



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

HCCC 15 of 2003

EPHARAIM MBAE OTHERSPLAINTIFF

V E R S U S

GILBERT KABERE M'MBIJIWE1ST DEFENDANT

JOCET AUCTIONEERS.....2ND DEFENDANT

COUNTY COUNCIL OF MERU.....3RD DEFENDANT

RULING ON A PRELIMINARY POINT

1. On 12.2.2003, Ephraim Mbae Thurania, Sarah Kathure and Winfred Maigene Stephen filed this suit seeking certain orders against the Defendants. The 1st Defendant, Ephraim Mbae Thurania, swore the verifying Affidavit on 12.2.2003, and at paragraph 1 thereof deposed as follows:-

“That I am the 1st Plaintiff and do swear this affidavit on my own behalf and that of the other 2 plaintiffs.”

2. On 25.3.2003, parties appeared before Mulwa J. and the record shows that the 1st Plaintiff withdrew the suit against the 1st Defendant, Gilbert Kabeere M'Mbijiwe as well as the 2nd Defendant, Jocet Auctioneers. On that day, the question arose whether upon that order being recorded (as it was), there was any suit left. Mulwa J. ordered that the matter be adjourned to 31.3.2003;

“to deal with the issue of costs and whether there is any suit left after withdrawal by the 1st Plaintiff”.

3. The issue was then canvassed before me on 2.8.2007 as a preliminary point and Mr. Opolu argued that once the 1st plaintiff withdrew his suit against the 1st and 2nd defendants, then no suit remained because with his withdrawal, the Verifying Affidavit also went with it and there was in fact therefore no suit to be pursued by the 2nd and 3rd plaintiffs. He sought that the whole suit be struck off and Mr. Mwanzia for the 2nd and 3rd Defendants concurred. Mr. Kariuki for the Plaintiffs in response argued that the suit can survive the withdrawal because the Verifying Affidavit was sworn on behalf of the other Plaintiffs and there was pending before court an Application to amend the Plaint and the intended amended plaint has a Verifying Affidavit sworn by the remaining Plaintiffs. That the error was a mere irregularity and could be cured by the filing of another Verifying Affidavit.

4. Both Advocates submitted useful authorities and I mean no disrespect when I do not at this stage refer to them. My understanding of this issue however lies in the interpretation to be given to Order VII Rule 1(2) of the Civil Procedure Rules and the effect of a withdrawal of a suit by one Plaintiff against some Defendants and yet it is that Plaintiff who has sworn the Verifying Affidavit. Order VII Rule 1(2) of the Civil Procedure Rules provides as follows:-

“The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in the plaint.”

5. I am aware of the decision in C.A. 98/2003 - Josephat Kipchirchir Sigilai vs Gotal Sanik Enterprises Ltd and 4 others where the Court of Appeal held that failure to comply with the above rule is an irregularity curable by the filing of an affidavit satisfactorily complying with it. The court however added that this can only be done where the claim is neither frivolous, vexatious nor scandalous. That decision was made on 30.3.2007 but on 27.4.2007, the Court of Appeal also had the opportunity to consider the rule in light of matters similar to those arising in this suit. This was in the case of Research International East Africa Ltd vs Julius Arisi and 123 others- C.A. 321 of 2003 (Nai). In that case Julius Arisi, the 1st Plaintiff swore an affidavit verifying the correctness of the Plaint in conformity with the rule under consideration. The Defendant filed a Chamber Summons seeking that the suit be struck out because it failed to comply with Order VII Rule 1(2) and specifically because:

(i) It was not sufficient for the 1st Plaintiff alone to swear the Verifying Affidavit.

(ii) It was doubtful whether the first plaintiff had authority from all the plaintiffs to institute the proceedings.

6. The Court of Appeal in discussing the matter alluded to the purpose for which Order VII Rule 1(2) was promulgated and it stated thus:-

“It seems from the commentary (by Juma J. in Hakimu, Journal of the Kenya Magistrates and Judges Association) that the primary purpose of the rule is to avoid claims whether false or not being brought on behalf of the Plaintiff without his express instructions.”

7. I should digress here and reproduce the comments by Juma J. in Hakimu aforesaid. The learned Judge said;

“The object of the amendment like any other amendment is to streamline the existing rules with the hope of improving the civil justice in our courts. It is not uncommon these days to find that a plaintiff is represented by different firms of advocates. This arises as a result of ambulance chasing. To try and put a stop to this kind of conduct, Order VII was amended by adding a new sub rule (2). This sub-rule provides that the plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments in the plaint. The affidavit is to be sworn by the Plaintiff not his advocate. It is hoped that the plaintiff will therefore, instruct one advocate as he or she will be required to swear an affidavit. I need not emphasize the consequences of filing a false affidavit.”

In any event, in Research International (supra), the Court of Appeal held firmly as follows:-

“We deal first with the ground of non-compliance by the 2nd to 214th respondents with Rule 1(2) of Order VII CP Rules. We observe at the outset that the suit filed by the Respondents is not a representative suit. That is to say that it is not a suit filed by Julius Arisi, the first respondent, on behalf of or for the benefit of the other 213 persons. Had this been a representative suit, then, there would be no doubt that Julius Arisi would be perfectly entitled to take any action in the suit on behalf of the other interested persons. Rather, the suit is filed by all the 214 persons through their advocate as authorized by Order 1 rule 1 CP rules. In that case, each of the plaintiffs is personally responsible for the conduct of his own suit. In our view, none of the 214 plaintiffs has any right to take any steps in the suit on behalf of any other plaintiff without an express authority in writing. Thus Julius Arisi cannot take any step in the suit on behalf of all the other plaintiffs including filing

a verifying affidavit unless he has been expressly authorized by any of the plaintiffs to so act as provided by Order 1 rule 12 (1) CP rules. In this case, Julius Arisi depones in the verifying affidavit that he has been authorized by all the co-plaintiffs to swear the verifying affidavit on their behalf and purports to verify the correctness of the averments of the plaint on behalf in the co-plaintiffs.

The appellant doubted that such an authority indeed existed. The learned Judge was of the view that the determination of the question whether Julius Arisi had authority from the other co-plaintiffs would involve calling for evidence. He accepted on the face value the statement of Julius Arisi that he had been authorized by all the co-plaintiffs. In our respectful view, the learned Judge overlooked Rule 12(2) of Order 1 CP rules which required that the authority, if granted, should be in writing and signed by the person giving it and, further that such written authority should be filed in the case. In the absence of such a written authority in the case file, the learned judge erred in holding in effect that Julius Arisi had sufficiently verified the correctness of the averments in the plaint with the authority of and on behalf of the 2nd to 214th Plaintiffs. The present case can be distinguished from the case of *Grace Ndegwa & Others vs. Hon. Attorney General – Civil Appeal No. 228 of 2002 (unreported)*. In that case, Grace Ndegwa swore the verifying affidavit on behalf of about 1484 plaintiffs. It was contended in Grace Ndegwa's case that the verifying affidavit was defective because there was no authority signed by other plaintiffs authorizing her to act on their behalf. There was however, a document signed by most of the plaintiffs in that case authorizing Grace Ndegwa and seven other persons to deal with the advocates for the plaintiff. This court found that document to be sufficient authority to Grace Ndegwa by the persons who had signed it.

In our view, the true construction of rule 1(2) of Order VII civil procedure Rules is that even in cases where there are numerous plaintiffs, each plaintiff is required to verify the correctness of the averments by a verifying affidavit unless and until he expressly authorizes any of the co-plaintiffs or some of them in writing, and, files such authority in the case, to file a verifying affidavit on his behalf in which case such a verifying affidavit would be sufficient compliance with the rule. Moreover, the Grace Ndegwa's case (supra) and Rule 12(1) of Order 1 CP rules leave no doubt that one or more of the co-plaintiffs can validly file an affidavit verifying the correctness of the averments of the plaint on behalf of the other co-plaintiffs with their authority in writing.

Having come to the conclusion that the verifying affidavit of Julius Arisi was filed without authority of the other 213 plaintiffs, it follows that the other 213 respondents have not complied with the mandatory provisions of Rule 1(2) of Order VII Civil Procedure Rules and that their suit was liable to be struck out by the superior court under rule 1(3) of Order VII CP rules.

The Superior court however had a discretion. It had jurisdiction instead of striking out the plaint to make any other appropriate orders such as giving the plaintiffs another opportunity to comply with the rule"

8. The appropriate guidance that this court gets from the above statement is that it has discretion; as was the case in *Sigilai* (supra) to give the Plaintiffs an opportunity to comply with the rule or strike out the suit. In ***Research International***, the court having seen the claim, determined that the suit as filed by the 1st Respondent could be sustained but that by the 2nd to 214th Respondents was struck out. I note that in the instant case, the claim arose from a purported execution of orders of demolitions on plot No. 58 Nkubu Market issued in ***CMCC No. 115/1972***. It is also claimed that the Plaintiff's were the owners of Plot No. 58 Nkubu Market pursuant to orders issued in ***CMCC No. 115/1972***. It is also claimed that the Plaintiffs were the owners of Plots No. 57A, 57B and 59 Nkubu market and in executing the orders, the 1st and 2nd Defendants also lay claim to those plots and caused damage amounting to Ksh.12 million. It is compensation for those loses that the Plaintiffs seek. My mind is however, clear that even with the intended amendment vide the Application dated 6.4.2005, the suit is frivolous and vexatious because I note that the intended amendment goes further to remove the 2nd plaintiff from the proceedings thus leaving the 3rd Plaintiff as the only Plaintiff in this suit. The claim put forth in that suit includes a new and wholly fresh claim for adverse possession and the claims as initially raised in the Plaint under attack are wholly abandoned precisely because the 1st Plaintiff has withdrawn the suit and therefore the

verifying affidavit that he swore could not no longer verify the correctness of the issues then raised. Even if I am wrong in taking that line of thinking, it seems to me that the original Plaint upon withdrawal of the claim by the 1st Plaintiff is rendered ambiguous and vague because the particulars of damage are not given and the basis for the prayer for permanent injunction lacking because it is admitted that in fact the structures on the suit land were long demolished. The substratum of the suit is gone and the suit itself is also dead.

8. What should the 3rd Plaintiff do? Perhaps, if any advise is needed, she may consider instituting, subject to limitation, a separate suit.

9. In any event, I find that there is good reason to uphold the objection and to order as I hereby do, that the suit herein be struck out with costs to the Defendants, to be paid by all the Plaintiffs jointly.

10. Orders accordingly.

DATED, SIGNED AND DELIVERED THIS 23RD DAY OF OCTOBER 2007 AT MERU.

ISAAC LENAOLA

JUDGE

In presence of

N/A Advocate for the Appellant/Applicant

Mr. C. Kariuki Advocate for the Respondent

ISAAC LENAOLA

JUDGE