



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

**AT MOMBASA**

**Civil Case 264 of 2001**

**MBETSA SAID MUNGA**

**BENSON LEWA TSUMA**

**CHRISTOPHER E KALU & 87 OTHERS .....**  
**PLAINTIFFS**

**VERSUS**

**COMMISSIONER OF LANDS**

**SULEIMAN ENTERPRISES LTD**

**KEMU SALT PACKERS PRODUCTIONS LTD ..... DEFENDANTS**

**R U L I N G**

This suit is instituted by originating summons under the provisions of the Constitution Section 84(1). The defendants have filed replying affidavits.

The plaintiff (numbering 90) desire the court to answer certain questions posed in the originating summons numbering in total 17. in summary, the dispute is on the land rights of the plaintiffs as against the defendants on certain registered land namely plot No. Cr 28301 and 28851 customary and traditional land rights of the Wagiriyama, Wassani, Wachonyi and Wakauma peoples in the Coast Province.

On 4.3.2005, the 2<sup>nd</sup> & 3<sup>rd</sup> defendants raised a Preliminary Objection which was served on all parties and argued on 3<sup>rd</sup> March 2005. these defendants argued that the Originating Summons does not allege what provisions of Sections 70-83 of the Constitution had been breached or contravened and therefore the Court lacks jurisdiction also in matters of land complaints Section 74 (2) a party aggrieved can only come to court by way of appeal, there is no direct access to court.

Orders permitting the suit to be filed were made on 1.11.2001. leave was not obtained at the time of filing and therefore application should be dismissed. Counsel further submitted that provisions of Order 1 rule of Civil Procedure Rules applies to these proceedings but the same was not complied with. On this point counsel relied on the ruling in the case **HCC NO. 304 OF 2004 BUNSON TRAVEL SERVICES LTD & OTHERS – VS - KENYA AIRWAYS LTD.** The ruling was dealing with Order 1 unless CPR rules and Order 1 Rule 12. In this case, Order 1 rule 8 was complied with but rule 12 was not. The court was of the view that it was mandatory to comply with both rules and the plaint was struck off.

Further counsel pointed out that the Originating Summons appears to represent over 500 persons and for costs implications it is not known who has authorized the suit. There is also failure to comply with legal notice 133 rule 11(b) and furthermore Section 84 of the Constitution concerns rights of individuals not communities or group of people to approach the court. There is no remedy for redress of grievances of the whole communities and therefore this Originating Summons should be dismissed. And another authority relied upon by Mr Maope is the decision of High Court in the case of **NJOYA & OTHERS – VS AG & OTHERS** by HCC No. 82/04 decision by a bench of 3 judges of the High Court at Page 20 of the judgment of Ringera J as he then was he said, ***“the scheme of protection of fundamental rights envisaged by our Constitution is one where individual as opposed to community or group rights are the ones enforced by the Court. Section 84(1) of the Constitution is clear. It provides subject to Sub-section (6) if a person alleges that any of the provisions of Section 70 to 83 and inclusive, has been, is being or is likely to be contravened in relation to him (or in the case of a person who is detained), if another person alleges contravention in relation to the detained person then that person may apply to the High Court for redress.”***

At page 21 ***“there is no room for representative actions or public interest litigation in matters subsumed by Section 70-83 of the Constitution.”*** Also that ***“the applicant in an application under Section 84(1) of the Constitution is obliged to state his complaint, the provision of the Constitution which he considers has been infringed in relation to him and the manner which he believes they have been infringed. Those allegations are the ones which if pleaded with particularly invoke the jurisdiction of this court.”***

That is where the counsel rested his address to court on his preliminary objections.

In reply Mr Wameyo for applicant submitted that Order 36 Civil Procedure Rules does not envisage a clear statement of claim but the raising of issues to be determined by the court. This is as opposed to the requirements in a plaint. In the rules made by the Chief Justice **“Practice and Procedure Rules”** rule 11(a) specifically provide that application shall be made by Originating Summons and consequently Order 36 CPC shall apply. Furthermore, he argued a casual glance on the Originating Summons shows issues raised relate to individual rights to property and in particular Section 75 of the Constitution. Was the disputed land acquired by the government without the compliance with express provisions of the Constitution without reference to the original occupants of the land. The net effect is to take away the property rights of the community. Issues of property being held in trust or individuals to take it away from is breach of the Constitutional rights. This is a serious matter to be heard on merit rather than on technicalities. Counsel also invoked the provisions of Section 60 of the Constitution, which he submitted gives court wide powers.

Mr Wameyo submitted that this is a public interest case raising constitutional issues to be determined under the jurisdiction conferred under Section 60 of the Constitution and the same cannot be limited under Order 1 rule 12. He submitted that Order 1 rule 8 is distinguishable from Order 1 rule 12. Order 1 rule 8 is discretionary; the word used is **“may.”**

In this case, leave was obtained on the issue of Order 1 rule 12. Mr. Wameyo said it is not applicable in this suit. He referred to the Mukhisa Biscuits case at page 10. At this stage, no facts are agreed and it would require an agreement on issues. Mr Wameyo also referred the court to the decision of 2-judge bench in **KENYA BANKERS ASSOCIATION –VS - MINISTER OF FINANCE MISC APPLICATION NO. 908/2001** in the High Court. In that case at page 62 holding 5 the court held that representative suits by organizations on behalf of its members are permissible, provided,

- a) The members have legal standing to sue in their own right or that the organization may have an interest of its own in its own right.
- b) That the interests sought to be protected are germane to the organization’s purpose and
- c) That matter the claim nor the relief sought requires individual participation of members.

Holding 6: in cases dealing with human rights, public interest and those challenging the Constitutionality of Acts of Parliamentary procedural and technical objections cannot bar the jurisdiction of the court at expense of justice.

Holding 7 also was referred to where that court held: the High Court under Section 60 of the Constitution has powers to do justice without technical restriction and restraints. So that court said at page 76, “**when a person or body of persons comes to this court and files or defends a representative suit or class action, the only prerequisites to the maintenance of such suit or action are:**

- a) **sufficient numerosity of parties**
- b) **commonality of issues**
- c) **commonality of claims or defences**
- d) **commonality of interest**
- e) **sufficient nexus between the representatives and the class**
- f) **a defined ascertainity or ascertainable group represented**
- g) **the good faith of the presentative parties.”**

Looking at the Originating Summons filed herein on 31.10.01 is in the form prescribed under Appendix B No. 13. Therefore, objections as to the manner issues are raised for determination is without merit. The court is bound to determine the questions made in the Originating Summons. The questions for determination concerns the Land Registered as titles.

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Whether they belonged to government or to certain tribes named in this application and whether the said lands are Trust land as defined in the Constitution and if so have the said lands been vested in the County Councils mentioned and whether the titles to the three pieces of land should be cancelled and expunged from the Coast Registry of titles and if the land concerned is vested in accordance with Section 114 (1) (c) of the Constitution, interest and to the use of the persons ordinarily resident on that land. And the suit premises lawfully and constitutionally transferred by the said County Councils to first Defendant pursuant to provisions of Section 118(1) and 4(b) of the Kenya Constitution and whether great environment degradation will be caused by activities of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants and whether there will be intergenerational equity by applicants and their formations should Section 119 of the Constitution of Kenya be applied whether displacing 6500 persons in favour of 2 legal persons who will own 11,212 hectares of land, shows proportionality.

All the above questions are weighty and serious legal questions of the Constitutional nature concerning the management ownership of the community’s resources by its residents.

I find that the nature of grievances and breach of the Constitutional right is clearly disclosed. It is alleged that there was no process of land acquisition was as contemplated under Section 75 and therefore that surely is a breach of the rights of owners/occupants to be determined by court. The defendants have unlawfully taken the applicants property unconstitutionally. It is for the court to decide on such issues. Regarding the issue of Order 1 rule 8 it is noted that leave was given by court for the applicants to having this suit as a representative suit on 1.11.2001 seeing that the number of persons involved are about 6500 as stated in the Originating Summons.

The record shows lists of names of persons concerned in this case. The exhibit CK6 includes a list of 151 persons. Exhibit CK5 lists declarations of 11 persons who claim to be affected.

There is also the list attached to the Originating Summons numbering 83 persons who are also interested as applicants. The Originating Summons states that the total number of them is 90 including the 3 stated applicants named at the head of the application. Therefore, there are people whose identities are disclosed as applicants. They are all claiming common rights in the same subject disclosed and they can be bound by an order of payment of defendant's costs if necessary. It appears the concern of the defendants is that there should be identifiable applicants to pay their costs. Those named people are ready to proceed with the suit individually but leave having been granted even one of them can push the prosecution of suit and abide with the decision of the court. The land in dispute measures 11212 hectares. Exhibits of photographs on the homes destroyed is evidence that the applicants are seeking individual rights.

The case is quite distinguishable with the authority of Njoya case. The section of Constitution breached is disclosed, the manner in which it is breach relating to each applicant is disclosed and the sum of the questions for determination is whether the applicant's individual rights to the 3 pieces of land have been breached. The magnitude of this case is such that the court should be let to give its determination is empowered under Section 60 of the Constitution without being hindered by claims of technicalities of procedure.

I agree in the pronouncements of the learned judges in the case of High Court in the case of Kenya Bankers Association & Others – Vs – Minister for Finance & Another (No. 4) when they said in cases dealing with human rights, public interest and those challenging the constitutionality of the Acts of pertinent procedural and technical objections cannot bar the jurisdiction of the court at the expense of justice. The High Court under Section 60 of the Constitution has powers to do justice without technical restrictions and restraints. The High Court is also empowered under Section 84 of Constitution to make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of Section 70 – 83 inclusive.

The upshot of the above is that I do not uphold the Preliminary Objection. The same is dismissed with costs to the Plaintiffs.

Orders accordingly.

Dated the 15<sup>th</sup> September 2006.

**J KHAMINWA**

**JUDGE**