



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Civil Case 76 of 2002

MONICA WAMBUI GITHAIGA Legal Representative of the Estate

of Gakuru s/o Karutha).....1ST
PLAINTIFF/RESPONDENT

WILLIAM KAMAU BORA.....2ND
PLAINTIFF/RESPONDENT

NJERI KABUI.....3RD
PLAINTIFF/RESPONDENT

STEPHEN WAGUCHA WAMARU.....4TH
PLAINTIFF/RESPONDENT

KAMAU WAGUCHA.....5TH
PLAINTIFF/RESPONDENT

GATHONI KANYOI.....6TH
PLAINTIFF/RESPONDENT

Versus

JOSEPH NDERITU WACHIRA.....1ST
DEFENDANT/APPLICANT

HARRISON WAWERU NDIRANGU.....2ND
DEFENDANT/APPLICANT

CYRUS KING'ORI GITAHU.....3RD
DEFENDANT/APPLICANT

RULING

When this case came up for hearing the defence counsel raised a preliminary objection in the following terms:

1. THAT the suit offends the provisions of Order 1 Rule 8(1) and (2) of Civil Procedure Rules in that

being a representative suit the other members of the group were not notified of the institution of the same.

2. THAT the suit is therefore incompetent and should be struck out with costs.

Order I Rule 8(1)(2) provides as follows:

“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.

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.”

Defendant’s counsel in raising the preliminary objection, referred to paragraph two of the Plaintiff’s plaint. In that paragraph the plaintiff pleaded that the Defendants are representatives of a group of villagers purporting to construct an access road that cuts through the Plaintiff’s land. He was of the view that in view of that pleading **Rule 8(1)(2)** should have been complied with. In response the Plaintiff’s counsel was of the view that the preliminary objection is an abuse of the court process. The basis of making that statement was because the group with which the Defendants operated with are unknown. The Plaintiff in filing this suit filed it against the specific persons who entered her land. Those persons had entered the land on the invitation of the assistant chief.

Having considered the Plaintiff and the defence I find that it was necessary for the Plaintiff to have complied with the provisions of Rule 8. The failure however, to comply with that rule does not make the suit fatal. In other words it cannot lead to the striking out of the suit as sought by the Defendant in the objection raised. It is important to remember that a preliminary objection is raised on a point of law and whose determination leads to the dismissal of the suit. Considering the above I am of the view that the Defendant’s preliminary objection is misconceived. **Subrule 2 of Order 1** provides that it is for the court to give directions to the Plaintiff on the manner in which the institution of the suit should be brought to the notice of the other relevant parties. The failure of the court to give that direction cannot be blamed on the Plaintiff to the extent of striking out the Plaintiff’s suit. The court does hereby dismiss the Defendant’s preliminary objection for there was no basis for raising that objection when the rules clearly show that the responsibility was on the court to give directions. The preliminary objection is therefore dismissed with costs to the Plaintiff. The court further does hereby direct the Plaintiff do advertise the institution of this suit in one daily Newspaper with countrywide coverage. Such notice should invite any interested party to participate in this suit. Orders accordingly.

MARY KASANGO

JUDGE

Dated and delivered at Nyeri this 9th day of October 2007.

M. S. A. MAKHANDIA

JUDGE