



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

Civil Case 115 of 2005

RUTH WAMBOI MUTURI.....PLAINTIFF

VERSUS

JOSEPH KARISA KATSOMA & 4 OTHERS.....DEFENDANTS

R U L I N G

By an application, by way of Chamber Summons, dated 10th April 2007, the applicant seeks orders that:

- 1) The plaintiff's suit be struck out with costs.**
- 2) The costs of this suit and of this application be paid by the plaintiff.**

The application is based on the grounds.

- (a) That the suit is bad in law as it is representative and yet no leave was sought at the time of its institution.**
- (b) That suit is an abuse of the process of the court.**
- (c) That the suit is prejudicial to the Defendants.**

The application is predicated upon the annexed affidavit of Joseph Karisa Katsoma sworn on the 10th day of April 2007.

For the applicant, it was argued that, when the suit herein was filed, the plaintiff, did not seek leave of the court to sue the 1st, 2nd and 3rd defendant as the representative of the fourth (4th) defendant.

That failure to seek leave, before filing suit against the defendants in their representative capacity, is fatal.

In any event, the plaintiff's suit is bad in law, vexatious and an abuse of the process of the court and should be struck out with costs to the defendant.

The thrust of counsel's argument is the procedure as laid down in Order 1 Rule 8 and 12 of the Civil Procedure Rules. A party seeking to file suit, on behalf of another, ought to seek leave of the court.

Similarly, when a party is suing several individuals in their representative capacities such leave must be sought and obtained. The court ought to give directions as to how the service would be effected and how

the suit should proceed.

For the respondent, it was argued that it is a society duly registered under the Societies Act (cap 108) of the Laws of Kenya

first, second and third defendants are mere officials. That if only the first, second and third defendant had been sued leaving out the fourth defendant, then there would have been need to seek leave to sue them in their representative capacity, courtesy of order 1 rule 8 of the Civil Procedure Rules.

That application is based, *inter-alia*, on the ground that no authority or leave was filed together with the plaint. Accordingly, there is no need to mention the names of the parties.

On the pleadings, there is no dispute that the first, second and third respondent were sued as officials of the fourth defendant.

Order 1 Rule 8 of the Civil Procedure Rules provides:

(1) 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 authorized by the court to defend in such suit, 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 persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct.

(3) Any person on whose behalf or for whose benefit a suit is instituted or defended under subrule (1) may apply to the court to be made a party to such suit.

On the premises, I am of the view that the court cannot authorize defendants to be sued in representative capacity without application being made to it, and further that all persons having an interests in the case ought be given an opportunity of defending this suit.

To my mind Order 1 Rule 8, does two things: One, it lays down the practice to be followed in cases where there are numerous persons having the same interest in one suit and where one such person is suing or being sued on behalf of all. Two, it contains a direction as to the manner in which the rights of all such persons must be safeguarded. It is couched in mandatory terms. The notice of the institution of the suit must be given to all parties interested in the suit, that is to say subject matter.

As I said earlier, on the pleadings, the suit is clearly a representative suit. The plaintiff's has failed to comply with the mandatory provisions of Order 1 Rule 8 of the Civil Procedure Rules. An amendment of the plaint cannot cure the omission. The omission is fatal.

In the result I strike out the plaint with costs to the applicant. Together with the costs of the application.

Dated and delivered at Malindi this 17th day of July, 2007.

N.R.O.OMBIJA

JUDGE

Mr.Busyieka for Njoroge } Plaintiff/Respondent

Mr.Mouko } For 1st, 2nd, 3rd and 4th

defendant/applicant.