



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

OF KISII

Civil Case 119 of 2004

FREDER NYABOKE ONDERA

**NCHAGA ISABOKE.....
PLAINTIFFS**

VERSUS

1. CLERK OGEMBO TOWN COUNCIL

2. OGEMBO TOWN COUNCI

**3. GUSII FARMERS RURAL SACCO LTD OGEMBO
DEFENDANTS**

RULING

By a plaint filed on 11th August 2004, the plaintiffs sued the defendants claiming damages on account of their houses which they alleged were demolished at Ogembo town, plots numbers 48 and 50. The first and second defendants filed a statement of defence through their advocates, M/S J. O. Soire & Co. Advocates. In paragraph 2 of the statement of defence, it was pleaded as follows:

“2. The 1st and 2nd Defendants shall raise a Preliminary issue that they are not properly sued and/or that they are wrongfully sued and/or further that the suit filed contravenes mandatory provisions of order VIII rule 2A and Order I rule 12 of the Civil Procedure Rules as they failed and/or neglected to disclose that there was a similar suit i.e. Kisii CMCC NO.377 of 2002 and hence shall pray that this suit be dismissed with costs.”

When the plaintiff’s suit came up for hearing, Mr. Soire sought to argue the aforesaid preliminary objection. He submitted as follows:

(i) That under **section 28(3)** of the Local Government Act Cap 265, the corporate name of the second defendant is **“TOWN COUNCIL of OGEMBO”**. The first and the second defendants were therefore wrongfully sued, he stated.

(ii) The first plaintiff had sworn a verifying affidavit on behalf of himself and the second plaintiff. The second plaintiff had not filed any written authority authorizing the first plaintiff to act on his behalf contrary to the provisions of Order 1 rule 12 of the Civil Procedure Rules.

(iii) Plaintiffs had earlier filed SRMCC NO.377 of 2002 at Kisii in respect of the same subject matter as in the present suit but they did not disclose that in their plaint.

On those grounds, Mr. Soire urged this court to strike out the suit.

Mr. Omariba for the third defendant supported Mr. Soire's submissions.

In reply, Mr. Sagwe for the plaintiffs stated that

SRM CC.NO.377 OF 2002 was struck out on 31/5/2002 and therefore there was no suit that was pending at the time of filing the present one. With regard to the provisions of **Order I rule 12**, counsel submitted that there was no need of filing a written authority because there were only two plaintiffs.

He urged this court to ignore the technical objections that had been raised and allow the plaintiffs to proceed with the hearing.

My views on the issues raised in the preliminary objection are as follows:

Section 28(3) of the Local Government Act provides as follows:

“Every County or town council shall, under the name of ‘ the County Council of -----’or the Town Council of -----,’ as the case may be, be each and severally a body corporate with perpetual succession and a common seal (with power to alter such seal from time to time) and shall by such name be capable in law of suing and being sued, and acquiring, holding and alienating land.”

From the above provision of the law, it is clear that there is no local authority known as Ogembo Town Council. The Plaintiff should have sued the first and the second defendants in their proper statutory names, that is, the Town Council of Ogembo. The first and the second defendants were not properly sued.

Secondly, with regard to the provisions of **Order I rule 12**, where there are more than one plaintiffs, any one or more of them may be authorized by any other of them to appear, plead or act for such other in the proceedings but such authority has to be in writing and signed by the party giving it and has to be filed in the case. The plaintiffs did not comply with that mandatory requirement.

Thirdly, **Order VII rule 1(e)** requires a plaint to contain an averment that,

“there is no other suit pending, and that there have been no previous proceedings, in any court between the plaintiff and the defendant over the same subject matter.”

The plaintiffs stated in paragraph 12 of the plaint that:

“there is no other suit pending in any other court between the plaintiffs and the defendants.”

The plaintiffs did not disclose that they had earlier filed SRMCC NO.377 of 2002 at Kisii which was struck out.

That was material omission on the part of the plaintiffs. All previous proceedings must be disclosed, even if they were withdrawn or disposed of, as long as they relate to the same subject matter in dispute.

From the foregoing, it is clear that the preliminary objection that was raised is well founded and valid in law. Mr. Soire urged this court to strike out the entire suit for reasons aforesaid. However, I am reluctant to do so. In **D. T. DOBIE & COMPANY (KENYA) LTD VS MUCHINA** [1982] KLR 1 at Page 9, it was held as follows:

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously

discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

If the plaintiffs' suit is struck out, they may be time barred

in their quest for justice. They should have their day in court so that the dispute is determined on its merits. I therefore direct that the plaintiffs do file and serve an amended plaint within the next fourteen days from the date hereof. The defendants will have the costs of the preliminary objection which are assessed at Kshs.5,000/- for each. The costs should be paid before the amended plaint is filed.

DATED, SIGNED and DELIVERED at KISII this 9th day of April 2008.

D. MUSINGA

JUDGE.

Delivered in open court in the presence of:

Mr. Sagwe for the Plaintiffs.

Mr. Omariba for the third defendant.

D. MUSINGA

JUDGE