



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

**Civil Suit 230 of 2009**

**GEORGE OCHIENG ODODA.....1<sup>ST</sup> PLAINTIFF**

**SIMONS M. MAHUGU .....2<sup>ND</sup> PLAINTIFF**

**BONIFACE K. NGUI .....3<sup>RD</sup> PLAINTIFF**

**JOHN YAA KAATANA .....4<sup>TH</sup> PLAINTIFF**

**JOSEPH MUTISO ..... 5<sup>TH</sup> PLAINTIFF**

**JAMES WAWERU & OTHERS.....6<sup>TH</sup> PLAINTIFF**

**VERSUS**

**KENYA RAILWAY STAFF RETIREMENT BENEFIT SCHEME ...DEFENDANTS**

**RULING**

The application before the court, is dated 27<sup>th</sup> April, 2009 brought by way of Chamber Summons, pursuant to Section XXXIX Rules 1, 2 & 3 and Order I Rule 8(1) of the Civil Procedure Rules, Section 3A & 63 of the Civil Procedure Act. It is supported by the affidavit of one George Ochieng Ododa the 1<sup>st</sup> Plaintiff dated 27<sup>th</sup> April, 2009, and a Further Affidavit dated 25<sup>th</sup> May, 2009, by the same person and further affidavit sworn by **Simon Mahugu** the 2<sup>nd</sup> Plaintiff dated 25<sup>th</sup> May, 2009 and the grounds on the face of the application.

The application is seeking for orders as follows:-

- 1. *This application be certified as urgent and service of the same be dispensed with in the first instance***
- 2. *That the Applicants/Plaintiffs be granted leave to bring this suit on behalf of the persons interested and threatened by the defendant.***
- 3. *That an injunction do issue restraining the Defendant or its servants or agents or any person claiming under it from interfering with the Plaintiffs' quiet enjoyment of the house the Plaintiffs' are occupying removing attaching, disposing of or in any other way alienating the Plaintiff's personal effects and or household goods in the premises pending the hearing of this application.***
- 4. *That an injunction do issue restraining the Defendant or its servants or agents or any person***

***claiming under it from interfering with the Plaintiffs' quiet enjoyment of the house the Plaintiff's are occupying removing, attaching, disposing of or in any other way alienating the Plaintiffs' personal effects and or household goods in the premises pending hearing of this suit.***

**5. That the costs of this application be provided for.**

The Defendant opposed the application by filing a Preliminary Objection dated 16<sup>th</sup> June, 2009 and a Replying Affidavit dated 17<sup>th</sup> May, 2009.

When the matter came up for inter parte hearing on the 30<sup>th</sup> of June, 2009 **Mr. Kerongo** for the Defendant raised the issue of their Preliminary Objection. The court ordered the Preliminary Objection to be argued with the application.

I have considered all the affidavits on record, submissions by learned counsel and the authorities cited.

The Applicants/Plaintiffs are former employees of Kenya Railway Corporation. By virtue of their employment with the said Corporation they become members of the Defendant. The Applicants/Plaintiffs were retrenched by the said Corporation in 1998. The Applications/Plaintiffs contend that part of their retrenchment package or arrangement with the Corporation included retention of the Corporation houses until they were fully paid. The Applicants/Plaintiffs & others filed a suit against the Corporation on 20<sup>th</sup> July, 1998 claiming that the Corporation was in breach and had disregarded the agreed terms of retrenchment and had asked the Applicants/Plaintiffs and others to move out/or vacate the houses immediately after payment of their dues amongst other allegations, they sought injunctive order in **HCCC No.397 of 1998 (Nakuru)**

They contend further that on 25<sup>th</sup> of September, 1998 Msagha J injuncted the Kenya Railways Corporation. The said order it has been submitted still remains in force. That despite the court order the Kenya Railways Corporation transferred the suit property to the Defendant.

The order stated:-

***“That this Honourable court be and is hereby pleased to issue an order of interim injunction to restrain the Defendant/Respondent by itself, agents, servants and/or employees from unlawfully evicting and/or interfering with the Applicant's quiet possession enjoyment of the tenancies and continued retention of the Respondent/leased houses until the Applicants are fully settled in accordance with the contract joint council agreement clause (ii) (b) , (c) and (d) of the 16<sup>th</sup> of January, 1998 (KRI) and General Manager circular letter ref: CST/19/14/1/e of 30<sup>th</sup> March, 1995 (KR2) respectively or however threatening, harassing or intimidating the Applicants.”***

The Respondent/Defendant raised a Preliminary Objection pursuant to order I Rule 12 of the Civil Procedure Rules. In opposing the Applicants/Plaintiffs application the Respondent/Defendant contents that it is the rightful owner of the houses occupied by the Applicants/Plaintiffs and that it had embarked on evicting illegal occupants and rent defaulters but was stopped by this court.

In response to the Preliminary Objection the Applicants/Plaintiffs submitted that any procedural defect is curable as the court may excise its discretion to allow rectification. I will first deal with Preliminary points raised by the Respondent/defendant counsel.

The Plaint and the Chamber Summons before the court were filed simultaneously on the 27<sup>th</sup> April, 2009. One of the prayers being sought by the Applicants is to be granted leave to bring this suit on behalf of other persons who may be interested in the same. It follows therefore, that this suit is intended to be a representative suit.

The Respondent/Defendant's contention is that the 1<sup>st</sup> Plaintiff should have sought written authority from the other 5 Plaintiffs before swearing the verifying affidavit in support of the plaint on their behalf.

Further that the other Plaintiffs are unknown as this is not a representative in the circumstances the suit is incompetent and ought to be struck out.

Order 1 Rule 12 (1) & (2) states:-

**12(1) “Where there are more Plaintiffs than one, any one or more of them may be authorized by any other of them to appeal, plead or act for such other in any proceedings, and in like manner, where there are more Defendant than one, any one of them by any other of them to appear, plead or act for such other in any proceedings.”**

**(2) The authority shall be in writing by the party giving it and shall be filed in the case.”**

The above rules clearly require authority be given to a party pleading or acting on behalf of others and that the authority be in writing. In the circumstances of this case it means that the 1<sup>st</sup> Plaintiff ought to have received written authority in line with the said order from the other 5 Plaintiffs. The 1<sup>st</sup> Plaintiff has only deponed to that fact in the verifying affidavit. There is no such authority in writing filed in court. Does failure to file the authority make the entire suit incompetent to the extend of the same be struck off?

I take cognizant of prayer No.2 of the Chamber Summons dated 27<sup>th</sup> April, 2009 that this is intended to be a representative suit. In arriving at my ruling I have been guided by the following authorities:-

1. **BEN YOUNG WAFULA & OTHERS vs. ELISHA CHEBII CHESIYNA & ANOTHER HCCC No. 318 of 2003** where the court allowed an authority letter to be filed pursuant to O.I Rule 12 after filing of the plaint.

2. **GIANT CLOSING DESIGNERS LTD & 2 OTHERS vs. INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION LTD HCCC NO. 447 of 2007** where Okwengu J stated in part:-

***“I therefore uphold the Preliminary Objection to the extend that the verifying affidavit sworn by Joseph Kioria Kahuho is not sufficient to verify the correctness of the averment in the plaint on behalf of the 1<sup>st</sup> & 3<sup>rd</sup> Plaintiffs as no authority in writing from the 1<sup>st</sup> and 3<sup>rd</sup> Plaintiffs has been filed. To this extend the 1<sup>st</sup> and 3<sup>rd</sup> Plaintiffs suit is defective. This court has however the discretion to allow the 1<sup>st</sup> and 3<sup>rd</sup> Plaintiffs to rectify the defect.”***

3. In **MICROSOFT CORPORATION vs. MITSUMI COMPUTER GARAGE LTD (2001) 2 E.A.** at 460 Ringera J had this to state about procedures,

***“Rules of Procedure are the hand maidens and not mistresses of justice. Theirs is to facilitate the administration of justice in a fair, orderly and predictable manner, not to fetter or choke it. .... Deviation from or lapses inform and procedure which do not go to the jurisdiction of court or prejudice the adverse party in any fundamental respect ought not to be treated as nullifying the legal instruments thus affected. In those instances the court should raise to its higher calling to do justice by saving the proceedings in issue In the matter at hand, I am of the view that the error manifest in verifying affidavit neither goes to the jurisdiction of the court not prejudices the defendants in any fundamental respect.”***

4. **RESEARCH INTERNATIONAL EAST AFRICA LIMITED vs. ARISI & OTHERS (2004) LLR 4561** the court of appeal stated in part:-

***“In our view, the true construction of rule 1(2) of Order VII Civil Procedure Rules is that even in cases where there are numerous Plaintiffs, each Plaintiff is required to verify the correctness of the averments by a verifying affidavit unless and until he expressly authorizes any of the co-Plaintiffs or some of them in writing, and, files such authority in the case, to file a verifying affidavit on his behalf in which case such a verifying affidavit would be sufficient compliance with the rule. Moreover, the***

**Grace Ndegwa's case (supra) and rule 12(1) of Order I Civil Procedure Rules leave no doubt that one or more of the co-Plaintiffs can validly file an affidavit verifying the correctness of the averment of the plaint on behalf of the other co-Plaintiff with their authority in writing**

**Having come to the conclusion that the verifying affidavit of Julius Arisi was filed without authority of the other 213 Plaintiffs, it follows that the other 213 respondents have not complied with mandatory provisions of rule 1(2) of Order VII Civil Procedure Rules and that their suit was liable to be struck out by the superior court under rule 1(3) of Order VII Civil Procedure Rules**

**The superior court however had discretion. It had jurisdiction instead of striking out the plaint to make any other appropriate orders such as giving the Plaintiffs another opportunity to comply with the rule."**

In the circumstances of this case I am of the considered view that failure to file letter of authority is not a good enough reason to strike out the entire suit. Although order I Rule 12(2) is couched in mandatory terms it does not state at what point the authority letter ought to be filed in which case in my view the Plaintiffs still have an opportunity to rectify the error, secondly guided by the above authorities I am of the view that the defect is not fatal and can be rectified, thirdly there will be no prejudice suffered by the Defendant should the court exercise its discretion by saving the pleadings herein.

Although upholding the Preliminary Objection, I will not strike out the entire suit.

Having dealt with Preliminary Objection I will now consider the merits of the application.

The court takes cognizant of the injunction against the Kenya Railways Corporation issued in **HCCC No. 397 of 1998 (Nakuru)** & the fact that the said Corporation transferred the houses subject matter herein to the Defendant, while the order of Msagha J was still in force. I find the same contemptuous to say the least. The actions of the Corporation and the Defendant herein is definitely an attempt to evade the orders of Msagha. J.

In his submission The Defendant's counsel submitted to the effect that the Defendant is a legal entity separate from the Corporation, however the Defendant's exhibit MKT II – clearly indicates that Kenya Railways Corporation is the sponsor of the Defendant and has established the Defendant for purposes of providing pension & other benefits. I therefore refuse and decline to appreciate the argument that the Defendant is totally distinct from the Corporation and therefore not bound by the agreement between the Applicants/Plaintiffs and the said Corporation.

Therefore in circumstances of the case before me and in view of the earlier order of the court I find that the Applicants/Plaintiffs have a prima facie case with a probability of success, I further find that the balance of convenience tilts in their favour.

I accordingly grant prayer 2 and 4 of the Chamber Summons dated 27<sup>th</sup> April, 2009 with costs to the Plaintiff. I also grant the plaintiffs leave to file the authority letter in line with Order 1 rule 12 (2).

Dated and delivered at Nairobi this 9<sup>th</sup> day of October, 2009.

**ALI-ARONI**

**JUDGE**