



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 699 of 2009

MAURICE MUSYOKA1ST PLAINTIFF/APPLICANT
HARRISON WETOI.....2ND PLAINTIFF/APPLICANT
AMOS MURENDE.....3RD PLAINTIFF/APPLICANT
ELIUD MAINA.....4TH PLAINTIFF/APPLICANT
CONSTATINE NAMUSASI.....5TH PLAINTIFF/APPLICANT
TOM WAFULA WACHIYE6TH PLAINTIFF/APPLICANT (SUING AS AND ON
BEHALF OF THE MEMBERS OF GLORY OF CHRIST MISSION CHURCH)
GLORY OF CHRIST MISSION.....7TH PLAINTIFF/APPLICANT
Versus
DON HEE ROHN1ST DEFENDANT/RESPONDENT
VIRGINIA WANJIKU KARUIKI.....2ND DEFENDANT/RESPONDENT
PAUL KARUIKI NJENGA.....3RD DEFENDANT/RESPONDENT

RULING

I was set to start hearing the Plaintiff's Chamber Summons dated 2nd February 2010 when M/s Koech, Counsel for the Defendants/Respondents raised a preliminary objection earlier on filed and served based on five grounds. Counsel relied mostly on the second, third and fifth grounds namely:-

- 2. That the plaint is incompetent for failure to comply with Order 36 Rule 3 D of the Civil Procedure Rules.
3. That the suit is time barred by virtue of the Limitation Act Chapter 22 of the Laws of Kenya.
5. That the suit is incompetent for failure to comply with Order 1 Rule 12 of the Civil Procedure Rules."

Mr. Herbet Mwendwa represented the Plaintiffs' opposing the preliminary objection and, in my view, he successfully opposed the first of the three grounds above listed. He pointed out that since, a part from basing their claim on Adverse Possession, the Plaintiffs were also seeking an injunction and prayed for rectification based on a Trust; the Plaintiffs were entitled to institute this suit by way of a Plaint instead of using an Originating Summons as advocated by the Defendant's Counsel. I do accept what Mr. Mwendwa said because while the claim under Adverse Possession can be accommodated in a plaint together with the other two claims, those other two claims cannot be accommodated in an Originating Summons where Adverse Possession would comfortably be. It would not be fair to force the Plaintiffs drop the other two prayers simply because the Plaintiffs must file this suit by way of an Originating Summons to base their claim on Adverse Possession.

On the issue of the effect of the Limitation of Actions Act, it is unfortunate M/s Koech could not lead the court to the relevant section of that Act and Mr. Mwendwa did not have to. But if I understood them properly, M/s Koech is basing her arguments on the 17 years claimed Plaintiffs have had Adverse Possession while Mr. Mwendwa is basing his arguments on the time from which the Plaintiffs are said to have learned that the Defendants wanted Plaintiffs to vacate the suit property. There is therefore a question as to when Adverse Possession commenced, a question to be determined during the hearing of the main suit and not in this Chamber Summons. That will then be the proper time to have the issue of limitation, under the Law of Limitation of Actions Act, determined; and that time, the party alleging limitation ought to be ready to specifically point out the section of the Limitation of Actions Act being relied upon.

Having said that, I now move to the third ground that this suit is incompetent for failure to comply with Order I Rule 12 of the Civil Procedure Rules which states as follows starting with sub-rule (1):

- (1) Where there are more Plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceedings,
(2) The authority shall be in writing signed by the party giving it and shall be filed in the case."

That having been said, it is of interest to also see what the same Order I says in Rules 1 and 2 and 9 as follows:

- 1. All persons may be joined in one suit as Plaintiffs 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, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise
2. Where it appears to the court that any joinder of Plaintiffs may embarrass or delay the trial of the suit, the court may either on the application of any party or of its own motion put the Plaintiffs to their election or order separate trials or make such other order as may be expedient.

.....
.....
.....

9. No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”

Bearing all those provisions in mind and looking at the Plaintiff I do encounter the following problems:

Firstly, there are seven Plaintiffs. Plaintiff numbers one to six are stating that they are

“SUING AS AND ON BEHALF OF THE MEMBERS OF GLORY OF CHRIST MISSION CHURCH.”

The Seventh Plaintiff is said to be

“GLORY OF CHRIST MISSION.”

When I asked Mr. H. Mwendwa, Counsel for the Plaintiffs, whether GLORY OF CHRIST MISSION CHURCH is also known as GLORY OF CHRIST MISSION, the learned Counsel was not clear as he seemed not sure of what he was talking about. But I vaguely got him as saying that GLORY OF CHRIST MISSION CHURCH is the same body also known as GLORY OF CHRIST MISSION. Mr. Mwendwa would then go on to say that the 2nd and 6th Plaintiffs, that is HARRISON WETOI and TOM WAFULA WACHIYE, are the Registered Trustees of the 7th Plaintiff and that other Plaintiffs are members of the 7th Plaintiff. But the 1st to 6th Plaintiffs are suing in this suit as and on behalf of the members of Glory of Christ Mission Church and he did not agree that those Plaintiffs needed authority under Order I rule 12 aforesaid.

To me that is not clear because if GLORY OF CHRIST MISSION CHURCH is the same body as GLORY OF CHRIST MISSION there would have been no need for the 1st to 6th Plaintiffs to come into the suit “SUING AS AND ON BEHALF OF THE MEMBERS OF GLORY OF CHRIST MISSION CHURCH” when GLORY OF CHRIST MISSION is also in the suit as a Plaintiff. In the circumstances therefore it seems to me as if GLORY OF CHRIST MISSION CHURCH is a separate body from GLORY OF CHRIST MISSION the 7th Plaintiff in this suit.

Secondly, whether the title GLORY OF CHRIST MISSION CHURCH and GLORY OF CHRIST MISSION refer to the same body or two separate bodies, once the 1st to 6th Plaintiff came out SUING AS AND ON BEHALF OF THE MEMBERS OF GLORY OF CHRIST MISSION CHURCH, the 1st to 6th Plaintiffs brought themselves under the requirements of Order I Rule 12 aforesaid and cannot escape having sub rule (2) of Rule 12 of that Order I complied with. The sub rule as quoted above is mandatorily stating that the authority shall be in writing signed by each party (person) giving the authority; and in this respect the people to give and sign the authority are INDIVIDUAL MEMBERS OF GLORY OF CHRIST MISSION CHURCH. That is the law and has to be complied with by the 1st to 6th Plaintiffs who decided to come into this suit in the manner in which the suit has been filed.

Thirdly, and this is the third problem I said I was encountering in this suit, is the manner in which the parties are joined as Plaintiffs.

If the 1st to 6th Plaintiffs are suing AS AND ON BEHALF OF THE MEMBERS OF GLORY OF CHRIST MISSION CHURCH who is also said to be GLORY OF CHRIST MISSION, then it suggests the 7th Plaintiff is not registered. If, as Mr. Mwendwa says, the 7th Plaintiff is registered, then I go back to what I have already said that the fact that the 1st to 6th Plaintiffs are joined in this suit as Plaintiffs SUING AS AND ON BEHALF OF THE MEMBERS OF GLORY OF CHRIST MISSION CHURCH suggests that GLORY OF CHRIST MISSION CHURCH is not registered and it is a separate body from the 7th Plaintiff. This is because if Glory of Christ Mission Church were registered, it could have sued as a Plaintiff in that name even if as Plaintiff jointly with the 7th Plaintiff. There would have been no necessity for the 1st to 6th Plaintiffs to be Plaintiffs in the suit, except perhaps the 2nd and 6th Plaintiffs claimed to be Trustees and would have been there as Trustees only, and not as individual members.

To conclude what I am saying, it appears to me from what has been brought to my attention during the hearing of this Preliminary Objection that there are three separate bodies in this matter.

One is the 7th Plaintiff GLORY OF CHRIST MISSION.

The second body is GLORY OF CHRIST MISSION CHURCH;

And

The third body is GLORY OF CHRIST CHURCH.

The learned Counsel for the Plaintiff should look into the matter again with a view to bringing a suit with legitimate Plaintiff or Plaintiffs, correctly joined if necessary. Counsel should bear in mind that if Plaintiff succeeds on the claim for adverse possession, the ultimate lawful end is to have title of the suit property registered in the name of that Plaintiff. How appropriate will it be when Plaintiffs are joined in the manner now before me?

Bearing all I have said above in mind, I do hereby determine this Preliminary Objection dated and filed the 25th day of February 2010, NOT by striking the Plaintiffs’ Plaintiff BUT by allowing the Plaintiffs’ Counsel liberty to file and serve an amended Plaintiff within thirty (30) days from to-day.

In the meantime I do order that the status quo be maintained for a period of thirty (30) days from to-day.

Further, it is hereby ordered that the Plaintiffs in this matter, as at to-day’s date, do pay costs of this suit, including the Preliminary Objection, up to and including the date of this ruling.

Dated this 26th day of March 2010.

J.M. KHAMONI
JUDGE

Present:

Mr. H. Mwendwa for the Plaintiffs

Mr. Wati for M/s Koech for the Defendants

Court Clerk: Kabiru