



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
OF KISII
Civil Case 38 of 2007
LAWRENCE SESE
NAHASON MOGAKA
GERALD OKEYO PLAINTIFFS
FERDINAND MOGERE
ERNEST BORURA
CHARLES NYANGAI
PATRICK OYUGI suing on behalf of themselves
and on behalf of the Members of
GESIMA SETTLEMENT SCHEME AND RIGOKO COMMUNITIY
VERSUS
JEREMIAH OTIENO OKENYE
SETTLEMENT FUND TRUSTEES, DEFENDANTS
GESIMA SETTLEMENT SCHEME

RULING

The plaintiffs filed this suit on 4th April, 2007. They filed this suit on their own behalf as members of Gesima Settlement Scheme and on behalf of other members of the said scheme's particularly Rigoko Community. They averred that in or about 1964 they were allocated parcels of land within Gesima Settlement Scheme, hereinafter referred to as "**the scheme.**" The lands were then charged to the Settlement Fund Trustees (S.F.T.) who must have been the proprietor thereof charges were drawn in its favour. The plaintiffs averred that at the time of allotment of the subdivisions forming the scheme, some plots were left for public purposes, among them were parcels Nos. 812 and 813. The defendant was allotted parcel No. 45 which was adjacent to the two parcels reserved for public purposes.

On the two public purposes plots members of the settlement scheme set up Rigoko Public Health

Dispensary and Rigoko Pentecostal Assemblies of God church.

The plaintiffs stated that in the year 2003 or thereabout the first defendant wrongfully and unlawfully claimed proprietary interest over the said public interest land parcels alleging that they form part of his land, that is, parcel No. 45; and has threatened to restrain, evict and/or stop members of the settlement scheme from using the utilities established thereon.

The plaintiffs further averred that the two Public interest plots and other parcels belonging to members of Gesima Settlement Scheme whose charges have not been discharged are held by the second defendant in trust for the members. They alleged that the first defendant was claiming the two parcels of land fraudulently. Particulars of fraud are set out in the plaint.

The plaintiffs sought a declaration that part of the plaintiff's parcel of land, Gesima Settlement scheme/45 upon which the water pump, the cattle dip, the Public Health Dispensary and the church are standing, measuring approximately 5 acres, is public purpose land for the benefit of all members of Gesima Settlement Scheme and is held by the first defendant in trust for himself and other members of the scheme. They further urged the court to order a rectification of the register in respect of parcel No. 45 to limit the acreage thereof by 5 acres and have that 5 acre portion registered in the name of the second defendant in trust for the members of the settlement scheme.

The first defendant filed a statement of defence and admitted that he is the registered proprietor of parcel No. Gesima Settlement Scheme/45 but denied any existence of parcels Nos. 812 and 813 at all. He stated that he permitted construction of Rigoko Public Health Dispensary on a portion measuring one acre, out of his parcel of land No. 45 and not otherwise.

In paragraph 8 of his defence, the first defendant stated:

**“ 8. The 1st defendant admits the contents
of paragraph 12 of the plaint together
with the particulars of fraud alluded to
thereunder.”**

However, that admission is negated by the averment in paragraph 9 of the defence where he stated that the allegations of fraud attributed to him are mischievous and/or misplaced. He further stated that parcel No. 45 was allocated to him in 1964 when the boundaries thereof were determined. Consequently, if the boundaries thereof included plots numbers 812 and 813, the plaintiffs' claim is time barred.

When this suit came up for hearing, the defendant's advocate chose to raise a preliminary objection in terms of a notice which he had filed on 26th September, 2007. The same contains the following grounds:

**“(i) That the plaintiffs herein have no personal
interest in the use and/or abuse of the
original plot Gesima/Settlement
Scheme/45. Consequently, the plaintiffs
lack the requisite *Locus Standi* to
commence and/or maintain the instant**

suit.

(ii) That the plaintiffs not being officials of

**Rigoko Community, which is an
unincorporated body, some lack the
representative capacity to sue**

for and on behalf of the said community.

(iii) That no leave was ever sought for and/or

**obtained to file a representative suit
whatsoever. Consequently, the instant suit
offends the provisions of Order 1 rule 8 of
the Civil Procedure Rules.**

(iv) That the allocation, merger and/or actions

**complained of occurred in 1964 and hence
the instant suit is statutorily time barred.**

(v) That the prayers sought are barred by dint

**of section 143 (I) of the Registered Land
Act, Chapter 300, Laws of Kenya.**

(vi) That the suit concerns and/or relates to plot

**No. GESIMA SETTLEMENT SCHEME/45, which
is admittedly sub-divided and hence
non-existent. Consequently, the suit is
legally untenable and otherwise an abuse of
the due process of court.**

(vii) That the plaintiff's suit herein does not raise

any reasonable cause of action or at all.”

The aforesaid grounds were argued by Mr. Oguttu, learned counsel for the first defendant. He cited several authorities in support of his submissions. I will refer to some of them at a later stage. Mr. Ombachi, the plaintiffs' learned counsel responded and also cited several authorities to buttress his arguments. I will deal with Mr. Ombachi's response in the course of my determination of the preliminary issues.

The decision of the Court of Appeal for East Africa in **MUKISA BISCUIT MANUFACTURING COMPANY LIMITED –VS- WEST END DISTRIBUTORS LIMITED** [1969] EA 696 provides a good starting point.

In that appeal, Sir Charles Newbold stated:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

This court has not heard any evidence relating to the pleadings by both parties. Though parties filed affidavits in respect of an application for an injunction, Gacheche J. did not certify the said application as urgent and the same seems to have been abandoned because since 24/4/2007 no effort was made to fix a hearing date for the application. Instead, it is the preliminary objection that was set down for hearing. In the circumstances, the court can only look at the pleadings, that is, the plaint and the defence, in determining the preliminary objections aforesaid.

That being the case, the court cannot make an informed determination on grounds (iv) (v) (vi) and (vii) without hearing evidence. I will therefore deal with grounds (i) (ii) and (iii) as stated in the notice of Preliminary objection. They are the only ones that can be determined by considering the pleadings only.

Do the plaintiffs have personal interest in the use of plot No. Gesima Settlement Scheme/45? Do they have ***Locus Standi*** to bring this suit? The seven plaintiffs, in their own rights, are living in Gesima Settlement Scheme within Rigoko Community. They are served by Rigoko Public Health Dispensary and Rigoko Pentecostal Assemblies of God Church. That is sufficient personal interest. In considering whether a person has ***locus standi*** to institute a suit, a court has to consider the nature of interest of the person. In **LAW SOCIETY OF KENYA –VS- THE COMMISSIONER OF LANDS** [2003] KLR – it was held that ***Locus Standi*** signifies a right to be heard and a person must have a sufficiency of interest to sustain his standing to sue in a court of law.

The plaintiffs have sufficient personal interest in this matter and my view is that they have a right to be heard.

I will now deal with the second ground of the Preliminary Objection – that the plaintiffs, not being officials of Rigoko Community, which is an unincorporated body, lack the representative capacity to sue for and on behalf of the community.

In **KEDUIWO A. MARISIN & 7 OTHERS –VS- SAMUEL KIPSIGE ARAP SOI** (suing on behalf of **KILANDA VILLAGE GROUP**) Civil Appeal No. 140 of 1996, the respondent purported to sue on his own behalf and on behalf of a village group known as Kilanda village group which was an unregistered group. He sought, ***inter alia***, declarations that the village group, of which he was a member, by virtue of their occupation of certain parcels of land in Narok, which were registered in the name of the appellants, that the appellants were so registered in trust for them, that is, members of the group. The Court of Appeal held that the respondent had no capacity to bring a representative suit on behalf of Kilanda village group but could only have proceeded in that suit on his own behalf and not of the group members.

It is not disputed that Gesima Settlement Scheme and Rigoko Communities are unincorporated bodies. Consequently, the 7 plaintiffs can only bring this suit on their own behalf and not as a representative suit. And this is related to the third ground which I shall proceed to deal with right away. Did the plaintiffs require leave of the court to file a representative suit?

Order I rule 8 of the Civil Procedure Rules provides as follows:-

“8 (I) 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.**

(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 sub rule (I) may
apply to the court to be made a
party to such suit.”**

A close reading of the above quoted rule reveals that in filing a representative suit a plaintiff does not need leave of the court to bring such an action. All he needs to do upon filing of the suit is to ask the court to give directions as to how he should give notice of the institution of the suit to all such persons who may have the same interest in the suit. The court may direct that they be served personally but where the persons concerned are so many that personal service is not reasonably practicable, the court may order

that they be notified by way of Public advertisement. It is only the defendant who requires leave of the Court to defend on behalf of other would be defendants. See VOI JUA KALI ASSOCIATION –VS- SANGE & OTHERS [2002] 2 KLR 474.

To tie together grounds two and three, since Gesima Settlement Scheme dwellers or Rigoko Community are not registered entities, the seven plaintiffs ought to have filed the suit in their names only. If they wanted to do so on behalf of the said communities, they should have complied with the provisions of **Order 1 rule 8** of the **Civil Procedure Rules**. In respect of a registered society, the officials can sue or be sued in their respective names.

In view of all the foregoing, the plaintiffs can only proceed with the case on their own behalf and in that regard, I direct that the plaint be amended accordingly within the next fourteen days from the date hereof. The defendants shall be at liberty to amend their respective defences (if any) within fourteen days from the date of service of the amended plaint. The plaintiffs shall bear the costs of the preliminary objection assessed at Kshs. 5,000/=.

DATED, SIGNED AND DELIVERED AT KISII THIS DAY OF 2009.

D. MUSINGA

JUDGE.

29/7/2009

Before D. Musinga, J.

Mobisa – cc

Mr. Ombachi for the Plaintiffs

Mr. Oguttu for the Defendants

D. MUSINGA

JUDGE.