



The Executive Committee Of Ngei Estate Phase II v Waweru (Environment and Land Case Civil Suit E013 of 2020) [2022] KEELC 3961 (KLR) (28 July 2022) (Ruling)

Neutral citation: [2022] KEELC 3961 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT E013 OF 2020**

JO MBOYA, J

JULY 28, 2022

BETWEEN

THE EXECUTIVE COMMITTEE OF NGEI ESTATE PHASE II PLAINTIFF

AND

ERIC MUREITH WAWERU DEFENDANT

RULING

1. Vide the Notice of Motion Application dated February 7, 2022, the Defendant/Applicant herein has approached the court seeking for the following Reliefs;
 - a. The Plaint dated July 13, 2020, the Notice of Motion Application dated, July 13, 2020 and the Notice of Motion Application dated November 19, 2021 be struck out with costs.
 - b. Costs of this Application be provided for.
2. The subject Application is premised on the Grounds enumerated at the foot thereof and same is further supported by the affidavit of one, namely, Dr Hosea W Waweru, hereinafter referred to as the deponent, sworn on February 7, 2022.
3. Upon being served with the subject Application herein, the Plaintiff/Respondent responded thereto by filing a Replying Affidavit sworn by one, Noella Mutanda, sworn on June 17, 2022 and to which the deponent has attached various documents, serialized as MM1 to MM4.

Deposition By The Parties:

a. Defendant's/applicant's Case:

4. Vide Supporting Affidavit sworn on February 7, 2022, Dr Hosea W Waweru, has averred that the suit property otherwise known as L R No Nairobi/Block 72/924, hereinafter as the suit property, belongs



- to and is registered in the names of the Defendant/Applicant who granted an authority to the deponent to swear the subject affidavit.
5. Further, the deponent has averred that the suit property was lawfully and duly alienated to and in favor of the Defendant/Applicant by the Government of the Republic of Kenya and thereafter a Certificate of lease was issued on June 30, 2011.
 6. On the other hand, the deponent has averred that upon the Defendant/Applicant being issued with the requisite Certificate of Lease, same commenced the process of preparing the suit property for development.
 7. Pursuant to the foregoing, the deponent has averred that the Defendant/Applicant proceeded to and procured an Environmental Impact Assessment License from National Environment Management Authority as well as approvals from the Nairobi City County, which license and approval authorized same to commence developments on the suit property.
 8. Be that as it may, the deponent has averred that prior to and/or before same could commence the intended development on the suit property, the Plaintiff/Respondent filed the subject suit and also sought for and obtained an order of temporary injunction, which effectively barred and/or prohibited that Defendant/Applicant from developing the suit property.
 9. Nevertheless, the deponent has averred that the Plaintiff/Respondent herein is not a registered Entity either as a Society or at all. In this regard, the deponent has further averred that the Plaintiff/Respondent is an amorphous organization which cannot mount and maintain the subject suit.
 10. On the other hand, the deponent has further averred that even if the Plaintiff/Respondent was a registered Association under the Society Act, which is not the case, the Plaintiff/Respondent would still not be competent to file the subject suit in own name.
 11. Finally, the deponent has averred that the Plaintiff/Respondent herein does not have any Proprietary Rights and/or Interests over the suit property.
 12. Consequently and in the premises, the deponent has contended that the suit before the court has been lodged and/or mounted by a non-existent organization and hence same is void ab initio.

b.The Plaintiff's/respondent's Case:

13. The Plaintiff/Respondent to the subject Application vide a Replying affidavit sworn by one Noella Mutanda, who avers that same is currently the Vice Chairperson of the Plaintiff/Respondent Association and therefore same is authorized and/or mandated to swear the subject affidavit.
14. Further, the deponent has averred that same is a resident of Ngei Phase 11 , within the city of Nairobi and that by virtue of being such resident, same and other fellow residents formed an Association known as Ngei Phase Two Lang'ta Resident Association, which was registered as a Society.
15. On the other hand, the deponent has averred that the duly registered Society, known as Ngei Phase Two, is also generally known as Ngei II Residents Association or as Ngei II. However, the deponent averred that all the names refer to one and the same Association.
16. Further, the deponent has averred that by virtue of being a duly registered Society, the Plaintiff/Respondent has a legitimate capacity to sue on their own name and therefore the suit herein is neither unlawful nor illegal.



17. Other than the foregoing, the deponent has averred that the current Plaintiff/Respondent, has filed several suit before other courts including the Environment and Environment Land Court using her name and the issue of capacity have never arisen thereto.
18. Be that as it may, the deponent has further averred that if the court were to find that there was lapse on the part of the Plaintiff/Respondent, then any such lapse, can be remedied by way of an amendment.

Submissions By The Parties:

19. The subject Application came up for hearing on June 30, 2022, whereupon it was ordered and or directed that the Application be canvassed and disposed of vide Oral submissions.
20. On behalf of the Defendant/Applicant, it was contended that the Plaintiff/Respondent herein is neither a registered entity nor a legal body, seized and/or possessed of the requisite capacity to sue and or be sued in own name.
21. Secondly, it was further submitted that even if the Plaintiff/Respondent was duly registered, either as a Society or Association (which is not the case), same still cannot mount and/or commence the subject proceedings in its own name.
22. Thirdly, it was the Defendant's/Applicant's submissions that either as a society or association, the Plaintiff/Respondent can only sue and or be sued through the registered trustees and/or officials on behalf of the Society/Association.
23. Fourthly, it was submitted that by virtue of the fact that the Plaintiff/Respondent is not a legal entity, known to law, same is therefore devoid of the requisite Locus standi to commence, originate and/or mount the subject suit.
24. Fifthly, Learned Counsel for the Defendant/Applicant submitted that the Plaintiff/Respondent herein similarly have no property rights over and in respect of the suit property and hence same cannot commence and/or mount a suit pertaining to and/or concerning the ownership of the suit property.
25. Finally, it was submitted that the defect, which has been raised touching on and/or concerning the suit by the Plaintiff/Respondent herein goes to the root of the Plaintiff's/Respondent's claim and to the jurisdiction of the court and therefore same is irredeemable.
26. On behalf of the Plaintiff/Respondent, it was submitted that the Plaintiff/Respondent is a duly registered Society, with known officials and therefore the Plaintiff/Respondent has the requisite capacity to sue and/or commence and/or maintain a suit under its own name.
27. Secondly, Learned counsel for the Plaintiff/Respondent contended that the Plaintiff/Respondent in it currents status have previously filed several suits before various courts, including the Environment and Land Court and the issue of capacity has never arisen, whatsoever and howsoever.
28. Further, it was submitted that even if the court were to find and hold that the Plaintiff/Respondent lacked the capacity to file the suit in her own name, then the defect and/or error is curable by way of an amendment.
29. In any event, it was also submitted that the defect that has been alluded to is procedural in nature and smacks of technicality, which the court ought to disregard, in the Interest of Justice.
30. Finally, it was submitted on behalf of the Plaintiff/Respondent that the court should endeavor to render substantive justice as opposed to non-suiting the Applicant away from the seat of justice on the basis of Procedural technicalities.



31. Based on the foregoing, Learned Counsel for the Plaintiff/Respondent therefore implored the court to find and hold that the subject suit was redeemable by way of an amendment and same ought not to be terminated by the manner proposed by the Defendant/Applicant herein.

Issues For Determination:

32. Having reviewed the Application herein, the Supporting Affidavit thereto, as well as the Replying affidavit and having similarly considered the oral submissions on behalf of the Parties, the following issues are pertinent and therefore germane for determination;
- i. Whether the Plaintiff/Respondent is duly registered either as an Association or a Society in accordance with the relevant and known provisions of the law.
 - ii. Whether a Society/Association (Unincorporated Body) can sue in its own name.
 - iii. Whether the suit filed by and/or on behalf of the Plaintiff/Respondent is redeemable by way of an amendment.

Analysis And Determination

Issue Number 1. Whether the Plaintiff/Respondent is duly registered either as an Association or a Society in accordance with the relevant and known provisions of the law.

33. The Defendant/Applicant herein has contended that the Plaintiff/Respondent herein is neither registered as a Society, pursuant to and/or under the [Society Act](#), 108 Laws of Kenya or as an Association, under the Ministry of Social Services, Culture and Gender or otherwise.
34. Having been confronted with such an averment, which impeaches and/or impugns on the registration of the Plaintiff/Respondent either as a society or an association, it was incumbent upon the Plaintiff/Respondent to avail and/or supply evidence of her registration, either as a society or otherwise.
35. Suffice it to note that the registration documents and/or instruments would ordinarily issue to and therefore be placed under the custody of the Plaintiff/Respondent herein by virtue of being the organ/association that sought for registration.
36. In any event, the registration certificate and the fact pertaining to such registration would be within the peculiar knowledge of the Plaintiff/Respondent and therefore once her registration status was challenged like the one being challenged herein, then it behooved the Applicant to justify her existence and/ or Registration, by availing evidence of (sic) registration.
37. To this end, it is imperative to take cognizance of the provisions of Section 112 of the [Evidence Act](#), Chapter 80 Laws of Kenya, which underscores the manner of proving evidence and/or information which is within the peculiar knowledge of a particular person.
38. Perhaps, it is appropriate to reproduce the said Section 112 (*supra*) and same is reproduced as hereunder;
112. Proof of special knowledge in civil proceedings:
- In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.
39. Premised on the foregoing, it is my considered view that the burden of proving and/or establishing that the Plaintiff/Respondent was indeed registered as a Society or otherwise as an Association laid at



the door step of the Plaintiff/Respondent the moment her registration status was impeached and/or challenged.

40. Nevertheless, even though the registration status of the Plaintiff/Respondent was challenged, the Plaintiff/Respondent herein never deemed it appropriate and/or expedient to exhibit and/or display any registration certificate in the name of Ngei II Residents Association or at all.
41. Notwithstanding the foregoing, what the Plaintiff/Respondent herein generated and/or exhibited was a Certificate of registration issued in favor of Ngei Phase Two Lang'ata Residents Association, which was issued on February 6, 2001.
42. Be that as it may, there is no gainsaying that the Plaintiff/Respondent herein, namely Ngei II Resident Association is separate and distinct from Ngei Phase Two Lang'ata Residents Association, both in terms of the wording, character and description.
43. In any event, if the Plaintiff/Respondent herein would wish to purport and/or pretend that the two distinct names refer to one and the same organization, then it would be incumbent upon the officials of the Plaintiff to generate the requisite minutes and thereafter apply to the Registrar of Society for change of name and registration.
44. However, what is crystal clear is that the certificate of registration in favor of Ngei Phase Two Lang'ata Association cannot suffice to vindicate and/or confirm that the Plaintiff/Respondent herein, (which bears a distinct name), is registered under the Society Act or otherwise.
45. In the premises, it is common ground that even the Plaintiff/Respondent herself was unable to avail, bring forth and/or proffer any evidence over her registration or at all.
46. In a nutshell, it is my finding and holding that the Plaintiff/Respondent is an amorphous and non-existent Entity and same is therefore unknown in the eyes of the law.
47. Consequently, the Executive Committee of a non-existent Association/ Organization, cannot purport to commence, originate and/or otherwise maintain any civil proceedings, either in the manner commenced by the Plaintiff/Respondent or at all.
48. In view of the foregoing, it is apparent that the suit by and/or on behalf the Executive Committee of the non-existent of the organization herein was/is void *ab initio* and hence, Legally untenable.
49. At any rate, it is expedient to take note and/or cognizance of the provisions of Section 4 of the Society Act Chapter 108 Laws of Kenya, which essentially underscores that a Society which is unregistered is an unlawful society and therefore an illegal Entity.
50. In this regard, it suffices to reproduce the provisions of Section 4 of the Society Act (supra), which provides as hereunder;

4. Unlawful societies:

- (1) Every society which is not a registered society or an exempted society is an unlawful society:
Provided that a society shall not be an unlawful society where, within twenty-eight days of its formation, it has applied for registration or for exemption from registration under section 9 of this Act and it has not been notified of the determination of its application, unless—
 - (i) it is formed for an unlawful purpose; or
 - (ii) the Cabinet Secretary has declared it, by order, to be a society dangerous to the good government of the Republic; or



- (iii) the Registrar has notified the society (whether or not before the making of the application) that he intends to refuse registration or exemption from registration on one of the grounds specified in section 11(1)(b) of this Act.

51. To underscore the import and tenor of what is void, it suffices to take cognizance of the Dictum in the case of *Macfoy vs United Africa Co Ltd* [1961] 3 All E R 1169, where Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said;

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

52. Based on the foregoing, I would have been constrained to terminate the subject ruling at this juncture, but for completeness, I shall venture to address and dispose of the outstanding issues.

Issue Number 2 Whether a Society/Association (Unincorporated body) can sue in its own name.

53. The Plaintiff's/Respondent's Counsel made a very curious submissions to the extent that same contended that a registered Society and/or an Association, which is essentially unincorporated body, can file and/or mount legal proceedings in its own name.

54. Based on the foregoing submissions, it is therefore appropriate to interrogate the obtaining jurisprudence and essentially to authenticate whether a Society or any other Association, which is not a body corporate can file and maintain a civil suit in its/ her own name.

55. To my mind, a Society and/or an Association, is devoid of the requisite legal personality, which inheres in incorporated bodies, for Example, Companies, Co-operative societies and Political Parties, the latter which is registered under the *Political Parties Act*, 2011.

56. Whereas duly incorporated bodies, are vested with legal capacity and/or personality to sue and/or be sued in their own names, the converse obtains in respect of Unincorporated bodies, inter-alia, Societies registered under the *Societies Act*, Chapter 108 Laws of Kenya.

57. At any rate, it is common ground and worthy of repetition that a society or an association, which is not a body corporate, can only sue through her Registered Trustees or Officials, but not in her own name.

58. On the other hand, it is also worth mentioning that where the Society or Association is suing in the names of her officials, it is imperative that the names of the Officials as opposed to the Titles be used. For clarity, no legal suit can be filed under the guise of chairman, secretary and treasurer of some society/ association.

59. Notwithstanding the foregoing, it also bears repetition that there is no legal capacity that inheres in a body known as the Executive committee, in the manner that has been used by the Plaintiff/Respondent herein. For the avoidance of doubt, the said purported Executive committee, comprises of known persons whose names ought to have been used, subject to the impugned organization being registered in accordance with the law.

60. In view of the foregoing, it is my finding and holding that a Society and/or an Association, which is not a Body Corporate cannot file and/or mount any suit in own name, in the manner propounded by learned counsel for the Plaintiff/Respondent in the subject matter.



61. In regard to the foregoing observation, case law abound, but it would suffice to mention just two (2). First and foremost, I take cognizance of the holding of Githua J in HCA No 128 of 2013 *Peter Taracha & Anor vs Holiness Church & Anor* [2016] eKLR, where the Honourable Judge stated:-

“I have carefully gone through the entire *Societies Act* Chapter 108 of the Laws of Kenya and I have not come across a single provision that provides for the institution of suits by or against entities registered under the Act. I thus wholly agree with the sentiments expressed by Justice Bosire (as he then was) in *John Ottenyo Amwayi & others V Rev George Abura & others* HCCC No 6339 of 1990 when he stated as follows:-

“The *Societies Act* does not contain provisions with regard to the presentation and prosecution of suits by or against unincorporated societies. It would appear to me that the legislature did not intend that suits be brought by or against those societies in their own names”

62. Secondly, there is the decision in the case of *Kiserian Isinya Pipeline Road Resident Association & others v Jamii Bora Charitable Trust and Another* Civil Appeal No. 307 of 2006 Hon Justice Alnashir Visram (as he then was) relying on several authorities including the case of *Free Pentecostal Fellowship in Kenya V Kenya Commercial Bank* HCC No 5116 of 1992 (O.S) struck out an appeal with costs on grounds inter alia that it had been lodged by appellants whose majority consisted of unincorporated entities which did not have capacity to sue. In the Free Pentecostal Fellowship in Kenya case (*supra*) Justice Bosire (as he then was) expressed himself in the following terms :-

“The position at common law is that a suit by or against unincorporated bodies of persons must be brought in the names of, or against all the members of the body or bodies. Where there are numerous members the suit may be instituted by or against one or more such persons in a representative capacity pursuant to the provisions of Order 1 rule 8 Civil Procedure Rules.

In the instant matter, the suit was instituted in the name of a religious organization. It is not a body corporate which would then mean it would sue as a legal personality. That being so it lacked the capacity to institute proceedings in its own name”.

..... It is important to appreciate that lack of capacity to sue or be sued is a weighty matter that goes to the root of the validity of proceedings before a court. It is not a mere procedural issue. The consequences of instituting a suit without legal capacity to sue are grave: such a suit is incompetent and any proceedings flowing from it are a nullity in law.”

63. To my mind, the exposition of the law obtaining in the various decisions alluded to in the preceding paragraphs, enunciates and/ or underscore, what is otherwise trite, established and common knowledge.
64. Be that as it may, had learned counsel for the Plaintiff/Respondent bothered to carryout and/ or conduct some basic research, no doubt, same would have come and/or arrived at a contrary submissions.
65. Nevertheless, it is my considered view and which is re-enforced by the obtaining corpus of law, that a Society and/or an Association (which is not a Body Corporate) cannot mount and/or maintain a civil suit in own name.



Issue Number 3 Whether the suit filed by and/or on behalf of the Plaintiff/Respondent is redeemable by way of an amendment.

66. Other than the contention that a Society and/or an Association can sue in its own name, the Plaintiff's/ Respondent's Counsel also submitted that if the court were to find that the Plaintiff/Respondent cannot sue in its own name then same can be remedied by way of an amendment.
67. Nevertheless, I beg to point out that an amendment can only arise and/or ensue where a suit has been commenced by an existing legal entity, known under the law and existing at the inception of the suit.
68. Contrarily, an amendment cannot arise and/or ensue where the suit was commenced by a non-existent body and/or person. In this regard, where a suit is filed by a non-existent body, the suit is void and invalid from inception. Such a suit is dead on arrival and cannot be resuscitated, whatsoever and howsoever.
69. To vindicate the foregoing observation, it is appropriate to adopt and restate the dictum of the Supreme Court of India vide Jai Jai Ram Manohar Lal vs National Building Material 1969 AIR 1267, 1970 SCR (1) 22
- “..... the question whether there should be an amendment or not really turns upon whether the name in which the suit is brought in the name of a non-existent person or whether it is merely a misdescription of existing persons. If the former is the case, the suit is a nullity and no amendment can cure it. If the latter is the case, prima facie, there ought to be an amendment because the general rule, subject no doubt to certain exceptions, is that the Court should always allow an amendment where any loss to the opposing party can be compensated for by costs.”
70. Premised on the foregoing, there is no gainsaying that a suit that is filed by a non-existent body, which is ipso jure, a nullity, cannot be validated vide any iota of amendment, either as propagated by Learned counsel for the Plaintiff/Respondent or at all.
71. For the avoidance of doubt, the defect that touches on the legal standing of a Party and in particular, where it is contended that the Party is non-existent in the eyes of the law, is not a technical issue, but a substantive one which goes to the root of the matter and the Jurisdiction of the Court.
72. To vindicate the foregoing, it is appropriate to restate the holding in the case of Kituo Cha Sheria versus John Ndirangu Kariuki & another [2013] eKLR, where the Court observed as hereunder;
- “The legal capacity of a party to institute proceedings in court is not a technical matter or one of form. It is not a simple misdescription of names as obtained in the case of *A N Phakey Vs World Wide Agencies Ltd* [1948] Vol XV EACA 1. Far from it. It is a substantive matter of law that cannot be accommodated within the latitude of article 159 (2) (d) of the Constitution or Rule 4 of the *Elections (Parliamentary and County Elections) Petition Rules 2013*.
73. Yet again, I do not find merit in the submissions of learned counsel for the Plaintiff/Respondent, who contended that the impugned defect, could be remediable vide amendment.
74. Simply put, the Plaintiff's/Respondent's suit was incurably, irredeemably and hopelessly bad. Consequently, same was beyond cure even by the application of the Oxygen Principle and the Overriding Objectives of the Court vide Sections 1A and 1B of the Civil Procedure Act, Chapter 21 Laws of Kenya.



Final Disposition:

75. Having reviewed and or analyzed the issues outlined for determination in the body of the ruling herein, it must have become apparent and/or evident that the Application filed by the Defendant/Applicant is irresistible.
76. In the premises, I come to the conclusion that the Application dated February 7, 2022, is meritorious and thus ought to be allowed.
77. Consequently, I proceed to make the following orders;
- i. The Application dated February 7, 2022, be and is hereby allowed.
 - ii. The Plaintiff/Respondents suit vide Plaint dated July 13, 2020, be and is hereby struck out.
 - iii. The Temporary Orders of Injunction issued vide Ruling rendered on September 16, 2021, be and are hereby Discharged.
 - iv. Costs of the Suit and the Application dated February 7, 2022, be and are hereby awarded to the Defendant.
78. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JULY 2022.

HON JUSTICE OGUTTU MBOYA,

JUDGE,

In the Presence of;

Joan Court Assistant

Mr Sichangi Nyongesa for the Plaintiff/Respondent

Mr Gachuba for the Defendant/Applicant

