



IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO. 23 OF 2011

**KENYA AGRICULTURAL RESEARCH INSTITUTE (K.A.R.I.)
..... PLAINTIFF**

VERSUS

**FARAH ALI, CHAIRMAN ISAHAKIA SELF HELP GROUP (Sued on his on behalf And on
behalf of Members of the Group).....**

**.....1ST
DEFENDANT**

**COMMISSIONER OF LANDS.....
.....2ND DEFENDANT**

RULING

On 24/2/2011, the Kenya Agricultural Research Institute, hereinafter referred to as KARI, filed this suit against Farah Ali, Chairman Isahakia Self Help Group (sued on his own behalf and that of members of the group) and the Commissioner of Lands seeking:-

- a) A declaration that the letters of allotment dated 7/12/2010 in respect of Land Ref. No. 5211/R in favour of the 1st defendant is of no legal effect and is null and void ab initio and doe not in any way verify or affect or interfere with the plaintiff's interest in and ownership rights of the said land.**
- b) An order for unconditional delivery up of vacant possession of the said LR 5211 to the plaintiff.**
- c) An injunction to restrain the defendants, by themselves, their agents or servants from issuing a certificate of title, transferring or disposing of LR 5211 otherwise than by way of conveyance in favour of the plaintiff.**

Filed simultaneously with the plaint is the Notice of Motion supported by the affidavit of Dr. John Kariuki, the Director of KARI Centre, Naivasha. The plaintiff seeks an order of temporary injunction to restrain the defendants from interfering with the plaintiffs' quiet possession and enjoyment of the land LR 5210 and 5211 situate at Naivasha, pending hearing and determination of this suit.

On 2/3/2011, the 1st defendant through its counsel, Maobe Maotsetung filed a notice of preliminary objection which was three fold;

- 1. That the plaintiff lacks the locus standi to lodge this application;**
- 2. That the plaintiff has not complied with Order 51 Rule 13(2) of the Civil Procedure Rules; and**

3. That the application and suit contravenes Section 13A and 16 of the Government Proceedings Act and Section 23(1) of Registration of Titles Act.

The preliminary objection was opposed by Ms. Masila, counsel for the plaintiff. Mr. Maobe urged that the application is incompetent because it does not comply with **Order 4 Rule (1)(4)** of the **Civil Procedure Rules**. He submitted that the verifying affidavit sworn by Dr. Kariuki is not accompanied by an authority under seal. Ms Masila in reply argued that **Order 4 Rule (1)(4)** does not require that the authority be attached to the pleadings. She said that the affidavit is sealed. **Order 4 Rule (1)(4)** of the **Civil Procedure Rules** provides:-

“where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so.”

The plaintiff is a statutory body established under the **Science and technology Act, Cap 250 Laws of Kenya** under the Ministry of Agriculture. It has been so described in paragraph 1 of the plaint. **Section 13** of the **Act** provides that each Research Institute shall be a body corporate with perpetual succession and a common seal and shall have powers to sue and be sued in its corporate name and to assume, hold or dispose of moveable or immovable property for its own purpose. Under the **Sixth Schedule, Art. 9** to the **Act**, the common seal of each Board shall be authenticated by the signatures of two members of the Board authorised in that behalf. Under **Art. 10** such documents shall be received in evidence and be deemed to be so executed.

Ms Masila argued that it is not required that such authority be attached to the affidavit. In my view, the plaintiff has to demonstrate that this suit is properly filed and not just brought by a busy body or an officer who has no authority. Such authority should be exhibited. None was exhibited. But as to whether this suit should be struck out just because the authority is not exhibited, I find that to be a drastic measure to be taken at such an early stage. This matter has just been filed by a party who believes they are aggrieved. It is a dispute over land. This court has a duty to do substantive justice to the parties by taking into account the overriding objectives of the **Civil Procedure Act** as provided under **Section 1A & 1B** of the **Civil Procedure Act**. The sections provide:-

“1A (1) the overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of, the civil disputes governed by this Act.

(2) the court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to given effect to the overriding objective specified in subsection (1).

(3) a party to civil proceedings or any Advocate for such a party is under a duty to assist the court to further the overriding objective of the Act and to that effect to participate in the processes of the court and to comply with the directions and orders of the court.

1B(1) for the purposes of furthering the overriding objective specified in Section 1A, the court shall handle all matters presented before it for the purpose of attaining the following aims:-

- (a) the just determination of proceedings;**
- (b) the efficient disposal of the business of the court;**
- (c) the efficient use of the available judicial and administrative resources;**
- (d) the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties; and**
- (e) the use of suitable technology.”**

In the case **TRUST BANK LTD V AMALO CO. LTD (2009) KLR 63** where the applicant’s

documents were expunged from the record by the court and the appellant was denied the right to be heard in the application because of lack of diligence in the matter, the Court of Appeal while allowing the appeal held:-

“(1) The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merit and that errors should not necessarily deter a litigant from the pursuits of his right.

(2) The spirit of the law is that as far as possible in the exercise of judicial discretion the court ought to hear and consider the case of both parties in any dispute in the absence of any good reason for it not to do so.”

In the instant case, this court would be reluctant to strike out a suit just because authority under seal has not been filed. This is because the plaintiff can be allowed time within which the authority can be filed failing which the court can then take that drastic action of striking out the pleadings.

The second objection taken by the respondent is that the plaintiff failed to comply with **Order 51 Rule 13(2)** which provides as follows:-

“Every application shall bear at the foot the words –

‘If any party served does not appear at the time and place abovementioned such order will be made and proceedings taken as the court may think just and expedient’.”

Counsel urged that the Commissioner of Lands has not appeared and that renders the application fatal. In reply Ms Masila urged the court to consider **Order 10 Rule 2** of the **Civil Procedure Rules** which provides that an application should not be defeated for want of form because they served all the parties. I would reiterate my earlier observations in this matter that even if the Commissioner of Lands has not appeared, want of the footnote cannot be a basis for striking out the plaintiff’s suit. The court has discretion to direct on how the case will proceed in a just and expedient manner. The 1st plaintiff is in court and the matter must proceed against the party before it.

The third limb of the objection is that **Section 13A** of the **Government Proceedings Act** was not complied with. In my view, it is only the Commissioner of Lands who could have raised that objection and who can confirm whether or not the required notice to the Attorney General was served 30 days prior to the filing of this suit. The 1st defendant is not privy to the notice. In any event, under **Section 13A(3)** there is no requirement for notice where a party is seeking a declaratory order under **Section 16(1)** of the **Government Proceedings Act**. **Section 16(1)** of the **Government Proceedings Act** is not couched in mandatory terms. It provides ‘that the court may’. A prayer for injunction is not fatal to the suit. Besides, the words used being persuasive, it should be left to the court to decide whether or not to grant the prayer sought. The plaintiff seeks a declaration in the main suit. I find the objection to have no basis. For the above reasons, I find that the objection raised has no basis and is hereby dismissed.

Since the dispute herein relates to ownership of land, quite a serious issue, I direct that the parties should purpose to determine the substantive issues and put the matter to rest once and for all. The 2nd defendant is at the core of this dispute and therefore an important party to these proceedings. This court hereby serves summons on the Solicitor General to appear and state his position in this matter to enable the court arrive at a fair determination. It is also ordered that the plaintiff has 7 days within which the authority under seal (pursuant to **Order 4 Rule (1)(4)** of the **Civil Procedure Rules**) should be filed, in default the suit will stand dismissed. Costs of the preliminary objection will be in the cause.

DATED and DELIVERED this 1st day of April 2011.

R.P.V. WENDOH
JUDGE

PRESENT:

Ms Masila for the plaintiff.

Mr. Maobe for the defendants.

Kennedy – Court Clerk.