated societies in their own name cannot be so sued. The right to sue and be sued is a corporate franchise.”

44. In the case of Football Kenya Federation Supra the learned Judge goes on to state as follows;

“It is my humble view that the presence of proper parties before the court is sine quo non for exercise of jurisdiction of the court. I am fortified on this point by the holding In *Appex International ltd & Anglo leasing & Finance International ltd Vs Kenya Anti-Corruption Commission* [2012] eKLR citing with approval *Goodwill & trust Investments Ltd & Another Vs Will & Bush Ltd* (supreme Court of Nigeria), the court held

“it is trite law that to be competent and have jurisdiction over a matter, proper parties must be identified before the action can succeed. The parties to it must be shown to be proper parties whom rights and obligations arising from the cause of action attach. The question of proper parties is a very important issue which would affect the jurisdiction of the suit in limine. When proper parties are not before the court the court lacks jurisdiction to hear the suit, and where the court purports to exercise jurisdiction which it does not have, the proceedings before it and its judgment will amount to a nullity no matter how well reasoned.” (emphasis is mine)

Applying the above holding to this application, I find that the Applicant in the application dated 20th February, 2015 filed on the same day simultaneous with the suit does not constitute a legal persona.”

45. The circumstances in the Kipsiwo case (supra) are on all fours with the present suit and the holding is that a self-help group lacks legal capacity to sue or be sued. The Football federation case (supra) also held the same and goes ahead to state that when proper parties are not before the court, then the court lacks jurisdiction and if the court purports to exercise jurisdiction which it does not have, the proceedings before it and its judgment are nullity.

Disposition.

46. I appreciate that the 6th Defendant was joined to this suit by way of an amendment. I also appreciate that it has shown tremendous interest in this suit. It must however find appropriate and legal avenues to do so. Needless to say that there are numerous options available.

47. The upshot of the forgoing is that the Preliminary Objection is merited.

48. Consequently, the 6th Defendant is struck out of this suit and the application dated 7th December, 2021 is dismissed with no order as to costs.

49. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 12TH DAY OF MAY 2022.

L. A. OMOLLO

JUDGE

In the presence of: -



Mr. Maina for the 6th Defendant/Applicant.

Mr. Waiganjo for the 2nd and 3rd Defendant/Respondent
Court Assistant; Ms. Jeniffer Chepkorir.

