



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 28 OF 2011

GLADYS MAINGO.....1ST PLAINTIFF
BENSON O. MAINA.....2ND PLAINTIFF
JOEL NGUGI.....3RD PLAINTIFF
MARIKUS PANDE RERU.....4TH PLAINTIFF
HASSAN SHABA ADAN.....5TH PLAINTIFF
ABDULAHI MOHAMMED.....6TH PLAINTIFF

VERSUS

JUNE SEVENTEENTH ENTERPRISES LTD.....1ST DEFENDANT
FRANCIS MWANGI MUTURI.....2ND DEFENDANT
LAWRENCE KITHINJI MUTUNGI.....3RD
DEFENDANT
AMEDEO KINEGENI NYAGA.....4TH
DEFENDANT
MILDRED AMONDI AGOLA.....5TH
DEFENDANT
RICHARD MOGAKA.....6TH DEFENDANT
NADHIFO ALIO BORA.....7TH DEFENDANT
MOHAMED ADAN MOHAMED.....8TH
DEFENDANT
MUKTAR KUNO ROBA.....9TH DEFENDANT
JATTANI ABDI RAHAMAN HALLOW.....10TH
DEFENDANT
GATIRU DANIEL IGORO.....11TH
DEFENDANT

ALIW GOLO TACHE.....	12 TH	DEFENDANT
JOHN MUNYAO MUSAU.....	13 TH	DEFENDANT
SOLOMON LUVAI.....	14 TH	DEFENDANT
THE LIQUIDATOR TRUST BANK LTD (IN LIQUIDATION).....	15 TH	DEFENDANT

RULING

This Ruling is delivered in the 1st to 14th Defendant/Respondent’s Notice of Preliminary Objection dated 28th February 2011 to the effect that:

- 1. The suit herein is fatally defective and a nullity for reasons that leave to institute the same was not obtained from the court as required under provisions of the Companies Act**

- 2. This being a representative suit, leave of the court ought to have been sought and obtained “as provided for by the Civil Procedure Rules.”**

The Plaintiff/Respondents are squatters on land charged to the 15th Defendant, which they desire to purchase under the auspices of the 1st Defendant in whom they appear to be shareholders. They have clearly stated in paragraph 2 of the Plaint that they have filed the suit as a representative action, on their own behalf and that of 128 other persons, and that in total 300 persons are interested in the suit as shareholders of the 1st Defendant and purchasers of the suit land.

A Preliminary Objection filed by the 15th Defendant on the same ground as Ground 1 hereinabove was withdrawn when the matter came up for hearing, the reason perhaps, why the objectors’ advocate, did not make any submissions as regards that ground. He chose instead to submit on the 2nd Ground of objection, arguing that the suit was filed in contravention of **Order 1 Rule 8** of the now repealed **Civil Procedure Rules** and was therefore incompetent and liable for striking out. He cited two authorities as follows:

1. **WANJIRU V STANDARD CHARTERED BANK [2003] E.A 700.**

2. **YAIPAI OLE SEESE & OTHERS V SAKITA OLE NAROK & 2 OTHERS [2008] eKLR
(Civ. Appeal No. 2 of 2001)**

Order 1 Rule 8 of the repealed **Civil Procedure Rules** provides as follows:

“8(1) Where there are numerous persons having the same interest in one suit, one or more of such persons may sue or be sued, or may be authorized by the court to defend in such suit on behalf of or for the benefit of all persons so interested.

(2) The court shall in such case direct the plaintiff to give notice of the institution 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 may in each case direct.

(3) Any person on whose benefit a suit is instituted or defended under subrule (1) may apply to the court to be made party to such suit.”

In opposing the Preliminary Objection, counsel for the plaintiff/Respondents submitted that no leave is required to institute a representative action under the above provisions and the authority of the court is only required where one wishes to defend such an action on behalf of numerous Defendants/Interested Litigants.

Counsel relied on 6 authorities filed on 16th March 2011, under a list dated 15th March 2011, and submitted further that the objection did not pass the test of a Preliminary Objection set in **MUKISA BISCUIT MANUFACTURING CO. LIMITED V WESTEND DISTRIBUTORS CO. LIMITED [1969] E.A. 696.**

In closing, counsel submitted that the notice required under **Rule 8 (2)** may be issued by both the Plaintiff/Respondents and the Objector, arguing that the court should proceed to give directions to that effect, taking into consideration the **2010 Civil Procedure Rules** which have been done away with the need for Defendants to seek leave altogether.

I accept the submission that a Plaintiff is not mandated to obtain leave to institute a representative action. That however, does not preclude the need to notify all interested parties of the existence of the suit. Whereas only the Plaintiff would be directed by the court to issue such notice, the 2010 Rules make this the responsibility of both parties.

With the enactment of the **New Civil Procedure Rules** and in view of the overriding objective of the **Civil Procedure Act** and **Rules** as set out in **Sections 1A** and **1B** of the **Civil Procedure Act** and **Article 159 (2)(d)** of the **Constitution of Kenya 2010**, which requires that justice be administered without undue regard to procedural technicalities, I would consider it inappropriate to strike out the suit as against the 1st to 14th Defendant, merely on the ground that the Plaintiffs have not moved the court for directions to issue under **Rule 8 (2)**.

I refuse to uphold the objection, directing instead that the parties do proceed to issue the requisite notice of the suit in accordance with **Order 1 Rule 8 (2)**. The notice shall be by way advertisement in the Daily Nation, the Standard and “Taifa Leo” Newspapers.

Accordingly the Preliminary Objection is hereby dismissed. Costs in the cause.

DELIVERED and SIGNED at NAIROBI this 12TH day of SEPTEMBER, 2011.

M. G. MUGO

JUDGE

In the presence of:

No Appearance

For the Applicants

Miss Ogutu

For the 15th Respondent

No Appearance

For the 1st -14th Respondents