



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Suit 484 of 2007

1. Land and Environmental Law Division
2. Civil Practice and procedure Order 1 r8 Civil Procedure Rules
3. Subject of main suit:- Land

LR No. 88 /5

Original 88/3/2 Kiambu

- (a) Original land sub-divided
- (b) Issue of access road within the sub-division and adjacent land .
- (c) Application for injunction restraining defendants from interfering with use of access road.
- (d) Trespass

4. Preliminary Objection

- (a) That Order 1 r 8 Civil Procedure Rules not complied with The plaintiff failed to apply and bring suit under a representative suit claim.
- (b) There was no authority from the plaintiff company to file suit.

5. In reply

The provisions of order 1 r 8 Civil Procedure Rules not complied with

- (a) No reply on issue of authority.

6. Held

1. That there must be leave to bring a representative suit against the defendants. Leave by plaintiff to file representative suit is not compulsory in Kenya but is so compulsory in Uganda
2. The suit is struck out. The application dismissed.

7. Case Law:

(a) Hinga & Another V PCEA thro' Rev Dr Njoya & Another

(1986) KLR 317 Alouch J.

(b) Brollo Kenya Ltd V Ondatto V 3 Others (1989) KLR 553 Mombasa Githinji J.

(c) Musa Misango V Eria Musingire & Others (1966) p 390

(e) Kiwanuka & Co V Walugembe (1969) EA 660

8. Advocates

A.M.D. Enonda Instructed by Enonda Makoloo, Makori and Co Advocate for defendant/applicant

J.W Kimiti instructed by Rumba Kunuthia & Co advocate advocate for plaintiff/respondent.

WAVERLEY ESTATE LTDPLAINTIFF

VERSUS

ALEX GITATA MWANGI (Sued on his own behalf and on behalf of other

KIIHU ESTATE OWNERS).....DEFENDANT

RULING

ON A PRELIMINARY OBJECTION

I: BACKGROUND

1. Waverley Estate Ltd, is a limited liability company incorporated under the Companies Act Cap 486 Laws of Kenya. They are the registered owner of the Land parcel LR 88/5 (Original 88/3/2 situated with Kiambu District sub-division of their parcel of land was effected to 250 shareholders.

2. The issue herein arose that within the sub-division of their property access roads were provided and duly approved by the relevant authorities. One such road was adjacent to the defendant's property being LR 6909/7. They had denied the plaintiffs access to the use of the road and the plaintiff filed suit on 31 July, 2007 seeking orders from this court to restrain the defendants from interfering with the plaintiff's access.

3. The defendants filed a notice of appointments of advocate. An attempt to reach a settlement between the parties was mentioned on 20.9.2007 (Aganyanya J) 22.10.2007, (Aganyanya J). 30.11.2007, (Rawal J.) and further dates taken 3.03.2008 & 15.4.2008 by Osiemo,J.

4. On the day the matter came up for the hearing of the inter parties application for injunction dated 27 July, 2007 the defendants raised a preliminary objection as to the laws of the said defendants to be sued.

III PRELIMINARY OBJECTION

5. The defendants sued herein were Alec Gitata Mwangi. The title of the plaint and pleadings thereafter described him as being:-

"sued on his own behalf and on behalf of other Kiihu Estate Owners"

6. The defendant argues that he was sued in his personal capacity without leave of the court as required under Order 1 & 8 Civil Procedure Rules. The said order provides for a representative suit which in this case had not been provided for.

7. The cases relied on being:

Hinga & Another V P.C.E.A thro' Rev Dr. Njoya & Another (1986) KLR 317, Aluoch, J.

Brollo Kenya Ltd V Ondatto & 3 Others

(1989) KLR 553, Githinji, J.

8. In both cases above the High Court held that leave of the Court is required in order to file a representative suit. The suit should therefore be struck out as being incompetent.

9. The second limb of the Preliminary Objection concerns the plaintiff, a limited liability company before a suit is filed authority should be given to the advocate to file suit. The advocate for the plaintiff concedes no authority to file suit was given in writing to them.

10. In reply the plaintiff/respondent states the provisions of Order 1 r 8 Civil Procedure Rules was not mandatory.

II FINDINGS

Order 1 r 8 Civil Procedure Rules reads: -

"1. Where there are numerous person having the same interest in one suit one or more of such persons may sue or be sued 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 personal service or where from the member of persons any other cause such is not reasonably practicable by public advisement as the court in each case may direct.

3. ..."

11. It provides for a representative suit to be filed. The procedure to do so is outlined in the case of Brollo Kenya Ltd (Supra). The plaintiff is required to make application seeking to bring in a representative suit. In doing so, the plaintiff must prove that "there is a class of persons who are numerous" having the same interest in the suit. That the defendants (office bearers or otherwise) are authorized to represent the others. That any liability against the members is and will be fixed against them.

12. In the Hinga & Another case (supra) it noted the distinction between the Uganda Law and that of the Kenyan law of Order 1 r 8 Civil Procedure Rules. According to the case of

Johnson V Moss and Others (1969) EA 654 the Ugandan law requires that leave of the court be sought, to seek leave to bring in a representative action. Failure to make application, the suit is fatally defective.

13. In the case of:-

Wanjiru V Standard Chartered Bank

Onyango Otieno, J.

A distinction was further made between the Ugandan Law and that of the Kenya Law namely that in Uganda whether a representative suit is brought by the plaintiff or defendant leave in either case must be

obtained.

14. In the Kenya law, this is not so. It is not compulsory for the plaintiffs who are in a representative capacity to seek leave to sue. It is though a requirement of our Kenyan law to seek leave of the court to bring a representative suit for a class of persons who are named as defendants.

15. The defendants are not an incorporated organization. Leave is required at bring a representative suit. The objection on this point is accordingly upheld.

16. On the second limb of the objection that there was no authority given to the advocates to file suit, the advocates for the plaintiffs stated she had no response to this. The court can only correct the opinion that no such authority had been given.

17. I would accordingly upheld the Preliminary Objection. The application is hereby dismissed. The main suit is accordingly struck out with costs to be paid for the plaintiffs to the defendants.

DATED THIS 17TH DAY OF APRIL 2008 AT NAIROBI.

M.A. ANG'AWA

JUDGE

A.M.D. Enonda Instructed by Enonda Makoloo, Makori and Co Advocate for defendant/applicant - present

J.W Kimiti instructed by Rumba Kunuthia & Co advocate for plaintiff/respondent- present