REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL CASE 80 OF 2004

1. AITHI MA AATHI MTITIO ANDEI RIVER RANCHING GROUP

2. RAPHAEL KIVUVA

3. RUTH KASYOKI

4. ESTHER NGUMBI.....PLAINTIFFS

V E R S U S

1. SIMON TREVOR

2. JEANS FRANCOIS

3. JILL WOODLEY

4. DAPHNE SHELDRICK.....DEFENDANTS

R U L I N G

1. The Defendants have applied by **chamber summons dated 24th May 2005** for orders to strike out the plaint and consequent dismissal of the Plaintiffs' suit. The application is brought under **Order VI, rule 13(1) (b)** and **(c)** of the then **Civil Procedure Rules** (the **Rules**). **Section 3A of the Civil Procedure Act, Cap 21** (the **Act**) which saves the court's inherent power to make any order in the interests of justice is also cited.

2. The grounds for the application as stated on the face thereof are -

(i) That the subject parcel of land is "still a Game Reserve and is under the jurisdiction of the Kenya Wildlife Service."

(ii) That the Plaintiffs have failed to identify the land they are claiming.

(iii) That the 1st Plaintiff lacks necessary legal standing to bring the suit as it is not a body capable of suing.

(iv) That the suit is frivolous, vexatious and an abuse of the court process.

3. There is a supporting affidavit sworn by the 4th Defendant. It provides the evidential basis for the grounds upon which the application has been brought.

4. The only response to the application filed by the Plaintiffs is a notice of preliminary objection dated 21st July 2005. It raises two technical objections

(i) That the application is fatally defective in that "it fails to comply with the mandatory provisions of Order L, rule 15(2) of the Rules.

(ii) That the supporting affidavit does not comply with Order XVIII, rule 4 of the Rules.

5. As it happened, the preliminary objection was not taken up as there was no appearance for the Plaintiffs at the hearing of the application despite hearing notice having been served.

6. I have considered the submissions of the Defendants' learned counsel. The main point taken in the application is that the land the Plaintiffs claim in the plaint has not been identified at all.

7. I have read the plaint dated 22nd July 2004. The Plaintiffs' claim is pleaded **in paragraphs 8, 9, 10** and **11** thereof as follows-

"8. At all material times prior to this suit the Plaintiffs were the lawful owners of all that parcel of land which is un-surveyed situated at Kathekani Settlement scheme, at Mtito-Andei measuring about 1,300 hectares having been allocated to them in 1970.

9. The Plaintiffs aver that in mid-December 2003 the Defendants without justification whatsoever unlawfully encroached on the aforementioned parcel of land and have embarked on the exercise of putting up permanent fixtures.

10. The Plaintiffs state that due to the Defendants' illegal actions they have suffered and continue to suffer irreparable loss and damage.

11. The Plaintiffs therefore claim confirmation (sic) and quiet possession of the suit parcel of land."

8. The immediate problem that presents itself in this: what land are the Plaintiffs talking about? How is it to be identified and distinguished from the other lands at **Kathekani Settlement Scheme** in Mtito-Andei? They have pleaded that it was allocated to them in 1970. Surely the documents by which it was allocated must have better described the land in order that the Plaintiffs and lands officials could properly identify it?

9. But in **grounds of opposition dated 1st October 2004** filed in response to the **Plaintiff's application by chamber summons dated 22nd July 2004**, for temporary injunctive relief to preserve the *status quo* pending disposal of the suit, the Defendants have pleaded, *inter alia*, that the subject land parcel "is still a Game Reserve under the jurisdiction of Kenya Wildlife Service, the same having been gazette as such". This must mean therefore that the Defendants pretty well know what land the Plaintiffs have pleaded in their suit. So, the defect of failure to properly identify the suit land can be cured by way of appropriate amendment.

10. Regarding the 1st Plaintiff which is pleaded to be a "social help group", it is apparent that it is not a legal person with capacity to sue or be sued. It should thus have brought its suit through its duly elected officials. But again this is a defect capable of rectification by way of appropriate substitution.

11. In the new Constitutional dispensation the courts must lay less emphasis on technicalities in favour of fully and finally adjudicating upon the real issues between parties. The law (**section 1A** and **1B** of the **Civil Procedure Act)** demands the same.

12. I therefore find no compelling legal reason to strike out the Plaintiffs suit, and I will refuse the chamber summons dated 24th May 2005 with no order as to costs. But I will direct that the Plaintiffs do file within thirty (30) days of delivery of this ruling an appropriate application for amendment of the plaint in order to properly describe the suit land and for substitution of the officials of the 1st Plaintiff. In default the plaint dated 22nd July 2004 shall stand struck out and the suit dismissed with costs to the Defendant. Those shall be the orders of the court.

13. The delay in preparation of this ruling is deeply regretted. It was caused by my poor health the last few years. But thanks God I have now regained full health.

DATED AT NAIROBI THIS 8TH DAY OF AUGUST 2012

H.P.G. WAWERU

JUDGE

COUNTERSIGNED AND DELIVERED AT MACHAKOS THIS 28TH DAY OF SEPTEMBER 2012

ASIKE-MAKHANDIA
.....
JUDGE