



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

CIVIL CASE NO. 283 OF 2010

AMINA HASSAN & 372 OTHERS.....APPLICANTS/
PLAINTIFFS
(Suing as LEKIJI COMMUNITY)

VERSUS

NIGEL WELBEY TRENT.....1ST
RESPONDENT/DEFENDANT
CHRISTOPHER FRANCIS TRENT.....2ND
RESPONDENT/DEFENDANT

RULING

On 9th September 2010, the Plaintiffs filed an Originating Summons dated 12th August 2010 in the High Court of Kenya at Nyeri, Civil Case No. 108 of 2010 (O.S.) seeking the following prayers -

- (1) Whether the title of the said Nigel Welby Trent and Christopher Francis Trent registered as tenants in common in equal shares to the whole of land reference number 2747 Northwest of Nanyuki Township in Nanyuki is extinguished and or exist in the first place.***
- (2) Whether the Applicants have become entitled by adverse possession to the whole of land reference number 2747 Northwest of Nanyuki Township in Nanyuki.***
- (3) Whether the Plaintiffs should be registered as the proprietors of land reference number 2747 Northwest of Nanyuki Township in Nanyuki.***
- (4) Whether the Plaintiffs are entitled to the costs of this suit.***

On 20th September 2010 the Plaintiffs filed an application of even date, seeking temporary orders of injunction to restrain the Respondents from interfering with the Plaintiffs' possession of the land known as LR No. 2747 - Northwest Nanyuki ("***the suit property***"). Following the said application, the Plaintiffs were granted interim orders of injunction on 20th September, 2010.

When the matter came up for hearing ***inter partes*** on 18th October 2010, Counsel for the Plaintiffs and the Defendants agreed to have the matter withdrawn from the High Court Registry at Nyeri and be transferred to the Nakuru High Court Registry. The Hon. Mr. Justice Serگون made an order accordingly, and this matter was transferred to this Registry, and given Nakuru HCCC No. 283 of 2010. The learned Judge also extended the interim orders to 15.11.2010.

To the Plaintiffs' suit, the Respondents raised an objection by way of a Notice of Preliminary Objection on points of law urging the court to strike out the entire suit with costs against the Plaintiffs, on the following grounds -

- (1) ***that the entire suit is res judicata and the orders sought are thus incapable of being granted,***
- (2) ***that no leave has been applied for or obtained by the applicants prior to filing the suit as by law required and the suit is hopelessly inept and cannot be sustained,***
- (3) ***that the applicants have no legal capacity and or locus standi to institute the suit and no authority has been exhibited,***
- (4) ***that the suit is mala fides and a gross abuse of the court process.***

In sum, the Preliminary Objection raised three points of law, whether -

- (1) ***the Plaintiffs' have capacity to institute the suit, and if so,***
- (2) ***whether they require leave of court to do so under Order 1, rule 8 of the Civil Procedure Rules,***
- (3) ***whether the suit is res judicata, within the provisions of Section 7 of the Civil Procedure Act, (Cap 21, Laws of Kenya).***

When this matter was argued before me on 29th November 2010, Mr. Mwangi who appeared for the two Respondents (*the Applicants*) urged grounds 2 and 3 of the Preliminary Objection first, and then ground 1 thereof.

Grounds 2 and 3 of the Preliminary Objection raise the twin questions of whether the Plaintiffs have capacity or ***locus standi*** to institute the suit, and if so whether it was necessary for them to seek and obtain leave of the court to institute the suit in a representative capacity as is envisaged under Order 1 rule 8 of the Civil Procedure Rules. I will discuss each of these issues in turn.

OF WHETHER THE PLAINTIFFS AS LEKIJI COMMUNITY HAVE CAPACITY OF LOCUS STANDI TO SUE OR BE SUED

Mr. Mwangi, learned counsel for the Defendants/Applicants submitted that the suit herein is incompetent as the Plaintiffs, LEKIJI COMMUNITY has no capacity or *locus standi* to sue or be sued. Counsel submitted that LEKIJI COMMUNITY is not a recognized legal entity and therefore has no capacity to sue or be sued.

Mr. Kigen who appeared for the Applicants submitted that it is not the LEKIJI COMMUNITY which is suing. The suit has been brought by the three hundred and seventy-three plaintiffs who have capacity to sue and be sued.

The expression *locus standi* in law means-

"a right to be heard, a sufficient interest, or the legal capacity to challenge some decision."

Order I rule 1 of the Civil Procedure Rules prescribes who may be joined as parties to a suit. It is all

"persons ... in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, or severally or in the alternative, where, if such persons brought separate suits, any common question of fact or law would arise."

In this regard also, Order 30 rule 1 of the Civil Procedure Rules 2010, makes provision for the manner of suing partners carrying on business in names other than their own. This order and rule are similar to former Order XXIX rule 1 of the repealed Civil Procedure Rules.

The Originating Summons herein is expressly stated to be brought by the Plaintiffs "**SUING AS LEKIJI COMMUNITY**". There is no indication what, or who the LEKIJI COMMUNITY is. It is not stated whether it is a business firm in which it could sue or be sued as such under Order 30, rule 1 of the Civil Procedure Rules or, it is merely a social group. Either way it is an amorphous group with no legal capacity or *locus standi* to sue or be sued.

Section 1A(1) of the Civil Procedure Act, declares the overriding objective of the Act and the rules made thereunder, is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

Rules of procedure are goal posts by which orderly litigation and determination of civil disputes are guided. Indeed as the Constitutional Court held in the case of **Kenya Bus Service Ltd & Others vs. Attorney General** (Nairobi HCCC No. 413 of 2005), held -

"Rules of Procedure should be observed as failure to do so may result in prejudice and injustice, and failure to observe rules of procedure amounts to an abuse of the process of court."

To extent therefore that the Plaintiffs' suit is brought in the name of an amorphous entity called LEKIJI COMMUNITY, it can neither facilitate the just, expeditious, proportionate nor affordable resolution of the civil dispute (*if any*) claimed by the plaintiffs. I therefore uphold the objection by the Defendants counsel, and find that the Plaintiffs' suit is both inept and incompetent, and is on this ground alone liable to be struck out.

OF WHETHER THE PLAINTIFFS SHOULD HAVE SOUGHT LEAVE OF COURT TO COMMENCE THE ACTION HEREIN

It was also the submission of Mr. Mwangi learned counsel for the defendants that the plaintiffs' suit should be struck out for failure to seek and obtain leave of court before commencing suit as is required by Order 1 rule 8(1) of the Civil Procedure Rules 2010 (*which is in **pari materia** with Order 1, rule 8(1) of the repealed Civil Procedure Rules*). Order I rule 8(1) permits one person to sue or defend on behalf of all persons who have the same interest in any proceedings.

In the case of **GEORGE OLE SANGUI & OTHERS VS. KEDONG RANCHING LTD** (*Nakuru HCCC No. 21 of 2009 (O.S.)*), after reviewing the various decisions on joinder of parties, and the representative suits, I concluded that ***"no leave of court is necessary, to bring a representative suit."***

And in **YIAPAS OLE SESE & 4 OTHERS VS. SAKITA OLE NAROK** (*Civil Appeal No. 292 of 2001*), the Court of Appeal said at p.3 -

"... up to the time the plaint was filed the appellants were perfectly entitled to file a plaint in a representative capacity, if in their own mind they were satisfied their cause of action and those of the persons on whose behalf they instituted the suit were the same ... Likewise they were perfectly entitled to bring an application under Order 1 rule 8(2). It is mandatory."

And that court added -

"where a decree is passed in a representative suit without complying with the requirements of this rule, the proper order to pass is to set it aside and direct the case to proceed in accordance with the law."

At p.6 of the same case, the court said -

"... the whole purpose of the provisions of Order 1 rule 8 is to ensure that all persons with unlitigated similar causes of action who are desirous of having their cause determined are included in the suit for their own convenience and obviate a multiplicity of suits. Hence the need to notify them of the institution of the suit so that they in case any of them wishes to take part he is given the opportunity to do so."

So in this case it would have been perfectly in order for the plaintiffs suing in their representative capacity and not LEJIKI COMMUNITY to commence suit, and later apply under Order 1, rule 8(2) of the Civil Procedure Rules, for directions to serve notice on all person interested - but there is no requirement for prior leave to commence a representative suit. That leg of Mr. Mwangi's submissions fails, and I so hold.

OF WHETHER THE SUIT BY THE PLAINTIFFS IS RES JUDICATA UNDER S.7 OF THE CIVIL PROCEDURE ACT

This was the first ground of the Defendants' Preliminary Objection. Section 7 of the Civil Procedure Act provides as follows -

"S.7 No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between the parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit in which such issue has been raised, and has been heard and finally decided by such court."

Under the Civil Procedure Rules and other enabling statutes, there are several ways of instituting claims in court. The premier or commonest method among these, is the Complaint, and the Originating Summons under **Orders VII and XXXVI** respectively of the Civil Procedure Rules. There are also the Petition and the Originating Notice of Motion under the Constitution, **Sixth Schedule, Article 19**, and the Companies Rules, rule 4 under **the Companies Act, (Cap. 486, Laws of Kenya)**. A determination following an action commenced by a plaintiff before the subordinate court may be appealed against to the High Court, Court of Appeal, and tomorrow to the Supreme Court. An Originating Notice of Motion, or Originating Summons (*as the names denote*), usually commenced in the High Court may be appealed against to the Court of Appeal and again tomorrow to the Supreme Court.

In this case, the Plaintiffs have been litigating unnecessarily since 1994. As Mr. Mwangi counsel for the Defendants submitted, the plaintiffs' rights (*if any*) were determined by a competent court **firstly** in Nyahururu PMCCC No. 371 of 1994 between **MACHAMUKA FARMERS CO. LTD vs. KALOLESUMAT & 17 OTHERS** and **DOMINIC ELKAYAN LESORMAT & 336 OTHERS** (*Interested Parties*). This was subject of Nakuru H.C. Civil Appeal No. 85 of 1999 which was marked as withdrawn by order of court made on 23rd July 2004, and issued on 30th September 2004.

Secondly, the withdrawal of Nakuru HC Civil Appeal No. 85 of 1999 was a ploy to enable the Interested Parties to pursue Nyeri H.C. Civil Appeal No. 31 of 2005 (**DOMINIC ELKAYANI LESORMAT & 336 OTHERS VS. MACHAMUKA FARMERS CO. LTD & 170 OTHERS**). The appeal was dismissed by Hon. Lady Justice Kasango in a judgment delivered on 18th December 2008. That court cited a passage from the case of **UHURU HIGHWAY DEVELOPMENT LTD vs. CENTRAL BANK OF KENYA LTD & 2 OTHERS** (*Civil Appeal No. 36 of 1996 the Court of Appeal said inter alia*) -

"... There is not one case cited to show that an application in a suit once decided by courts of competent jurisdiction can be filed once again for a rehearing. This shows only one intention on the part of the legislature in India and our Civil Procedure Act. That is to say, there must be an end to applications of a similar nature, that is further, wider principles of res judicata apply to applications with the suit. If that was not the intention we can imagine that the courts could and would be inundated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation."

In this case, the Plaintiffs have been litigating unnecessarily since 1994. Their latest forage was an appeal to the High Court in Nyeri in 2008, which appeal as already observed above was duly dismissed. Undeterred, the Plaintiffs changed tact, they instituted an Originating Summons before the Nyeri High Court which promptly referred and transferred the matter to this court because the suit property, the subject of the litigation is situate within the jurisdiction of this court. An Originating Summons is merely one of the several ways of commencing an action and or seeking a remedy in the High Court. It does not change the subject matter of the claim, the suit property, even if a few names are turned around or added as claimants or defendants as in the current suit where the Defendants are the new parties. The subject matter remains the same, the suit property.

It is the ownership and title to the suit property which was conclusively determined in previous litigation. The suit property belonged to Machamuka Farmers Co. Ltd who sold it to the Defendants free of any claims of any adverse possession or other encumbrances. The Plaintiffs cannot change their nature of claim by calling it an Originating Summons and claim adverse possession against these Defendants. They lost that claim against Machamuka Farmers Co. Ltd in previous litigation, the orders of which are binding upon the plaintiffs.

As aptly explained by Lord Drake J in the case of **WEST WATER LTD VS. BINNIN & PARTNERS**

"Where an issue had been decided in a court of competent jurisdiction, the court would not allow that issue to be raised in a separate proceeding between the different parties arising out of identical facts and dependant on the same evidence since, not only was the party seeking to re-litigate the issue prevented from doing so, by virtue of issue estoppel but it would also be an abuse of process to all, the issue to be re-litigated."

Explanation 4 to Section 7 (above) states -

"Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

If the Plaintiffs had any claim of adverse possession or trust or other ground of attack or defence, it ought to have been raised in those former suits - suits which have been decided before the suit in question (*the Originating Summons herein*), whether or not it was instituted before this or another court.

In the premises therefore the Plaintiffs Originating Summon is indeed ***res judicata***. It has been conclusively determined in previous litigation as outlined at the beginning of this Ruling.

For those reasons, the Plaintiff's entire Originating Summons dated 12th August 2010 and filed at the High Court at Nyeri as Civil Case No. 108 of 2010 (O.S.), and transferred to this court by order of Hon. Mr. Justice Serگون on 18th October, 2010, is inept, incompetent, by being brought by persons a body which is not competent to do so, and also does not lie on grounds of ***res judicata***.

The Respondent's Preliminary Objection on a point of law dated 30th September 2010 and filed on 1st October 2010 succeeds. The Plaintiffs Originating Summons dated 12th August 2010 and filed on 9th September 2010 is struck out with costs to the Defendants. For avoidance of doubt all interlocutory applications pending and any interim orders made hereunder are also struck out as they have no stratum upon which to stand. There shall be orders accordingly.

Dated, signed and delivered in Nakuru this 11th day of March 2011

M. J. ANYARA EMUKULE

JUDGE