



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL CASE NO. 142 OF 2005**

NDUNGU MUGOYA & 473 OTHERS.....PLAINTIFFS

VERSUS

STEPHEN WANGOMBE & 9 OTHERS.....DEFENDANTS

RULING

By a plaint dated the 17th of May 2005, Ndungu Mugoya and 473 other plaintiffs sued the defendants herein seeking the following reliefs:

“(a) A permanent injunction restraining the defendants jointly and severally from selling, allocating, alienating, surveying, sub-dividing, disposing, charging, wasting, resolving to allocate, to sell, to dispose of, to alienate, to allocate to any person(s), to charge or to survey L.R. No. 8943 and 8943 Solai, 9949 Subukia and the 10th defendants parcel of land at Rumuruti and all the defendants coffee trees, machineries and other assets of the 10th defendan’t and from withdrawing any monies from the K.P.C.U. account in Nairobi arising out of the coffee (s)ales, until all the plaintiffs rights and entitlements are agreed and taken into consideration on mutually agreed special meeting of the 10th defendant on an agreed neutral ground/venue.

(b) Costs of this suit.”

At paragraph 11 of the said plaint, the plaintiffs deponed as hereunder:

“The plaintiffs aver that there is no other suit pending except that there has been NKU CMCCC No. 2186 of 2003 in the Chief Magistrate’s Court which was dismissed on 10th February 2005 for lack of jurisdiction on the part of the lower court.”

The plaint filed was supported by the an annexed verifying affidavit sworn by Ndungu Mugoya. Paragraph 3 and 4 of the said verifying affidavit states as follows:

“3. THAT I have the authority of each of the rest of 473 coplaintiffs to swear this verifying affidavit on their behalf.

4. THAT there is no other suit pending except there has been NKU CMCC No. 2186 of 2003 in the Chief Magistrate’s Court which was dismissed on 10th February 2005 for lack of jurisdiction on the part of that lower court.”

Contemporaneous with filing the said suit, the plaintiffs filed an application under **Order XXXIX Rules 1, 2, 3 and 9 of the Civil Procedure Rules** seeking the orders of this court to restrain the defendants by means of a temporary injunction from convening a meeting on the 27th of May 2005 or on any other date

or day with a view of balloting the sub-divided parcels of land to members pending the hearing and determination of the suit. The application was supported by the annexed affidavit of Ndung'u Mugoya. In paragraph 1 of the said affidavit the said Ndungu Mugoya deponed that

“I am the 1st plaintiff herein and I swear this affidavit on my own behalf and on behalf of my co-plaintiff(s).”

When the application was listed for hearing, the 1st, 2nd, 3rd and 10th defendants who had been served to appear for the hearing of the application raised a preliminary objection to the application. The said defendants raised three grounds in objection to the suit filed by the plaintiffs. The first ground was that the application was misconceived, mischievous, bad in law and together with the entire suit amounts to a gross abuse of the court process and the same ought to be struck out and or dismissed with costs. The second ground was that there was no proper suit before this court by the 2nd to the 214th plaintiffs (the defendants obviously meant the 474th plaintiffs); and finally that the suit offended the mandatory provisions of **Order 1 Rule 12 and Order VII Rule 1(2) of the Civil Procedure Rules**.

Mr Kahiga, Learned Counsel for the 1st, 2nd, 3rd and 10th defendants (hereinafter referred to as the said defendants) argued the preliminary objection before this court. Mrs Ndeda, Learned Counsel for the plaintiffs responded on behalf of the plaintiffs. I have carefully read the pleadings filed. I have also considered the arguments made before me including the decided cases that were referred to by the said defendants. The thrust of the preliminary objection raised by the said defendants is that the plaintiff's suit is incurably defective and deficient and should therefore be struck out or dismissed with costs.

Should the plaintiffs' suit be so struck or dismissed?

I will address the issues raised and the arguments made point by point. The said defendants argued that when the said Ndungu Mugoya deponed in the verifying affidavit that there was no other suit pending save for the suit which was struck by the lower court, he was legally not verifying the plaint in accordance with **order VII rule 1(2) of the Civil Procedure Rules** which provides that

“The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in the plaint.”

Mr Kahiga submitted that the fact that there existed another suit shows that the said Ndungu Mugoya had not sworn a proper affidavit verifying the correctness of the contents of the plaint. In response, Mrs Ndeda, Learned Counsel for the plaintiffs argued that the plaintiffs had disclosed the existence of Nakuru CMCC No. 2186 of 2003 which had been struck out by the lower court due to lack of jurisdiction. She submitted that the plaintiffs had now filed a suit before the court which had jurisdiction.

I have considered the arguments made on this point. It is not disputed that the plaintiffs disclosed that there was a previous suit which had been dismissed by the lower court because the said court did not have jurisdiction. The matters in dispute were not decided to qualify the said suit to be referred to as “a previous” case. The mischief intended to be addressed when Order VII rule 1(2) of the Civil Procedure Rules was promulgated, I think, was to prevent a litigant who had a previous suit determined on merits from filing another suit over the same subject matter. The criteria to be used in determining whether a suit is “previous proceedings” for the purposes of order VII rule 1(2) of the Civil Procedure Rules is the definition of a determined suit in a situation where the plea of res judicata is raised. In the circumstances of this case dismissal of a suit on the basis that the court lacked jurisdiction cannot qualify the said suit to be referred to as “previous proceedings” as envisaged by order VII rule 1(1)(e) of the Civil Procedure Rules. The preliminary objection on this point therefore lacks basis in law and the same is rejected.

The second point which the said defendants have raised in preliminary objection to the suit filed by the plaintiffs is that the plaintiffs who number 474 ought to have each filed an independent verifying affidavit to verify the plaint filed in this suit. In support of their argument the said defendants have relied on a persuasive decision of Omondi Tunya J (as he was then) in **J. N. Ngoka t/a Electrical Enterprises and 16 others –versus- Municipal Council of Eldoret, Eldoret HCCC No. 60 of 2002 (unreported)** where

the learned judge at page 8 held that

“I have considered the question of verifying affidavit in support of the suit and the fact that only two of the indeterminate number of plaintiffs swore verifying affidavits. In my considered view and arising from the mandatory wording of O. VII Rule 1(2) of the Civil Procedure Rules, the requirement is not fanciful. This was emphasized with approval by the Court of Appeal in GAWO’S case (supra). In the absence of verifying affidavits by the co-plaintiffs and there being no averment that the two deponents, namely, plaintiffs Nos. 2 and 3 swore on behalf of the co-plaintiffs, there is no verifying affidavits which have accompanied this representative suit. In terms of the mandatory provisions above stated, the suit is a non suit and is hereby struck out.”

The said defendants also relied on the ruling of Lady Justice Gacheche in **Justo Ngoka & 225 others – versus- Rai Ply Wood(K) Ltd & 2 others Eldoret HCCC No. 69 of 2001 (unreported)** where the Learned Judge held at page 4 as hereunder:

“There are 226 plaintiffs here, it is imperative that I point out, that first and foremost, at the time of filing the plaint, each of the 226 plaintiffs was a plaintiff in his own right, and each should be treated individually.”

In response thereto Mrs Ndeda submitted that the 1st plaintiff Ndungu Mugoya had deponed that he was swearing the verifying affidavit and on behalf of the 473 plaintiffs who had authorised him to make the said averment on their behalf.

Having considered the arguments made and the two decisions referred to hereinabove, I am inclined to agree with the argument that a written authority has been obtained from the other plaintiffs and filed in court as provided by Order 1 Rule 12 of the Civil Procedure Rules. In the absence of such written authority filed in court it is incumbent upon all the plaintiffs mentioned in the plaint to file verifying affidavits as provided by Order VII rule 1(2) of the Civil Procedure Rules. The other situation where a number of plaintiffs who have filed a joint suit are exempted from filing verifying affidavits is where a representative has been filed. In the present suit, I hold that the 473 co-plaintiffs to Ndungu Mugoya having not filed verifying affidavits, their suit is not competent. It can only be cured and life breathed to it if they make an appropriate application and invoke the jurisdiction of the court to allow them to file verifying affidavits. As things stand, the suit by the 473 other plaintiffs is incompetent.

The other preliminary point raised by Mr Kahiga is that Ndungu Mugoya who purported to have sworn the verifying affidavit to the plaint and the affidavit in support of the application on behalf of the 473 other plaintiffs did so without the authority of the said 473 co-plaintiffs. He submitted that the plaintiffs had not complied with the provisions of Order 1 Rule 12 of the Civil Procedure Rules that require plaintiffs who seek others to appear, plead or act in proceedings to file a written authority giving such persons authority. Mrs Ndeda, Learned Counsel for the plaintiffs submitted that the requirements of Order 1 Rule 12 of the Civil Procedure Rules were not mandatory as the word used in Order 1 Rule 12(1) of the Civil Procedure Rules is “may be authorised”. Learned Counsel submitted that it was sufficient for the 1st plaintiff to state that he had been authorised by his co-plaintiffs to swear the affidavit in support of the application and the verifying affidavit to the plaint.

I have considered the arguments made. With the greatest of respect, I refuse to be persuaded by the submission made by the plaintiffs. The provisions of Order 1 rule 12(1) of the Civil Procedure Rules are mandatory where a plaintiff has opted for another to “appear, plead or act” for him in a proceeding. It is not sufficient for such a party to state that he has been so authorised without the written consent of the person so authorising him. The option is not mandatory where such a plaintiff as opted to act or appear on his own behalf in the proceedings of a suit. But where he has opted to authorise another plaintiff, then it is mandatory that such a written authority be filed in court, hence the wording of Order 1 rule 12(2) of the Civil Procedure Rules which provide that

“The authority shall be in writing signed by the party giving it and shall be filed in the

case". (underlining mine)

This court had the occasion to deal with a case of similar circumstances as the present case and ruled as hereunder in case of **John Kariuki & 347 Others –versuswww. John Mungai Njoroge & 8 others Nakuru HCCC No. 152 of 2003 (unreported)** at page 9:

“The plain reading of the above rule (Order 1 rule 12 Civil Procedure rules) is that where a party requires another party to appear, plead, or act on his behalf he has to give the authority in writing before such a person filing suit can claim to be representing such person. The said written authority has to be signed by the person giving the authority and must be filed in court where the suit is to be filed. The mischief that the said rule was meant to address, in my humble view, is to prevent a situation where a party may become bound by a court decision without his having any knowledge of the suit that led to the said decision. The court can envisage a scenario, where, lets say, after the dismissal of a suit, such a plaintiff whose name has been included declines to settle the costs on the pretext that he did not authorise the suit to be filed in his name. In my considered view, this requirement is mandatory. A party cannot be condemned or enjoy a benefit from a court process without his say so.”

The holding in the said case applies in this case. This court cannot be certain that all the 473 plaintiffs authorised the 1st plaintiff to file this suit on their behalf. Neither can the court be sure that all the said plaintiffs are actually aware of the court proceedings filed in their name. In the absence of written authority by the 473 coplaintiffs, the 1st plaintiff cannot purport to act on their behalf. He cannot have authority to act or plead on behalf of the other plaintiffs merely by his stating that he has such authority. The authority has to be obtained from each of the 473 co-plaintiffs before the plaintiff can depone that he has authority to appear or act for such plaintiffs. The preliminary objection raised by the said defendants therefore has merit. The 1st plaintiff purported to file his suit on behalf of 473 co-plaintiffs without authority. Their suits are therefore incompetent.

Lastly, the said defendants have stated that the plaintiffs did not exhibit their membership certificates to prove that they were members of the 10th defendant to cloth them with locus standi to file this suit. This court however does not agree that for a member of a company to file suit against such a company, it is mandatory for such a member to prove his bona fides by annexing his membership certificate in his pleadings. This court also takes judicial notice of the fact that the 10th defendant being, nominally a land buying company, does not operate like a normal company whose record keeping as regards its membership is properly kept and is upto date. I am however inclined to agree that the issues raised by the plaintiffs in their suit are issues which could ideally be resolved in a special meeting held by the directors of the 10th defendant and all the members of the company. For the plaintiffs to come to court to stop a meeting whose outcome cannot be predicted with certainty, is to say the least, interfering with the internal management of the 10th defendant. This court can only and intervene where the law is shown to have been breached. As was held by the Court of Appeal in the case of **James Orina & Anor –versus- Kenya Tea Development Agency & Anor C. A. Civil Application No. NAI 222 of 2004 (Nairobi)** (unreported) courts are illequiped to manage the affairs of companies especially where the dispute involves the internal management and operations of a company which is administrative in nature. The plaintiffs’ complaints are thus non-justiciable at this stage.

In the circumstances of this case, and for the reasons stated hereinabove, the preliminary objection raised by the said defendants has to succeed. The plaintiffs application together with the suit are hereby declared to be incompetent. Their application and the suit are hereby struck out with costs to the 1st, 2nd, 3rd and the 10th defendants.

DATED at NAKURU this 3rd day of June 2005.

L. KIMARU

JUDGE