



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU**

Civil Suit 21 of 2009

**GEORGE OLESANGUI
SHOKORET OLE SETABAU
FRANCIS PATU SIMPANOI
OLEKU OLE PUNYWA
SIPAIE OLE KOMEYAN
NTIKA OLE ROKA
DOPOI OLE NCHOSHOI
ATETI OLE NKUME
TERERE OLE MALOI
KUDATE OLE AMBONI
LENGUTUTI OLE LESIRI
KOOLI OLE KARATINA MUTUTUA.....PLAINTIFFS**

(Suing on their own behalf and on behalf of the persons and families residing on what is commonly known as Kedong Ranch situate on L.R.No. 8396 (I.R. No. 11977)

VERSUS

KEDONG RANCH LIMITED.....DEFENDANT

Civil Procedure Rules - Representative action - Whether leave if necessary to commence such action by the Plaintiff - Whether leave necessary to defend such action by named defendants - or other interested persons - Civil Procedure Rules, Order I rule 8 (1) &

(2)

RULING

The twelve Plaintiffs filed an Originating Summons on 26th January 2010 on their own behalf and allegedly on behalf of some other 2000 persons, all said to be residents of Kedong Group Ranch in Narok District against Kedong Ranch Ltd. represented by its directors.

Together with the Originating Summons, the Plaintiffs filed a Chamber Summons on the same date (*as the Originating Summons*) in which they sought leave of court to give notice of the institution of the suit through an advertisement of the suit to all persons who may be interested to join the suit as Plaintiffs or Defendants.

To the Plaintiff's Chamber Summons the Defendants filed an application by way of a Chamber Summons dated 12th February 2010 and in which they seek two orders, namely -

(a) *that the Plaintiffs' Originating Summons dated 18th December 2009 and filed in court on*

26th January 2010 together with the Chamber Summons of the same date filed in court on 26th January 2010 be struck out or be dismissed with costs to the Defendant/Applicant.

(b) that the costs of the Application be borne by the Plaintiffs/Respondents.

The Defendant's application is supported by the affidavit of Paschal Babu Wood and the grounds that -

(i) the Plaintiff's suit as filed on 26th January 2010 is incompetent, invalid and irregular ab initio for failure of the Plaintiffs to:-

(a) to seek and obtain the court's leave to file a representative suit prior to instituting the same in court;

(b) seek and obtain the court's directions as regards the filing of the representative suit at the time this matter was presented to court.

(2) That as leave was granted by the court prior to institution of this case yet that is a condition precedent to such a suit, and

(3) that the law is very clear and there is no ambiguity anywhere in that a party cannot first file a representative suit and thereafter seek the court's leave to file it. The reverse is the right course.

The Supporting Affidavit of Paschal Babu Wood was in like vein. Paragraph 5 (ii) - (v) said -

(iii) that there is no provision in law for a party such as the Plaintiffs to first file a suit and thereafter seek leave to file the same,

(iv) that the Plaintiffs have known this position in law all along only that they decided to overlook the same by attempting to validate an already invalid and incompetently instituted suit;

(v) that the Plaintiffs who are seeking to represent 2,800 "families" have neither named who those "families" are nor sought their written and signed authorities to file and prosecute this case;

The Plaintiff/Respondents in the Defendants'/Applicants application the subject of his ruling neither filed an affidavit in reply nor grounds of opposition as is required under Order L, rule 16 of the Civil Procedure Rules. Instead there is on record a certificate of urgency, undated but filed in court on 25th February 2010 explaining why the Plaintiffs' Application of 18th December 2009 was not prosecuted, and praying that their application be heard first before the Defendants'/Respondents' application of 12th February 2010 the subject of this ruling is heard.

In the event, since the Defendant's Application sought to have the plaintiff's entire suit struck out, the court directed and allowed the Plaintiff/Respondent to respond to the Defendants application.

The issue raised by the Defendants application is whether Order I, rule 8(1) of the Civil Procedure Rules requires prior leave of court before a person may file on his own behalf and on behalf of others - usually a numerous number of such would be plaintiffs, or put differently what is the true or correct interpretation of Order I, rules 8 (1) & (2) of the Civil Procedure Rules?

There were two opinions advanced during the hearing of the Defendants application before me on 14th April 2010. Mr. Karanja Mbugua for the Defendant/Applicant contended with the aid of authorities, that under Kenya law leave of court was a condition precedent to filing a representative suit. Mr. Karanja relied upon the following cases -

- (1) **ELBUSAIIDY VS. COMMISSIONER OF LANDS & TWO OTHERS** [2002] 1 KLR 508.
- (2) **MATHU & 3 OTHERS vs. GARETH & 6 OTHERS** [2001] 1 KLR 325,
- (3) **JOHN KABERE MUNGAI vs. CHARLES KONCHELLA**(Nairobi HCCC No. 174 of 2004)
(unreported)
- (4) **SAMM L. KONYOKEE & ANOTHER vs. ERICK KONCHELLA & 2 OTHERS**(unreported).
- (5) **MARTHA ACHIENG OCHIENG vs. ELIJAH KOGI & ANOTHER** (Nakuru HCCC No. 75 of 2009) (unreported) and
- (6) **CHARLE MAKWATA & 2 OTHERS vs. KENYA POWER & LIGHTING CO. LTD**
(unreported).

Because of the importance of this rule, rule (Order I, rule 8(1) & (2)), I will set out the holdings in each of those suits. In **El-Busaidy v Commissioner of Lands & 2 others** - Onyancha J. held inter alia -

(1) *Where there are numerous persons having the same interest in one suit and one of such persons wishes to sue, he has to do so for himself and on behalf of others in a representative capacity as per the requirements of order I rule 8 of our Civil Procedure Rules.*

(2) *It is mandatory that leave of the court has to issue before the suit is filed and that the court has mandatorily got to make a direction that notice of the institution of the suit has to be given to all parties concerned preferably through the print media or as the court will deem sufficient."*

In **John Kabere Mungai v Charles Karuga Koinange** [2005] eKLR Osiemo J was crisp-

"In order for the plaintiff to acquire the capacity to institute this suit in his name, he had to seek the consent of his 4 brothers to institute the suit by virtue of Order I Rule 8 of the Civil Procedure Rules. A consent and/or authority of the court is required. Since no authority was given, and since no notice was issued to other joint owners the Plaintiff had no capacity to institute this suit." (the suit was dismissed).

In **Charles Makwata, Samson Okiya Aseka and Elly Okiya** - Ombija J, did not dismiss the suit for want of prior leave of court, (although he did not say that such leave was not necessary - but said so impliedly) by directing the Plaintiffs to give notice to the defendant by personal service.

In **Salim Lemuta Konyokie & Kanyamal Senkelo & 2 others** - B. K. Tanui J. noted at p. 2 of his judgment -

"The first objection under this ground is that the application is incompetent in that no leave of court in terms of Order 1 rule 8(1) of the Civil Procedure Rules, was sought and obtained before the suit was brought as was held in the case of Wanjiru vs. Standard Chartered Bank Ltd and Others [2003] E.A. 701. There were also no directions sought and obtained in terms of Order 1 rule 8(2) of the Civil Procedure rules before the suit was instituted. As the 60 families on whose behalf the suit and the application were made did not give their consent in writing in terms of Order 1 rule 12(2) of the Civil Procedure rules, the application is also rendered incompetent."

The next case cited by Counsel for the Respondent was **Mathiu & 3 Others vs. Gareth & 6 Others**. It is a decision of Otieno J. (as he then was). Holdings (2), (3) - (4) were -

(2) ***All that order I rule 8 states is that where there are numerous persons having the same interest in one***

suit, one or more of such persons may sue.

(3) It is when it comes to defending that order I rule 8 states that the Court may authorize one or more persons having an interest to defend the suit on behalf of others.

(4) Order I rule 8 also requires the plaintiff to give notice to all interested parties of the action the plaintiff has taken and allows other interested parties to apply to be made a party to such a suit."

With respect to the Editors of the Law Report, holding (5) is out of context for the text. That holding was part of the discussion raised by Counsel for one of the parties, and the learned judge said -

"In my opinion, if the legislature wanted to have permission given to the plaintiffs before instituting a representative suit nothing would have been easier than to follow Mulla's Code of Civil Procedure as was apparently followed in Uganda. Our procedure clearly provides that the Court has to authorize defendants in such a case to defend on behalf of others. What would have been easier than to state that the plaintiffs are also required in such a suit to have permission to institute such a suit on behalf of others. I do not think it fair to read anything else into the rule which appears to me so clear."

At the end of his judgment the learned judge says -

"I humbly find that order 1 rule 8 of the Civil Procedure Rules does not require the plaintiffs to have permission of the court to file this suit. The sum total of the above is that I decline to sustain this preliminary objection....."

I did not find any relevance to this matter in the decision of **Martha Achieng Odhiambo vs. Elijah Kogi Gichaga and Laban Mwangi Gichaga** - which was a ruling on an Application for a stay of execution.

In response to arguments by Mr. Karanja Mbugua learned counsel for the Defendants/Applicants, Mr. Chacha Odera for the Plaintiffs argued to the contrary, that in law, no leave of court was required to file a representative suit. Any number of persons may file such a suit and the only requirement is that the court gives directions on service of the plaintiffs. Counsel relied partly on the decision of Otieno J. (*in Mathiu & 3 Others v Gareth & 6 others*)(supra), but more importantly on the decision of the same learned judge in the case of **VOI JUA KALI ASSOCIATION vs. SANGE & OTHERS** [2002] 2 KLR 474.

Before I come to the decision in that suit, it is necessary to set out for ease of reference the contentious rule 8(1) and (2) of Order I of the Civil Procedure Rules. The said rule provides -

"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 to defend 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 in each case may direct.

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

Discussing these provisions in the case of VOI JUA KALI ASSOCIATION v SANGE & OTHERS [2002] 2 KLR 474, Onyango Otieno J (*as he then was*) after citing Order I rule 8 of the Uganda Civil Procedure Rules concluded that the Uganda provision was different from the Kenyan equivalent provision. The Uganda rule says -

"8(1) Where there are numerous persons having the same interest in one suit, one or more of such persons may, with permission of the court, sue or be sued, or may defend such suit, on behalf of or for the benefit of all such person so interested. But the court shall in such case 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."

The learned Judge also referred to Mulla's Code of Civil Procedure Order I, rule 8 which provides -

8. One person may sue or defend on behalf of all in same interest -

(1) Where there are numerous persons having the same interest in one suit -

(a) one or more such person may, with the permission of the court, sue or be sued, or may defend such suit, on behalf of, or for the benefit of, all persons so interested.

(b) the court may direct that one or more of such persons may sue or be sued, or may defend such suit on behalf of, or for the benefit of, all person so interested.

(2) the court shall, in every case, where permission or direction is given under sub-rule(1) at the Plaintiff's expense, give notice of the institution of the suit to all persons so interested, either by personal service, or, where, by reason of the number of persons or any other cause, such service is not reasonably practicable by public advertisement, as the court in each case may direct."

I agree with the observation of Onyango-Otieno J (*as he then was*) that the position in the Uganda Civil Procedure Rules is the same as is the position in Mulla's Code of Civil Procedure, Order I, rule 8 except that in Mulla's Code, the Court gives notice at the expense of the Plaintiff whereas in Uganda no expense is mentioned, but as the learned Judge observed that is not material difference as the court will always give notice only after the Plaintiff pays for such notice.

At first observation indeed under Kanya law (Order 1, rule 8), a plaintiff does not need leave of court to bring a representative suit, and there is no literature why the framers of the Kenyan rule departed from Mulla's Code and from the Ugandan Rules. Again the said Judge observes in Voi Jua Kali Association vs. Sange & Others)-

"Ideally, it would have been proper and fair to parties and particularly to those parties interested in the suit if permission of the court was obtained before any of them sues on their behalf for some of them may very well not accept to be represented or even to have the Plaintiff filing a claim in their name for various reasons. However fair or unfair, the provisions of Order I rule 8 do not require the Plaintiff to obtain leave of the court to sue on behalf of their intended parties. All that the rule requires is to give notice to those interested parties of the existence of the suit to enable those of them who want to, comply with Order 1 rule 8 (3) i.e. apply to court to be made a party in such suit."

Similar sentiments were expressed by Megarry J. in the case of JOHN vs. REES & OTHERS, MARTIN & ANOTHER vs. DAVIS & OTHERS and REES and ANOTHER v JOHN [1969] 2 ALL E.R. 274 - where Megarry J held at p. 283 - that,

"the rule as to representative proceedings should be treated as being not a rigid matter of principle but a flexible tool of convenience in the administration of justice and should be applied, not in any strict or rigorous sense, but according to its wide and permissive

scope."

The English rule, R.S.C., Order 15, rule 12(1) indeed provides -

12(1) "Where numerous persons have the same interest in any proceedings the proceedings may be begun, and, unless the court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them."

(2) At any stage of proceedings under this rule the court may, on the application of the Plaintiff, and on such terms, if any, as it thinks fit, appoint any one or more of the defendants or other persons as representing whom the defendants are sued to represent them all, or all except one or more of those persons in the proceedings and where, in exercise of the power conferred by this paragraph, the court appoints a person not named as a defendant, it shall make an order under rule 6 adding that person a defendant."

Again the English rule is clear. It is unlike that of either Uganda or Mulla's Code of the Indian Civil Procedure Rules. There is no requirement for leave of court to commence a representative action. There is, however a requirement for notice to those on whose behalf the suit has been begun, and who might actually wish to be joined or not to be joined (as in the English case of **John vs Rees**(supra) - (where there was a division of opinion between the Plaintiff and those he claimed to represent). This rule is more like the Kenya rule 8(2) but is drafted in much clearer language than our rule.

Finally, I suspect that there is confusion among legal practitioners and judicial officers on the application of rules 8 and 12(1) of Order I. We have discussed and concluded that no leave of court is required to institute a representative suit. Rule 12(1) provides for the after of the commencement of the suit, and notice to persons interested in the suit. The rule says -

"12. (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 and in like manner where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for each other in any proceeding.

(2) the authority shall be in writing signed by the party giving it and shall be filed in the case."

This rule in my humble opinion requires that once a notice had been given in terms of rule 8(2) Order I, any further proceedings by the representative plaintiffs must have the authority in writing of those others on whose behalf the suit was commenced. In my view further, and in relation to this matter, it is the process the Plaintiffs ought to have been advancing by the Chamber Summons of 18th December 2009. They did not need leave of court to file the representative suit.

The long and short conclusion to this discussion is that under rule 8(1) of the Kenya's Order I, unlike either the Ugandan or Mulla's Code equivalent provisions (which expressly require leave of court before commencement of a representative suit) such leave is not a condition precedent to commencement or filing a representative suit. Like S.C.R. (Order 15, rule 12, the only requirement is a notice to those would be plaintiffs - persons with the same interest and on

whose behalf the suit is begun, and no doubt at the cost of those applying to give such notice.

The Plaintiff's Chamber Summons prays for leave to commence the suit which has already been filed! No such leave is necessary as was held in the **Mathiu & Others vs. Gareth & 6 Others**, and the **Voi Jua Kali Association vs. Sange & others**.

In the result therefore I would dismiss the defendant's Chamber Summons dated 12th February 2010 with costs to the plaintiffs.

There shall be orders accordingly.

Dated, delivered and signed at Nakuru this 21st day of May 2010

M. J. ANYARA EMUKULE

JUDGE