



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU Civil Case 298 of 2005

SYLVIA C. ENDERE.....PLAINTIFF
VERSUS
KAREN ROSES LIMITED.....DEFENDANT
RULING

There are two issues for determination in the instant application – chamber summons dated 5th April, 2006 namely whether the two applicants, Richard Chelimo and Paul Ngeno can be granted leave to represent thirty-four (34) members of Simotweet Community (The Community) in this suit and secondly whether Simotweet Community can be joined as interested party in this suit.

This suit was brought by the plaintiff, Sylvia C. Endere against the defendant, Karen Roses Limited to restrain the latter by an order of permanent injunction from excavating, constructing or channeling storm water into a dam located within the plaintiff’s land – Plot No.599 – Eldama Ravinne or into the neighbouring Simotweet Primary School.

The answer to the last issue – whether the community can be joined in this suit as interested party will have a bearing on the first question - whether the applicants can be granted leave to represent 34 members of the community.

I may state here that the plaintiff has opposed the application, while the defendant is in support. In her replying affidavit, the plaintiff has averred that the joining of the applicants will not have any bearing on the matters in controversy; that none of the applicants own land potentially affected by the acts complained of and therefore have no interest in the matter and that some members (other than the applicants) of the community are already adversely affected by the defendant’s activities.

I have considered the application and the foregoing averments by the plaintiff. This application is brought pursuant to the provisions of **section 34** of the **Civil Procedure Act** and **Order 1 rule 10(2)** and **(22)** of the **Civil Procedure Rules**.

Order 1 rule 10(2) aforesaid provides in the relevant part as follows:

“(2). The court may at any stage of the proceedings, either upon or without the application of either party and on such terms as may appear to the court to be just, order that the name of any party.....whose presence before the court may be necessary in order to enable the court to effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

Under the foregoing, a person can only be added either as a defendant or plaintiff. The applicants argue that some thirty four

H.C.C.C.NO.298/2005

(34) members of Simotwet Community including themselves have an interest in the suit herein; that the defendant has channelled the water to the dam at the request of the community for use by the community; that the decision of the court in this matter will directly affect the community.

What then is the interest of the community in this matter? It is the plaintiff’s case that the defendant has excavated a deep and wide trench from the former’s farm leading to the latter’s land which will drain storm water together with waste and contaminated water from the defendant’s green houses into the plaintiff’s dam.

The defendant on the other hand has maintained that the water being drained is clean rain water and that the same is being channeled to a community dam within Simotweet Primary School.

The Plaintiff has sought a permanent injunction to restrain the defendant
“.....from excavating, constructing, directing or channeling storm water, waste matter or any other substance into the plaintiff’s dam on plot No.599 or into the neighboring Simotweet Primary School.”
(emphasis supplied).

Bearing in mind that the community sought the help of the defendant to distil the community dam in Simotweet Primary School and thereafter to channel rainwater from its green house to the dam and noting that the water in that dam is used solely by the community, an injunction in the manner sought will definitely affect the community.

I come to the conclusion on this particular question that the community’s participation in these proceedings is necessary in order to enable the court decide with finality matter in controversy in this suit.

Having come to that conclusion, I turn to consider the issue of the two applicants being granted leave to represent 34 members of the community including themselves. Although the application has not cited the provisions of **Order 1 rule 8(1)** of the **Civil Procedure Rules**, the application may be described as a representative suit. **Order 1 rule 8(1)** aforesaid provides that:

“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.”

Since it is apparent that the community represented by 34 members would like to defend the suit, they can only be joined as defendants. By dint of the foregoing provisions or **Order 1 rule 8(1)**, leave is hereby granted to the applicants to be joined as defendants on behalf of the thirty four (34) members of the community including themselves.

Costs of this application will be costs in the cause.

Dated, Signed and Delivered at Nakuru this 15th day of January, 2010.

W. OUKO
JUDGE