REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL SUIT 213 OF 1997

1. KOMEN EGO…….....1ST PLAINTIFF

2. JOSHUA CHEBOBEI..... …….2ND PLAINTIFF

3. GILGERT MAGUT…….....3RD PLAINTIFF

4. KIPTALAM RONO..... ….....……4TH PLAINTIFF

=VERSUS=

1. DISTRICT SURVEYOR, UASIN GISHU DISTRICT…...…….1ST DEFENDANT

2. LAND REGISTRAR U/G.....…….…..…...…..2ND DEFENDANT

3. ATTORNEY GENERAL.....…….3RD DEFENDANT

RULING

The four (4) Plaintiffs filed this suit against the three (3) Defendants on 9th June, 1997. The Defendants were:-

1. The District Surveyor, Uasin Gishu District

2. The Land Registrar, Uasin Gishu District

3. The Attorney General.

The Substantive relief sought was for a permanent Injunction to stop the processing of titles in respect of all that parcel of land known as L.R. No. 5322/2006 also known as Sasitwo Farm situated in Meibeki Location of the Uasin Gishu District and measuring 818 acres pending the resolution of the proper members of the said land and preparation of the correct plan that will take care of all public utilities over the said property.

The Plaintiffs also filed an application for interim orders on the same terms, pending the hearing of the suit. At the hearing of the application, Counsel for the parties recorded the following consent:-

"**By Consent this suit is stayed pending the following:-**

(i) The suit is hereby referred to the D.O. Moiben for arbitration and filing of his award in the

Court within 90 days from the date of this order.

(ii) If the said award is acceptable to Plaintiffs and the Defendants, the District Surveyor to sub-divide the land pursuant to the said award filed by the District Officer.

(iii) Thereafter the Land registrar does issue Title subject to payment of the necessary fees.

(iv) The issue of costs be agreed later. "

The Consent was recorded as an order of the Court on 11th January, 2001. The District Officer Moiben Division complied with the Court order and filed his Award in Court on 2nd March, 2005. By further Consents of the parties, judgment was entered and Decree issued in the following terms:-

1). The recommendations of the District Officer, Moiben Division dated the 24th day of February, 2005 be and are hereby adopted as Judgment of the Court as requested.

2). It was established the land was irregularly surveyed.

3). There is an urgent need to re-survey the farm as per the wishes of members and for the farm to be subdivided among others.

4) Sasitwo is the only farm in Meibeki location whose members have not been issued with Title Deeds in order to resolve the long standing dispute.

5). The Counsel for the parties be provided with a copy of the District Officer's Report.

On the 30th May, 2005, thirty seven (37) persons claiming to be Shareholders and members of Sasitwo farm filed an application seeking the following orders:-

(a) ------

(b) There be a temporary stay of execution and/or further execution of the decree herein issued on 20th day of April, 2005 pending the hearing and determination of this application inter-parties.

(c) This Honourable Court be pleased to grant leave to the intended interested parties / Applicants to be enjoined as parties to this suit and directions be given as to the further conduct of this matter.

Upon hearing the application, Hon. Justice Dulu made the following orders on 12th July,2006.

1. Leave is hereby granted for the intended interested parties /applicants to be joined as parties to the suit.

2. The said intended interested parties will make any applications that they deem fit within 30 days from the date of delivery of this ruling, in default the leave hereby granted for them to be joined as parties will lapse, and be of no consequence.

The Applicants duly filed an application on 10th August, 2006 for inter-alia:-

(1) An order to set aside the decree and order of this Court dated 20th April, 2005 and all consequential orders flowing there from.

(2) An order of leave for the Applicants to file the statement in support of the defence.

Through their Counsel Mr. Cheruiyot, the Applicants claim to be Shareholders in the suit property also known as Sasitwo Farm. They allege that the Decree and the Consent giving rise to it was obtained

fraudulently and through collusion and that it is unconscionable and completely disregards the rights of the Applicants and even other parties.

The Application was opposed by the Plaintiffs. Before the hearing most of Applicants had withdrawn instructions from their Counsel. The Application was prosecuted by only 10 Applicants.

At the hearing the State Counsel Mr. Okello representing the Defendants did not oppose the same. He stated that the Government had no interest in the Land and that if the Applicants had an interest in the land, then they would not oppose the application to set aside their Decree.

The Plaintiffs through their Counsel, Mr. Cheptarus opposed the application stating inter alia that:-

Ø The 10 applicants were not parties in the suit at the time of the Consent and Decree and therefore, they could not be heard.

Ø The procedure used in challenging the Decree was wrong. They should have brought a separate suit seeking declarations.

Ø They should not have come by way of review.

Ø The Consent compromised the suit under the provisions of order 24 of the Civil Procedure Rules, Rule (1) (i).

Ø It is only the parties to the Consent who can challenge the suit.

I have carefully considered the application and supporting affidavit, the Replying affidavits and Submissions by Counsel.

In the Plaint dated 4th June, 1997, the four Plaintiffs claimed that they were "beneficiaries" of the suit property. They also said that there were other thirty members on the said farm thereby making a total of 34 members.

The Plaintiffs admit that the 10 Applicants are members of the farm but referred to various reasons why they had no causes of action or legitimate claims.

A perusal of the records shows that the Plaintiffs at no time did file any application to institute the suit as a representative suit on behalf of all the 34 members of the farm or any other with such an interest. The farm or suit property did not belong to them alone but all the members including the 10 applicants have beneficial interests therein. If the Applicants had filed the suit to protect the interest of all the beneficiaries to the land, then it was mandatory that they obtained leave of the Court in terms of order 1 Rule 8 (1). Rule 8 (1) reads:-

" **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 or for the benefit of all persons so interested "**

In such event, the Plaintiff shall be required to give notice to all such persons. This is a strict and mandatory requirement. Rule 8(2) provides:-

"

(**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."**

The requirement of notice is mandatory and is not a matter of discretion even for the Court. The other interested persons for whose benefit the suit is purportedly filed must be given notice of the suit. It is through that way they can now elect or decide to exercise their rights and / or options as envisaged by Rule 8 (3) which reads:-

"**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 a suit."**

The object, therefore, of Rule 8 is that any person for whom a suit is filed or a suit is defended by another must be given notice. Once he has the notice if a Plaintiff he can consent to the suit being prosecuted or demand his name to be removed. If a Defendant, he can join in the Defence or demand to be removed as a party in the suit. In other words, nobody can be made a party in prosecute suit or defend a suit in the name of or for the benefit of another person without such person's consent or authority.

In the light of the foregoing, if the Plaintiffs had sued the Defendants for the benefit of all the shareholders, then it was their duty to have obtained leave of the Court to file and prosecute the case.

If they were doing so only for their benefit, then the following must apply:-

(1) They must give notice to the other interested parties of the existence of the suit.

(2) They cannot purport to take any adverse action or obtain any adverse orders against the other members

(3) Their suit must be restricted to a cause of action which wholly belonged to the Plaintiffs without affecting any other party/parties whatsoever, whether positively or otherwise.

The bottom line is that the Principles of Natural Justice under-pin the provisions of order 1 Rule 8. In this case, since there were 30 other members of the farm or even more including the applicants, the Plaintiffs were under a duty to comply with the provisions of Order 1 Rule 8. The only alternative would have been to make any person who would be adversely affected by the suit to be a Defendant. Hence, since it appears that the interest of the Applicants and the Plaintiffs are adverse to each other and they clearly have disputed as shown in the Replying affidavits, they should have been joined as Defendants in the suit.

In the light of the disregard and non-compliance of the provisions of Order 1 Rule 8 (1), (2) and (3), I do hereby hold that this suit was incompetent and a nullity ab initio. The Plaintiffs purported and held themselves out as representing the interest of 34 members against the Defendant but did not plead that the suit was a Representative suit and /or obtain leave to prosecute it.

In such circumstances, this Court exercising its inherent jurisdiction and discretion would be entitled to prevent miscarriage of justice against the Applicants and even others who may not be aware of the existence of this suit.

With regard to the interest of the Applicants and whether they had any right to be made parties in the suit and be heard in any event, I think that this is a clear and certain issue. The Applicants are said to be "Shareholders" and members in Sasitwo Farm. The Plaintiffs are only 4 of 34 or more members of the farm and they were obliged to enjoin the Applicants as Defendants if they ever intended to obtain orders against them or which may affect their rights or interests adversely. In the premises, the Court must ask what remedies or orders were the Plaintiffs seeking in the Plant / suit in the first place?

The only relief being sought by the Plaintiffs against the Defendants was:-

"**A Permanent Injunction to stop the processing of titles in respect of the said parcel of land pending the resolution of the proper members of the said land and the preparation of the correct plan that will take care of all public utilities over the said property."**

The first issue which this Court can see is that the said relief appears to be for the general interest of the members of the farm. There is no order being sought against any other members and on the face of it there is no special advantage for the Plaintiffs. If the matter stopped there, perhaps there would be no application before the Court.

The Court notes that the relief's sought by the Plaintiffs i.e Permanent Injunctive orders could not in law be granted against the Defendants. The Defendants include Government Departments and the Attorney General. It is trite law that under the Government Proceedings Act, the Government is not amenable to injunctive orders. This Court has no jurisdiction to grant any injunctions against the Defendant. For this reason the suit was bound to fail from the very start. The matter should have ended there.

However, the Plaintiffs and the Defendants, suddenly, completely changed the agenda and the goal posts in the suit. They referred the suit for the D.O.'s arbitration and for him to file an Award. What was the D.O. going to arbitrate over? How could he resolve the question of an "Injunction" over the Government? The Court had no jurisdiction so how could he have any jurisdiction to decide whether any injunctions could be granted?

Then quiet subtly, the parties in the second paragraph of their consent introduced the question of subdivision of the suit property. I have no doubt this was at the behest or instance of the Plaintiff and it was done in bad faith and amounted to an abuse of the Court Process.

This was not an issue in the pleadings and there was no relief sought for sub-division of the Land. The question of sub-division clearly removed the dispute from the parties of the suit. It became a dispute between the members. So how could a few members "litigate" with the Defendants on a question which clearly did not involve the Defendants? In any case is this permissible in law and for the so-called arbitration to proceed without the Consent of the Applicants from the beginning" I do not think so.

I do hereby hold that the Plaint which was the only pleading on record did not give the Plaintiff and Defendant the right or basis for them to refer the suit for arbitration.

Firstly, there was nothing to arbitrate upon for reasons already given herein above. Secondly, the question of subdivision of the suit property was not strictly an issue in the suit.

Considering the facts and consequences, the Plaintiff and Defendants could not in law "Compromise" the suit in the manner they did. By the Consent judgment and Decree, the parties changed the subject matter of the suit leading to a decision which adversely affected and breached the rights of persons who were not parties in the suit i.e the Applicants.

For the foregoing reasons, if I am wrong on the question of Order 1 Rule 8, then I would also find that the judgment was entered and the Decree issued on basis of Consent orders which were unlawful and illegal.

I therefore, do hereby set aside the judgment and the Decree issued on 20th April, 2006. I hereby quash the Award or recommendations of the District Officer Moiben Division dated 24th February, 2005.

In exercise this Court's inherent jurisdiction and discretion, I do hereby strike out the Plaint dated 4th June, 1997 for non-compliance with the provisions of Order 1, Rule 8. The Application herein is allowed with costs to the Applicants as against the Plaintiffs. The Plaint is struck out with no order as to costs. Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 15TH DAY OF NOVEMBER, 2007.

M.K. IBRAHIM,

JUDGE.