



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)
CIVIL CASE 764 OF 2007

1. Land and Environmental Law Division

2. Subject of main suit land /Lease of game lodge.

Land within County Council of Isiolo (25.3 acres)

Buffalo Springs Lodge

Buffalo Springs Game

Reserve bordering Samburu National Reserve and Shaba National Reserves.

(b) Dispute - The leasing of the lodge to 3rd and 4th defendant as sole bidder illegal

3. Preliminary objection

(a) The plaintiffs has no capacity to institute suit on behalf of Damesa Association. (Suing as the secretary for and on behalf of Damesa Association).

4. In reply by plaintiff/respondents

a) (society can sue by its members.

5. Held: a) Secretary is not an office bearer to the plaintiffs' association.

b) Office bearers as per constitution are

The chairperson

The vice chairperson

The treasurer

Gender promoter

(The program manager acts as secretary to all committees.)

c) The Preliminary Objection upheld. Plaintiff has no powers/locus to act for plaintiffs association.

6. Case Law

(a) Simu Vendors Association v The Town Clerk City Council of Nairobi & Another Misc. Applic 427/2005, Ibrahim J.

(b) Eliud Mathiu & 3 Others v George Gareth & 6 Others Hccc120/01

Onyango Otieno J (as he then was)

(c) Free Pentecostal Fellowship in Kenya v Kenya Commercial Bank Hccc5116 of 1992 OS

(c) J.J. Campos v A.C.J. De Souza (1933) 15 KLR 86

7. Advocates

A. Nyandieki of Nyandieka & Co. Advocates for the plaintiff/applicant – present

J.S. Aullo for the 1st defendant/respondent Advocate s

2nd defendants case withdrawn

D. Machaja & Co. Advocate for the 3rd and 4th defendant/respondent - present

A. Ojiambo of Ojiambo & co. Advocates for the 5th defendant

**ABDINOOR DIMA JILLO (Suing as the Secretary for and on behalf of
DAMESA ASSOCIATION) PLAINTIFF**

VERSUS

COUNTY COUNCIL OF ISIOLO 1ST DEFENDANT
KENYA TOURIST DEVELOPEMNT CORPORATION 2ND DEFENDANT
MARA LANDMARD COMPANY LIMITED 3RD DEFENDANT
MARA SIMBA GROUP OF LODGES LIMITED 4TH DEFENDANT
NATIONAL ENVIRONMENT MAANGEMENT AUTHORITY 5TH DEFENDANT

RULING

ON A PRELIMINARY OBJECTION

I INTRODUCTION:

1. The parties to this suit are the plaintiff Rtd Major Abdinoor Dima Jillo (suing as the secretary for and on behalf of Demesa Association) The plaint was later amended to read.

Rtd Major Abdinoor Dima Jillo (suing as the Registered secretary of Demesa association)

2. According to the plaint, the plaintiff is described as:-

“The Registered Secretary of a community based association duly registered with its Headquarters at Central Isiolo Division of Isiolo District and brings this suit through its registered secretary for and on behalf of all the members of the association”.

3. The original defendants were

3.1. The County Council of Isiolo ... 1st defendant

3.2. Kenya Tourist Development Corporation.. 2nd defendant.

3.3. Mara Landmark Company Ltd .. 3rd defendant

3.4 Mara Simba Group of Lodges Ltd 4th defendant

3.5 National Environment Management Authority ... 5th defendant

4. By its amendment of the plaint filed on 28 November, 2007 the second defendant M/S Kenya Tourist Development Corporation was expunged from the record.

II. Preliminary Objection

5. The 3rd & 4 defendants herein raise preliminary Objection against the plaintiff on the judgments that:

"The plaintiff has no capacity and/or authority to institute this suit on behalf of Demesa Association"

6. Their very brief arguments is that according to the plaint, Rtd Major Abdinoor Dema Jullo brings this suit as a Registered secretary of Demesa Association. The said association is duly registered under the Society Act Cap.108 laws of Kenya. This being so it means as that the society has no legal capacity to sue in its own name. According to the law, they are not legal persons, as such do not have locus before this court to sue.

8. The advocate relied on the case law of:-

Simu Vendors Association v Town Clerk, City Council of Nairobi

The Hon. Judge in this case upheld a Preliminary Objection that the applicants in the said Judicial Review had no locus to file suit before court. The Judicial Review Application was duly struck out as the applicants lacked legal capacity to sue.

9. In relying on a second case law of Eliud Martin & 3 Others v George Gareth & 6 Others HCCC 120/01

The members of the association must authorize the plaintiff to file suit.

10. This argument was supported by the other defendants in this matter.

III In reply

11. The plaintiff argued in reply that the suit had been brought in the name of the member of society and not the society itself. Authority to sue was in fact sought by the plaintiff. That this court can further grant the plaintiff leave to issue a notice by affixing such notice on the court premises for permission to institute these proceedings.

12. The plaintiffs further argued that though the plaintiffs society constitution is before the court but

not signed, the fact that it is registered means that it is a valid constitution. The plaintiff is herein Rtd Major Abainoor Dima Jillo because he is seized with the facts of case. The arguments that a secretary under the said constitution does not exist is not correct as under Article 9 and 10 page 4, the secretary is named. He admits that no certificate of registration has been filed within the application but the defendant who pleads that the plaintiffs does not have a negotiable certificate is the one to plead and prove the said facts.

IV: Opinion

13. It is not disputed that Demesa Association is registered as a society where an association is established under the Society's Act Cap 108 Laws of Kenya they are permitted to sue or be sued but not in the name of the society but in the name of the office bearers.

14. An association under the Society's Act is an unincorporated body of persons. Suits must therefore be brought in the names of or against the members of the unincorporated bodies:-

“Where there are numerous members the suit may be instituted by or against one or more such persons in a representative capacity pursuant to . . . order 1 r 8 Civil Procedure Rules.”

15. Where an association sues it lacks the capacity to institute a suit in its own name.

16. The plaintiff argues herein that he has brought his suit in the name of the office bearer and therefore their capacity to sue through Rtd Major Abdinoor Dima Jillo is correct.

17. Before I deal with the locus of the plaintiff in this case I wish to just note the following points of law that was clarified in the case of Eliud Martin & 3 Others v George Gareth & 6 Others (supra)

18. In an unincorporated body such as a society, where there are numerous members, the office bearers would file suit in their names suing on behalf of the association. As plaintiffs they need not seek the leave of the court to bring a representative suit. The effect of the said plaintiffs suing is that they are suing in a representative capacity as well as under their own rights.

19. If the unincorporated body is sued as a defendant their authority must be obtained from court for leave to appoint certain persons to be defendants within the unincorporated body. Where the society holds trustee which is a corporate body then the trustee are known and can be so sued.

20. For clarification, leave to bring a representative suit is a requirement in the Uganda legislation and not in Kenya. See the Johnson v Moss & Others case relied on, by Onyango Otieno J.

21. In our situation in the matter before me the plaintiff did not sue in the name of the association but in his personal name. Legally the member of an association is permitted either alone or with others to bring a suit on behalf of the association.

22. The issue that arises in this matter is that the plaintiffs Rtd Major Abdinoor Dima Jillo described himself as a secretary later a registered secretary of the association. In his affidavit he annexed he copy of constitution which is not signed by the office bearers being the chairman and secretary. There was no certificate of registration shown on the annexure.

23. The 3rd and 4th defendants took issue to this and claimed that the plaintiff had no authority to sue, the position of secretary does not exist in the association's constitution. The plaintiff stated that it did.

24. I have perused this constitution and would note that the office bearers are described as: _

25.(a) The chair person

25.(b) The vice-chairperson

25.(c) The treasurer

25.(d) Gender promoter

25.(e) Provided that the Program Manager acts as secretary to all committee.

26. The Program Manager is the one described as being the secretary to the management committee.

27. It is unclear how "the registered secretary" position has been derived to by the plaintiff.

28. If the plaintiff was a chair person, suing together with the vice-chairperson and treasurer and Gender promoter in their personal name on behalf of the society, I would believe that the Preliminary Objection would not stand. As it is, the program manager – who is mandated to act as secretary to the Management Committee and is not officially an office bearer but possibly an ex official and or Co-opted member.

29. I would in this instant case note that the position of secretary is not that of an office bearer. The plaintiff Rtd Major Abdinoor Duma Jullo has no capacity as secretary to file suit. The suit must be filed by the chair-person and or office bearers on behalf of the association as a plaintiff.

30. I uphold the Preliminary Objection and accordingly the application, and the suit is hereby struck out with costs to the respondents.

Dated this 21st day of February 2008 at Nairobi.

M.A. ANG'AWA

JUDGE

A.Nyandieka of Nyandieka & associates Advocates for the plaintiff/applicant – present

J.S. Aullo & Co. Advocates for the 1st defendants/ respondent

2nd defendants case withdrawn

D. Machanja & Co. Advocates for the 3rd and 4th defendant/respondents – present

A. Ojiambo of Ojiambo & Co. Advocates for the 5th defendant.