



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

**Civil Case 130 of 2008**

**BEATRICE MGHAMBA ONYONKA**

**ELIZABETH KWAMBOKA ONYONKA.....PLAINTIFFS**

*(Both suing as personal and legal representatives of the Estate of the Late*

*Dr. Zachary Theodore Onyonka Oeri).*

**VERSUS**

**MOSOCHO HEALTH CENTER**

**COUNTY COUNCIL OF GUSII.....DEFENDANTS**

**RULING**

The plaintiffs filed a suit and stated that at all material times the late Dr. Zachary T. Onyonka Oeri was the registered proprietor of a leasehold interest in **L. R. NO. WEST KITUTU/ BOGESERU/ 657**, hereinafter referred to as “**the suit property**”. They claimed that the defendants, without any colour of right, trespassed onto the suit property and started to put up permanent structures thereon. The plaintiffs stated that the second defendant is the lessor of the suit land and had leased the suit land to the late Dr. Onyonka but that notwithstanding, the second defendant had purported to issue a fake plot card to the first defendant.

They sought orders of a temporary injunction to restrain the defendants from interfering with the suit property. In an affidavit sworn by the first plaintiff, she annexed thereto a certificate of lease in respect of the suit land. It showed that the late Dr. Onyonka was registered as the proprietor of the of the leasehold interest aforesaid on 13<sup>th</sup> October, 1987. The lessor is the second defendant. The term of the lease is 99 years from 1<sup>st</sup> January, 1984.

Sometimes in August, 2007, the first plaintiff realized that the defendants were depositing building materials on the suit property with an intention of putting up a permanent structure thereon to be used as a Health Centre. The first plaintiff proceeded to conduct a search at the Kisii District Lands Registry. She realized that the first defendant had been registered as the absolute proprietor of the suit land and a title deed issued to it since 30<sup>th</sup> October, 2001.

In her affidavit, the first plaintiff named the members of Mosocho Health Center Committee as Mr. John Bosco Mboga, Mr. Borura, Councillor Nyambega and Mr. Ongumba. she said that the said officials have been very hostile to her and her family and were even issuing threats to them.

On 19<sup>th</sup> January, 2009 Karanja, J granted interim ex parte orders of injunction and ordered that the application be served for inter partes hearing on 3<sup>rd</sup> February, 2009. When the application came up for for inter partes hearing on the aforesaid date, Mr. Masese for the plaintiffs told the court that the defendants had been duly served but had not filed any papers in opposition to the application and urged the court to confirm the **ex parte** orders that had earlier been made. The court obliged him and confirmed the injunctive orders pending hearing of the suit.

On 17<sup>th</sup> February, 2009 the second defendant filed an application seeking to set aside or vary the injunctive orders

aforsaid on the ground that proper service of the plaintiff's application had not been effected upon the council.

On 17<sup>th</sup> march, 2009 the first defendant filed an application and sought the following orders:

1. **Stay of proceedings**
2. **Discharge, variation and/ or setting aside of the exparte orders of injunction.**
3. **Striking out the name of the first defendant from the suit and consequently, dismissal of the plaintiffs' suit against the first defendant.**
4. **Costs of the application and of the main suit.**

Mr. Okemwa for the second defendant submitted that no proper service of the plaintiffs' application was effected upon his client. Contrary to the contents of the affidavit of service filed by Alice Ntabo, court process server, the plaintiffs' application was served upon an office messenger who was not duly authorized to accept service on behalf of the county council. At the time of the purported service, the county clerk was out of the office, having been bereaved on 30<sup>th</sup> January, 2009.

Mr. Oguttu for the first defendant submitted that Mosocho Health Center is an unincorporated body and has no legal capacity to sue or be sued in its own name. He said that it is a self help group registered under the Ministry of Gender, Sports, Culture and Social Services. The first defendant could only have been sued through its registered officials. In a further affidavit filed by the first defendant, it annexed thereto a certificate of registration which shows that its full names is **Mosocho Community Health Centre Project** which was registered as a Self Help Group/ Project by the ministry of Gender, Sports, Culture and Social Services on 31<sup>st</sup> March, 2006. On 27<sup>th</sup> May, 2009 the registration was renewed by the re-named ministry of Gender, Children and Social Development.

**In Halsbury's Laws of England**, fourth edition volume 19 at page 184, the learned authors stated that:

**" An unregistered Society cannot sue or be sued in its own name nor can the Secretary or any other officer of the Society sue or be sued on behalf of the Society, even if the rules purport to give him powers to sue and provide for his being sued."**

The position has been re-stated in several local decisions, for example, **SIMU VENDORS ASSOCIATION VS THE TOWN CLERK, CITY COUNCIL OF NAIROBI & ANOTHER [2005] e KLR AND JEREMIAH ONAMI OBWOGE T/a HIGH TECH COLLEGE OF ACCOUNTANCY VS THE CHAIRMAN, THE BRANCH MANAGER, AGRICULTURAL SOCIETY OF KENYA**, Civil case No. 89 of 2007 at Kisii.

Mr. Okemwa supported the submissions by Mr. Oguttu in this regard and urged the court to strike out the suit.

On the other hand, Mr. Masese argued that since it is trite law that only legal entities could be registered as proprietors of land and the plaintiff came to court after it realized that its land was improperly registered in the name of the first defendant, that implied that the first defendant was capable of being sued or suing in its name. Counsel did not cite any case law to support that contention.

It is clear beyond peradventure that a suit by or against an unincorporated body must be brought in the names of its members or officials. That being the position, the plaintiffs' suit against the first defendant is bad in law and does not lie. The plaintiffs' suit against the first defendant must therefore be struck out which I hereby do. I also believe that that first defendant cannot hold a Title Deed in its name. It is not clear how the District Land Registrar, Kisii Central, issued a Title Deed for the suit property in the name of Mosocho Health Centre, an unincorporated body. However, this is not an issue before this court for determination at this point in time. It cannot be argued that since Mosocho Health Centre is wrongly registered as the proprietor of the suit land, there is nothing wrong in suing the same unregistered body in its own name.

Two wrongs do not make a right and a court of law cannot perpetuate an illegality.

Having struck out the plaintiffs' suit against the first defendant, the suit cannot stand as against the second defendant only. The end result is that the entire suit is struck out and the plaintiffs will bear the costs of the suit including the applications. Having arrived at that conclusion, it will be unnecessary to determine the other issues raised by the defendants. The plaintiffs shall be at liberty to file a compliant suit.

DATED, SIGNED AND DELIVERED at Kisii this 15<sup>th</sup> day of June, 2009.

**D.MUSINGA**

**JUDGE.**

**15/6/2009**

Before D. Musinga. J

Mobisa – C. c

Mr. Masese for the plaintiff.

Mr. Oguttu & Mr. Okemwa for the first defendant.

**Court:** Judgment delivered in open court on 16<sup>th</sup> June, 2009.

**D. MUSINGA**

**JUDGE.**