



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA**

AT NAIROBI

CIVIL CASE 623 OF 2003

MRS JANNE ODHALO1ST PLAINTIFF
THOMAS ABUOGA.....2ND PLAINTIFF
SAMSON GACHAGO3RD PLAINTIFF
BEN ASHIHUDU4TH PLAINTIFF

(All suing as the officers of Woodley Residents Welfare Society and Also on their own behalf)

CHRISTOPER NDICHU MBUGUA5TH PLAINTIFF
WAHOME TIMOTHY GATHERU6TH PLAINTIFF
ABRAHAM LISERO7TH PLAINTIFF
BARACK ODOUR OTIENO8TH PLAINTIFF
ODUOR AMBALA9TH PLAINTIFF
NOAH KATANA NGALA10TH PLAINTIFF
DIANA JILL ONGUKO11TH PLAINTIFF

V E R S U S

CITY COUNCIL OF NAIROBIDEFENDANT

R U L I N G

This is a representative suit filed by the first four Plaintiffs on their own behalf and also on behalf of the residents of Woodley Estate, Nairobi through their welfare association called THE WOODLEY RESIDENTS WELFARE SOCIETY. In the course of time the other seven Plaintiffs have been made parties to the suit, apparently under Order 1, rule 8 (3) of the Civil Procedure Rules. Under that sub-rule, any person on whose behalf, or for whose benefit, a suit is instituted or defended under sub-rule (1), may apply to the court to be made a party to such suit. Such application must be by summons in chambers (see rule 22 of the same Order). For clarity, we may remind ourselves that sub-rule (1) of rule 8 aforesaid provides that 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 authorised by the court to defend in such suit, on behalf of or for the benefit of all persons so interested.

An application by notice of motion dated 24th May, 2007 was filed on that date. It seeks some four substantive reliefs as follows:-

1. A mandatory injunction to compel the Defendant to restore the Applicants back into their rented premises.
2. An order to compel the Defendant to supply the Applicants with current statements of accounts reflecting payments of rent made by them.
3. An order that the Applicants be allowed to settle any arrears of rent due by way of instalments.
4. An order that the Applicants be allowed to deposit all future rents and all rent arrears in court.

When this application came up for hearing on 31st May, 2007 the Defendant raised a preliminary objection as per the notice dated 30th May, 2007. The notice contains two grounds as follows:-

1. That the application as drawn and filed is bad in law, incompetent, frivolous and fatally defective.
2. That the Applicants herein, LEONARD NJUNO, DAVID SOSSAH and JOAN WANJIKU lack the *locus standi* to bring this application on their own behalf.

Learned counsel for the Defendant pointed out that as disclosed by prayer number 5 of the application, the Applicants are the 8th Plaintiff (BARRACK ODUOR OTIENO) and three other persons who are not parties to the suit, namely LEONARD M. JUNO, DAVID SOSAH and JOHN WANJIKU. He submitted that apart from the 8th Plaintiff, the other three Applicants as named above have no *locus standi* to bring the application.

Learned counsel also pointed out that the application is supported by the affidavit of LENARD MUCHIRI NJUNO, one of the three Applicants who are not parties to the suit. He further submitted, therefore, that since a non-party cannot have audience before the court, he cannot swear an affidavit in support of an application before the court. In his view, therefore, the application is fatally defective for being supported by an affidavit sworn by a person who is not a party to the proceedings.

Learned counsel for the Plaintiffs replied as follows. Since the three persons who are not parties to the suit are residents of Woodley Estate, and since the suit was brought on their behalf, they are entitled to apply as they have done in this application. He also referred the order of Lenaola, J. of the 5th August, 2004 in support of this contention. In my respectful view, that order cannot lend support to that submission. The order merely added the 8th Plaintiff as a party to the suit upon a formal application under sub-rule (3) of rule 8 aforesaid.

Learned counsel for the Plaintiffs also submitted that in any event a party can easily be added to a suit under rule 10 of Order 1, either by the court on its own motion or upon an oral application by a party. Learned counsel then proceeded to make such oral application to add LENARD N. NJUNO, DAVID SOSSAH and JOAN WANJIKU as plaintiffs in the suit. Learned counsel for the Defendant responded that it was too late to make such oral application.

I have considered the submissions of the learned counsels. No authorities were cited. This being a representative suit, all the residents of Woodley Estate, Nairobi who are, or were, tenants of the Defendant in that estate are already represented in the suit by the first four Plaintiffs who instituted the suit. Again, by dint of that representation, any such resident or tenant of the Defendant can make any representation in the suit (including filing an application such as the present one) only through the first four Plaintiffs. However, that is not to say that such resident or tenant of the Defendant cannot make his

independent representation in the suit if he so wishes. But he can do so only after he applies by summons in chambers under sub-rule (3) of rule 8 of Order 1 to be made a party to the suit, and an order to that effect is made. The rationale for this is obvious. There must be certain persons who have the responsibility of prosecuting and conducting a representative suit. It cannot be open to all persons on whose behalf the suit has been brought to prosecute and conduct the suit in any manner they may deem fit. Prosecuting and conducting the suit here must necessary include filing interlocutory applications such as the present one. But a party will not be denied the right to prosecute his own cause as he deems fit so long as he is made a party first upon formal application under sub-rule (3) of rule 8 aforesaid.

LENARD N. NJUNO, DAVID SOSAH and JOHN WANJIKU are not yet parties to the suit, notwithstanding that the suit was brought on their behalf, *inter alia*, because they have not yet applied to be made parties to the suit. They, therefore, cannot bring the present application, and as far as they are concerned the application is not properly before the court. I not agree that an order for their addition as parties can be made under rule 10 of Order 1. That rule provides for situations where a suit has been instituted in the name of the wrong persons as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff (sub-rule (1)) and where the court deems it necessary to add the name of any stranger as plaintiff or defendant or to remove the name of any person whether as plaintiff or defendant. Those situations do not obtain here as the suit was instituted in the names of the right persons and the three persons are not strangers to the suit.

As already seen, the application is supported by the affidavit of LEONARD MUCHIRI NJUNO who is not a party to the suit. This is not proper. The application should have been supported by the affidavit of one of the first four Plaintiffs who instituted the suit or of the 8th Plaintiff who is one of the applicants in the application. The said affidavit is therefore liable to be struck out, and it is hereby struck out. The application being unsupported by affidavit evidence as it should be, it is also defective and must be struck out.

In the result I will uphold the preliminary objection. The application as laid before the court is fatally defective. It is hereby struck out with costs to the Defendant. Order accordingly.

DATED AT NAIROBI THIS 13TH DAY OF JUNE 2007

H. P. G. WAWERU

JUDGE