



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU

Civil Case 65 of 2005

FRANCIS MUCHEMI JOEL1ST PLAINTIFF

JOSEPH GATHUNI WAHU.....2ND PLAINTIFF

JAMES MURIITHI KAMA.....3RD PLAINTIFF

VERSUS

MWEA RICE FARMERS SACCO SOCIETY LTD.....DEFENDANT

RULING

Chamber Summons dated 3.11.05 seeks orders to commit the manager of the defendant company to jail for 6 months for breaching a court order made on 21/6/05 by this court. Also order is sought to strike out the defence dated the 8/7/05 and that judgment he entered for the Plaintiff as prayed.

The defendant has opposed this application saying that the entire application does not lie and is bad in law and that the suit is fatally defective in substance and can not form the basis of lawful orders being granted.

A preliminary point is raised by defendant in paragraph 9 statement of defence. It is the P.O that was heard first. The Counsel for Defendant argued that the provisions of order 1 rule 8 has not been complied with after leave was granted no service was effected either personally or by advertisement by the three plaintiffs who were granted leave. Further argument is that this Chamber Summons is seeking the Defendant to be punished for contempt of court by breach of order granted. Contempt does not lie as the whole suit is bad in law he says. The plaintiffs lack capacity. Several groups listed are lacking in capacity as being not legal bodies with capacity to sue or be sued. They are not capable of swearing the verifying affidavits. The bodies not having capacity cannot authorize swearing affidavits. Counsel relied on the case of ***Fort Hall Bakery Supply & Co Vs F. Muigai Wangoe [1959] EA 474*** where it was held that ***“plaintiffs who could not be recognized as having any legal existence were incapable of maintaining an action”***, and were also not entitled to order for costs. Ms Thungu for Plaintiff says the authority is not relevant as in that case Plaintiffs were traders as a group. However it is to be noticed that the Plaintiffs herein are claiming money deposited in their accounts held by defendant. This is also business of banking between the parties.

Regarding the issue of representative suit there is no dispute that leave was granted to 3 Plaintiffs to represent 118 others listed under paragraph 7 of the Plaint. It is also not in dispute that the provisions as

to service were not complied with. There is not also shown that these numerous persons listed authorized the prosecution of suit by the three plaintiffs as provided under rule 12 (1) and 2 order 1 C.P.C.

It is to be noted that names of the 118 persons on whose suit is filed are listed in the plaint together with their respective claims. The question here is whether they have authorized the 3 Plaintiffs to prosecute this case on their behalf. Rule 12 (1) and (2) of the C.P.C aforesaid is not complied with.

I find this suit not a representative suit to require that the plaintiffs be served. Each named person has a separate claim against the defendant.

In the circumstances considering the provisions of Order 1 rule 9 this suit cannot be struck off in respect of the 3 Plaintiffs who have set out their claims in the plaint. Regarding striking out of those parties without capacity to sue order 1 Rule 13 provides that an application may be made by Chamber Summons to strike them out. It is my view that the plaint stands out and the Defendant may apply to strike out those parties he objects to.

The Preliminary Objection is overruled.

Costs in the cause.

J. N. KHAMINWA

JUDGE

2/3/2006

Chamber Summons should be listed for hearing on merit. Notice to Advocates for 2/3/06 to read ruling.

2.3.2006

Mr. Kahiga

N/A for Ms Thungu

Parties present

Ruling Read out.

J. N. KHAMINWA

JUDGE