



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

Civil Suit 140 of 2008

ALICE WANJIKU NDUNGU.....1ST PLAINTIFF
ESTHER WANJIRU MURIA KIARA.....2ND PLAINTIFF
SERA THARA KIROMO.....3RD PLAINTIFF
MARGARET GATHONI NJUGUNA.....4TH PLAINTIFF
JANE WANJA.....5TH PLAINTIFF

VERSUS

MARIA WAMBUI MUNGAI.....1ST DEFENDANT
HANNAH WAIRIMU NJAU.....2ND DEFENDANT
ESTHER NJERI KURIA.....3RD DEFENDANT

R U L I N G

1. Mary Wambui Mungai, Hannah Wairimu Njau and Esther Njeri Kuria, who are the defendants in this suit, have moved this court for orders that the plaint filed against them be struck out for being an abuse of the process of the court. In the alternative the defendants seek to have the suit filed against them dismissed for want of prosecution. The application is anchored on the following grounds:

- (i) That the plaint herein be struck out for being an abuse of the process of this Honourable Court.
- (ii) That the plaintiffs are not members of the Mwithegei Women Group and therefore do not have any right to stop the intended sale of the suit property.
- (iii) That the plaintiffs herein have no *locus standi* to bring this suit, as they are not members of the Mwithegei Women Group.
- (iv) That this suit does not disclose any cause of action against the defendants herein.
- (v) That the entire suit as framed and filed constitutes a blatant abuse of the Court process.
- (vi) That since filing suit herein on 2nd April, 2008 the plaintiffs have failed to fix it for hearing.
- (vii) That the plaintiffs' disinterest in prosecuting this suit has greatly prejudiced the defendant.
- (viii) That it is only fair that this application be allowed with costs.

2. The application is supported by an affidavit sworn by the 1st defendant Maria Wambui Mungai who claims to be the Chairlady of Mwithegei Women Group. In the affidavit the deponent reiterates *inter alia*, that the plaintiffs are not and have never been members of the Mwithegei Women Group and therefore their suit is a blatant abuse of the court process. The application is opposed through 3 affidavits. The first affidavit which is sworn by the plaintiffs' advocate Biwott Korir explains the delay in setting down the plaintiffs' suit for hearing. The delay is attributed to several acts including the need to amend the plaint, and the difficulty in tracing the court file at the court registry.

3. The 2nd affidavit is sworn by the 3rd plaintiff Sera Thara Kiromo whilst the 3rd affidavit is sworn by Alice Wanjiku Ndungu, who is the 1st plaintiff. According to these two affidavits, the plaintiffs swear that they are *bona fide* members of Mwithegei Women Group. They maintain that the defendants have deliberately printed a list of members leaving out some *bona fide* members with the intention of depriving the members their rightful contribution and investments. The plaintiffs further aver that the defendants without the consent or authority of the members of the group intend to dispose off the group's assets. The plaintiffs explain that they intend to amend the

plaint to include all other assets of the group which are in danger of being disposed off.

4. Mr. Owang who appeared for the defendants argued that the plaintiffs had no locus standi to bring the suit as they are not members of Muthengei Women Group. Mr. Owang further submitted that the suit as filed was defective, as the plaintiffs have sued the defendants in their personal capacity and not as trustees of the group. Finally, it was submitted that no action had been taken by the plaintiffs to prosecute the suit since it was filed. The court was therefore urged to strike out the suit.

5. Mr. Misati who appeared for the plaintiffs argued that the application before the court is defective as it was brought by way of a notice of motion while order VI Rule 16 provides that such an application should be brought by way of a chamber summons. Secondly, the application is defective because it is brought under Order VI Rule 13(b)(c) & (d) of the Civil Procedure Rules which do not exist in the Civil Procedure Rules. It was submitted that the allegation that the suit does not disclose a cause of action cannot hold as Order VI Rule 13(1)(a) has not been cited. In support of these submissions Mr. Misati relied on *D.T. Dobie & Company (K) Ltd vs Muchina [1982] KLR*, *Sagoo vs Bharij [1990] KLR 459*, and *Transnational Bank vs Mogaka [1991] KLR 389* were also cited.

6. I have carefully considered the application, the submissions made before me and the authorities cited. Firstly, the application has been wrongly brought under Order VI Rule 13(b)(c) & (d) which does not exist. However, this is a minor technical error resulting from a typographical error whereby sub-rule (1) has been omitted, so that instead of order VI Rule 13(1)(b)(c) & (d), it reads Order VI Rule 13(b)(c) & (d). Under Section 1A & B of the Civil Procedure Rules, this court is obliged to give effect to the overriding objective of the Civil Procedure Rules, which is to administer substantial justice without undue regard to technicalities. Indeed, no prejudice has been caused to the plaintiffs by the omission of sub-rule (1) as it is clear from the body of the motion that the defendants seek to have the suit struck out for being an abuse of the process of the court.

7. The defendants' main contention is that the plaintiffs have no locus standi to bring the suit because they are not members of Mwithegei Women Group and therefore have no right to stop the intended sale of the suit property. In the plaint filed on 31st March, 2008, the plaintiffs have indicated in paragraph 5 of the plaint that they have brought the suit in their capacity as members of Kinoo Location Mwithegei Women Group. The defendants in paragraph 2 of the statement of defence have denied that the plaintiffs are members of the group. Therefore, there is a triable issue with regard to the membership of the plaintiffs. The defendants have attempted to show through the affidavit filed in support of the application, that the plaintiffs are not members of the group. However the list of members relied upon is an unsigned document whose authorship has not been revealed. It cannot therefore be relied upon. The defendants' contention that the plaintiffs have no locus standi is a matter for trial and cannot therefore support the defendants' application for striking out, as no abuse of the court process has been established.

8. With regard to the argument that the plaintiffs' suit does not disclose any cause of action against the defendants' such an application ought to have been brought under Order VI Rule 13(1)(a) of the Civil Procedure Rules. Moreover, such an application can only be supported by the grounds stated on the face of the application and not by any evidence. In this case the defendants have failed to demonstrate that the plaintiffs have no reasonable cause of action, as the defendants are relying on disputed facts. As was held in *D.T. Dobie & Company (K) Ltd vs Muchina (supra)*:

“The words reasonable cause of action in Order VI Rule 13(1) means an action with some chances of success when the allegations in the plaint only are considered...”

9. In this case, the plaint as filed does reveal a reasonable cause of action. With regard to the alleged failure by the plaintiff to prosecute the suit, the plaintiffs' advocate has explained the delay. In the circumstances, it is only fair and just that the plaintiffs are given an opportunity to be heard so that the suit is determined on merit.

10. For the above reasons, I find no merit in this application and do therefore dismiss it with costs.

11. Orders accordingly.

Dated and delivered this 20th day of September, 2010

H. M. OKWENGU

JUDGE

In the presence of: -

Misati for the plaintiffs/respondents

Owang for the defendants/applicants

Kosgei - Court clerk