



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL CASE NO. 617 OF 2000**

GEOFFREY KOIRA GESHARISHA..... 1ST PLAINTIFF

TIMOTHY MEJA KOIRA..... 2ND PLAINTIFF

ANTHONY GESHARISHA KOIRA..... 3RD PLAINTIFF

MOSES KARATHE GESHARISHA..... 4TH PLAINTIFF

JOHN KARATHE..... 5TH PLAINTIFF

BERNARD GETAU..... 6TH PLAINTIFF

NJENGA GESHARISHA..... 7TH PLAINTIFF

VERSUS

RUARAKA SABUNE COMPANY LIMITED..... 1ST DEFENDANT

SAMMY KARIUKI MWANGI..... 2ND DEFENDANT

MARTIN MULI TIMOTHY..... 3RD DEFENDANT

RUTH WACHERA CUMBI &

161 OTHERS..... DEFENDANTS

RULING

This Ruling is made in a Preliminary Objection filed under a Notice of Preliminary Objection dated 29th July 2002. It is filed in objection to the Plaintiff/Applicants' Originating Summons dated 19th June 2001 but filed on 19th June 2002 (H.C.C.C. No. 1034 of 2002 Consolidated with H.C.C.C. NO. 617 of 2000). In their Notice of Preliminary Objection the Defendants pray for orders

“1. That the suit be struck off.

2. That the 2nd 3rd and 4th Plaintiffs do pay the costs of the suit.

The Grounds of Objection are that

1. The suit is bad in law in that no leave for filing a representative suit on behalf of the 161 persons mentioned in the Originating Summons and listed in the schedule attached

to the Supporting Affidavit was obtained from the Court as required under Order I Rule 8 of the Civil Procedure Rules.

2. That the (1st) Plaintiff company is not a party to the suit and its name is being used by unauthorized persons.

3. That the suit is an abuse of the process of Court there being a similar case pending at the Milimani Commercial Courts H.C.C.C. No.69 of 1999 between the 1st Plaintiff and the 7 Defendants herein.

4. That the 2nd, 3rd and 4th Plaintiffs together with the 161 persons listed in the schedule above-referred to have no locus standi to sue the Defendants.

5. That parcel No. Ngong/Ngong/22398, 22400 do not fall within the land which the 1st Plaintiff company purchased.

6. That the 6th and 7th Defendants were not parties to the contract between the 1st Plaintiff Company and members of the Gesharisha family.

7. That the 1st 6th and 7th Defendants shall rely on pleadings as filed, statutory law and the affidavits of Messrs Geoffrey Koria Gesharisha, Antony Kisharisha Koira, Timothy Meja Koira and Paul Karenju Wambugu filed herein.

In his submissions, Mr. Agina for the Respondents (Defendants) appears to have abandoned all the above grounds save for the 1st ground on which he submitted that there being no evidence of leave to sue in representative capacity the suit is incompetent and ought to be struck out as having failed at the threshold. He prayed that the same be struck out on the authority of NJAU –vs- CITY COUNCIL OF NAIROBI 1983 KLR.

Mr. Agina went further to argue on issues that are not part of his Notice of Preliminary Objection, to wit;

1) That the Supporting Affidavit offends Section 35(1) of the Advocates Act as well as the provisions of the Oaths and Statutory Declarations Act.

2) That the Originating Summons offends Order XXXVI Rule 3D (2) since no extract of Title has been attached to the same.

Mr. Ng'ang'a for the Plaintiffs submitted only that the Preliminary Objection is misplaced, that the filing of a schedule of Plaintiff is proper, that the affidavit in support does not offend Section 35 of the Advocates Act and that annexing the various certificates of official search as per the purported bundle "SKM-1" as deponed in paragraph 8 of the affidavit has adequately taken care of the provisions of Order 36 Rule 3D.

The most important consideration for a Court in an application of this nature is whether or not the Preliminary Objection meets the criteria set down in the case of MUKISA BISQUITS –vs- WEST END DISTRIBUTORS [1969] E.A. 696 regarding the raising of Preliminary Objections to a suit and/or pleadings. NEWBOLD, P, clearly stated in the said judgment, and I quote, that

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

The points raised as 2,5,6 and 7 in the Notice of Preliminary Objections clearly show that what is pleaded by the Plaintiffs herein is not, in the Defendants opinion correct. That the Defendant would wish to disprove certain of the Plaintiff's contentions in the Originating Summons clearly shows that certain facts

need be ascertained. It follows therefore that the Preliminary Objection as filed and argued does not qualify and should be disallowed. Accordingly, the same is hereby overruled. Parties may proceed to take suitable dates for the hearing of the Originating Summons in the normal course.

Dated, Signed and Delivered at Nairobi this 22nd day of April 2005

M.G. Mugo

Judge

In the presence of:

Agina Advocate for the Applicants

Ms Mungai h/b for E.N. Ng'ang'a Advocate for the Respondents