



CIVIL PRACTICE AND PROCEDURE
Order 1 R 8 relating to representative suits
REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 30 OF 2009

RAMESH D. PANDYA.....PLAINTIFF

-VERSUS-

1. CHAIRMAN – MR. UMESH CHUDASAMA
2. THE HONORARY SECRETARY – MR. TUSHAR PATEL
3. THE HONORARY TREASURER – MR. BHUPENDRA L. NAKESHRI

OF MVITA TENNIS CLUB.....DEFENDANTS

RULING

The plaintiff sued the defendants in this case as the chairman, honorary secretary and honorary treasurer of Mvita Tennis Club. The defendants filed a chamber summons dated **27th February, 2009** seeking dismissal of the plaintiff's case on the ground that the plaintiff's claim is a representative action where no authority was obtained from the court prior to the service of the summons. Parties were ordered to file their written submissions to the application.

The defendants submitted that it is the members of Mvita Tennis Club which is embroiled in the dispute with the plaintiff. That accordingly the plaintiff has not sued the defendant in their individual capacity but has sued them as representatives of the club. That being so, the plaintiff argued that the provisions of Order 1 Rule 8 of the Civil Procedure Rules 2010 required the plaintiff to seek authority from the court for orders authorizing the defendants to defend the suit on behalf and for the benefit of all interested persons, that is members of the club.

Further, that the plaintiff should have sought directions from the court, whereby the court would have directed how the notice of the suit would be brought to the attention to all interested parties. The Defendants relied on the case; **STEPHEN GICHUHI MBOTE vs YOGUSII PATEL & 10 OTHERS MSA HCC 43 OF 1996** in that case, the court struck out the claim which was filed against office bearers of the Mombasa Gold Club. That case was struck out because of the plaintiff's failure to obtain leave of the court to sue the defendants in their representative capacity and for failing to get the court's directions. In that case the court relied on a decision in the case; **J.J. CAMPOS & ANOTHER VS A.G DESOUZE & 5 OTHERS (1993) KLR 86** where the court held:

“it is infact mandatory upon the court to see that notice of the institution of the suit is given to all parties interested and from this it may be inferred that in a case of this sort the court is not at liberty to take cognizance of a suit by or against one or several persons selected from a body of interested

persons unless and until the steps set out in the rule are carried out.”

The plaintiff responded by opposing the application on the basis that the defendants are officials of a society governed by the Society Act Cap 108. I have perused that Act and I was unable to find any section which authorizes officials of society to be sued. The plaintiff was also not specific in his submissions on which section he relied on.

Further the plaintiff argued that even if there was that failure the court should take into account the overriding objective in section 1A of the Civil Procedure Act Cap 21. The plaintiff relied on several authorities where the overriding objective has been given effect. The plaintiff relied on the following cases:

1. ***Kenya Commercial Bank Ltd =vs= Kenya Planters Co-operative Union. Civil Appeal No. 85 of 2010 (C.A) [Unreported]***
2. ***Deepak Chamanlal Kamani & Another =vs= Kenya Anti-Corruption Commission & Others –Civil Application No. 152 of 2009 (C.A) [Unreported]***
3. ***Ayub Murumba Kakai =vs= Town Clerk of Webuye County Council. Civil Appeal (Application) No. 107 of 2009 (C.A) [unreported]***

The defendants relied on order 1 rule 8 of the Civil Procedure Rules. Although the Defendants chose to rely on the now revoked rule 8, I am of the view that the rule that should apply is Civil Procedure Rules 2010 which is not punitive as the revoked Civil Procedure Rules. Order 1 Rule 8 (1) (2) of those rules provide as follows:

“8. (1) 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 or as representing all except one or more of them.

(2) The parties shall in such case give notice 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.”

The question that I need to determine is whether the defendants and the other members of the Mvita Tennis Club have the same interests. In the case: **DUKE OF BEDFORD –VS- ELLIS [1901] A.C.** the House of Lords stated that persons will have the same interest if:

- ***They have a common interest; and***
- ***They have a common grievance; and***
- ***The relief sought is in its nature beneficial to all whom the claimant proposes to represent.***

Do the defendants and its members meet that criteria? I would answer in the positive. That being so, what is the fate of the plaintiff’s claim where notice was not given to the interested parties to join in the action if they wish so? I respectively respond that it is premature to dismiss the plaintiff’s case. This is because the overriding objective in section 1A of Cap 21 is to facilitate the just, expeditious, proportionment and affordable resolution of civil disputes. Further as will be seen Order 1 Rule 8(1) above allows an action to either continue against the defendants before court in their own right or as representative of others.

In my view, to dismiss the plaintiff’s suit would only lead to the increase of legal costs. This is because it would lead to the plaintiff filing a fresh suit. The court also cannot dismiss the plaintiff’s suit because it has not been heard on merit. The best that the court would have done is to order for the striking out of the plaintiff’s suit. I will however not make such an order. The orders that commend themselves to me are:

- ***That the plaintiff is ordered within 21 days from today to advertise this suit in one of the widely read newspapers inviting all interested parties to this suit to file papers seeking to be joined in this action.***

· *The chamber summons dated 27th February 2009 is dismissed with costs being in the cause.*

JUDGMENT BY:

MARY KASANGO
JUDGE

DATED and DELIVERED at MOMBASA this 1st day of December, 2011.

R. MWONGO
JUDGE